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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 30-1995
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INQUIRY RE: A Complaint from the Radio and Television News Directors Association of Canada concerning the handling of a request by the Ministry of Attorney General and the Search Fees that the Ministry Proposed to Charge

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral hearing at the Office of the Information and Privacy Commissioner (the Office) in Victoria on December 2, 1994. This inquiry arose out of complaints by the Radio and Television News Directors Association of Canada (RTNDA) over the handling by the Ministry of Attorney General (the Ministry) of its request for information and the amount of the fee proposed for a continued search.

On October 5, 1993 the RTNDA, through its counsel, requested information from the Ministry of Attorney General relating to alleged surveillance of a New Democratic Party convention in April 1987 by private investigators. The Ministry has been unable to find any records relating to this particular episode. The Ministry believes that the surveillance of the NDP convention occurred as a result of a contract for surveillance by private investigators of pro-choice advocates. The Ministry subsequently offered to review its invoice files for that year, on an item by item basis, and requested a fee of $6,900 in order to do so.

2. Documentation of the inquiry process

The Office invited representations from the applicant and the Ministry of Attorney General as the public body. There were no third parties or intervenors.

The applicant was represented by Daniel W. Burnett, Barrister and Solicitor with the law firm of Owen, Bird of Vancouver. The Ministry was represented by Catherine

Hunt, Barrister and Solicitor with the Legal Services Branch, Ministry of Attorney General.

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a three-page statement of facts (the Portfolio Officer's fact report), which, after minor clarifications, was accepted by the parties as accurate for purposes of conducting the inquiry.

3. Issues under review at the inquiry

a) The failure to find and disclose any records:

The RTNDA asked that the Commissioner consider and enunciate the principles and practices which ought to apply to searches for records and decide whether the efforts of the Ministry of Attorney General were sufficient to meet statutory obligations to the applicant.

b) The Ministry's responsiveness to the complaint:

The RTNDA submitted that the Ministry did not comply with the various time limits set out in the Act and did not make adequate efforts to assist the applicant.

c) The proposed fees for searching:

The RTNDA is of the opinion that the Ministry did not exercise its discretion when it charged the maximum search fee allowable under the Regulation to a non-profit society which functions in the public interest.

4. The applicant's case

It is the applicant's contention that this complaint concerns an array of practical barriers to access to information under the Act: for example, "poorly managed information, unhelpful public bodies and onerous fees." The RTNDA complains that the Ministry took the maximum time extension to process the request, missed it, and then found nothing. Further, it did not provide the applicant with a timely description of its efforts to search for records and it only spent five hours on the search.

The applicant offered certain tentative criticisms of the nature of the search conducted by the Ministry in response to its request: the search was for invoices or contracts and excluded reports or memoranda; the search was limited to three names provided by the applicant, even though they were intended only as potentially helpful possibilities; there was no search of the then Attorney General's remaining personal files; there was no search for reports to Cabinet on a matter that "may well have been a matter of interest and discussion at the Cabinet level."

Section 6 of the Act sets out a duty to assist for public bodies. It reads:

> 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.

In addition to various delays in the present case, the Ministry took eleven months to tell the requester that there were 309 additional boxes of documents that could be searched (for a substantial fee). The applicant described this level of response as "hopelessly inadequate." However, "[n]either the RTNDA nor any other reasonable requester expects magic or immediate responses from public bodies. What they do expect, and what it is submitted the Commissioner ought to require, is timely, common sense responses that keep the requester informed of what is happening and why."

With respect to the issue of search fees, the applicant noted that the fee quoted by the Ministry was the maximum of $30 per hour permitted by the Schedule of Maximum Fees under the *Freedom of Information and Protection of Privacy Regulation* (B.C. Regulation 323/93, September 22, 1993). Further, section 75 of the Act is voluntary and not mandatory. It states that:

> 75(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>
> (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or
>
> (b) the record relates to a matter of public interest, including the environment or public health or safety.

The applicant argued that it is fair to excuse payment of all or part of the search fee proposed in the current case. The RTNDA is a non-profit society, consisting of radio and television news directors, formed to maintain and advance the quality of news in Canada. Oral testimony before me indicated that the organization has a membership of two hundred, income of $125,000 (mostly from a convention), a deficit last year of $14,000, no commercial income, and an endowment from which only the interest can be spent. The RTNDA is a professional organization that promotes a code of ethics for journalists and lobbies on matters of specific interest to its members, such as the Act.

Furthermore, the applicant argues that the records sought in the present case are of "significant" public interest: "The fact of one governing party spying on its opposition party is a fundamental matter of public trust and raises vital questions about the possible abuse of power in government with public funds." It is the applicant's view that it is hard to imagine a case more deserving of excused or reduced fees than its own.

5. The Ministry's case

The Ministry responded to each of the several issues under review at this hearing (as described in section 3 above). The Ministry argues that it made "every reasonable effort" to assist the applicant and to respond without delay, thereby fulfilling its statutory obligation under section 6(1) of the Act.

On the matter of fees, the Ministry did not charge any fees for search time between October 1993 and August 1994. It then provided a fee estimate in accordance with the Act. Furthermore, the issue of waiving fees is discretionary for the head of a public body, and the applicant in this case did not ask for a waiver of fees until November 22, 1994. The Ministry also cited various decisions of the Ontario Information and Privacy Commissioner to support its contention "that there is sufficient evidence before the Commissioner to support its fee estimate and further, that there is no requirement in the Act to waive all or part of the fees to be charged to the applicant." (Submission of the Ministry, p. 17)

The Ministry submitted an affidavit, with exhibits, from a Policy Analyst with the Information and Privacy Program of the Ministry of Attorney General, outlining the steps she had taken to locate records responsive to the request. She contacted a Ministry Records Officer to retrieve "contract files" for a three-month period in 1987. I describe the Ministry's search efforts in greater detail below.

6. Discussion

This is the first time that a request for access to records has resulted in a hearing about a complaint. This problem arose when an applicant made an access request and the public body could not locate responsive records. Our Office found itself in a quandary in the present case, as did the applicant, because the Ministry continued to search for records for a long period. The Act assumes that public bodies will be able to respond to requests by finding records. What is the appropriate remedy when no records are found?

What constitutes a proper search? My main concern is how the Ministry of Attorney General went about the search and how poorly documented the process was for the applicant, especially in terms of what was provided to the RTNDA before the summer of 1994. I agree with the applicant that a public body should "candidly describe all potential sources and its reasons [for] any decision not to explore one or more of them." (Applicant's Outline of Argument, p. 3)

I further agree with the following "expectations" set forth by the Radio and Television News Directors Association and encourage all public bodies to follow them:

> Deadlines should be treated as deadlines, recognizing that the failure to meet them constitutes a breach of the Act. In rare cases where the promised deadline cannot be met, the public body should give the requester the courtesy of

> a letter, before the deadline, explaining the situation. That way the requester will not be left in the dark and will be able to decide to make an issue of the delay under the 'deemed refusal' provisions.
>
> Where records have not been located, the requester's obvious concern will be what efforts were made. Accordingly, public bodies should automatically include a description of those efforts, consisting of the hours expended, the manner of searching, and any other potential sources and the reason that they were not searched.
>
> Where either a requester or a Portfolio Officer requests further information from the public body, the public body should treat the provision of that information as part of its general duty of helpfulness and respond in a timely way. What is 'timely' may vary with the circumstances, but the time lines in the Act for requests (30 days plus 30 if necessary) and reviews (90 days) ought to set the rough 'outside limits.' Certainly, seven months is far beyond any acceptable parameter. (Applicant's Outline of Argument, p. 4)

The applicant made a coherent and wide-ranging access request in its initial approach to the Ministry on October 5, 1993. What I continue to find puzzling is how this general request was turned into a search primarily for contracts with law firms and private investigators, since the applicant specifically wanted any written information about the alleged surveillance of the NDP convention. But the primary focus of the search was for "security contracts" filed among financial service contracts (Affidavit of Jan Evans, Exhibit A). As the Ministry explained to our office on August 9, 1994:

> All invoices relating to this ministry are processed through the Financial Services Branch. Payments for contracted services will not be remitted prior to the establishment of a valid contract. Therefore, it is our conclusion that, if no contract was ever established and no invoices ever paid through the Financial Services Branch, there was no contact with these companies for services relating to the N.D.P leadership convention.

This only helps somewhat to explain the contract focus. It is also an example of a communication that, in my judgment, should have been sent directly to the applicant by the Ministry (rather than being forwarded by our Office almost two weeks later). The Ministry's position is that this was part of a mediation process and should have been handled through our Office. Since clear communication is a primary goal of mediation, I remain dissatisfied with the lack of communication among all of the parties involved in the present case.

As a matter of practice, my Office encourages public bodies to continue to communicate directly with applicants, even during the mediation process, when doing so may help to resolve a problem amicably. If relationships become strained, as seems to

have happened in the present case, my Office accepts the responsibility to facilitate communication where necessary.

My reading of the applicant's various letters and the Ministry's responses to them suggests that the Ministry did not follow a coherent search strategy that, in my opinion, would be standard for anyone undertaking such a quest. For example, obvious material that should have been tracked were the written reports that private investigators normally prepare for their clients. If the government actually ordered and paid for such surveillance, then the government should have received something written in return. Jan Evans' oral testimony was to the effect that she was looking for records of any sort, not just contracts, but that is not what she wrote to her Ministry Records Officer (Affidavit of Jan Evans, Exhibit A). On the other hand, the 1988 Ombudman's report, as discussed below, suggests that the government received nothing in writing in this case.

This issue of the adequacy of a search is highly relevant to understanding the applicant's obvious frustration in how this request was handled. Since we live in times when truth continues to be stranger than fiction, it is credible for any applicant to suspect foot-dragging in a case such as this, where any information disclosed to an applicant might be embarrassing to the former government. While I am not making any allegations of improper behaviour by either politicians or public servants, I simply point out that the rationality of such a suspicion, in a sensitive case like this one, means that a public body has to be above suspicion and, further, document its efforts at responsiveness. As I will indicate elsewhere, various errors in searching appear not to meet this standard, such as spelling errors in the titles of law firms being searched. Evidence also indicates that the total documented search time was only five hours over a long time period.

The Ministry of Attorney General provided our Office with a several-paragraph description of its search efforts to date on March 7, 1994. Had this been forwarded to the applicant at any point before the oral hearing, preferably by the Ministry, it would have responded at least in part to the applicant's complaint that it had not received a description of the Ministry's efforts. The applicant asked for such information on several occasions. The Ministry did finally write to the applicant for this purpose on July 8, 1994.

In fact, the applicant and the Ministry may have benefited from face-to-face meetings to review what the Ministry had attempted to do, in good faith, to find responsive material. I accept that such communication problems are normal in the start-up phase of a new piece of legislation with a major impact across government institutions. I am grateful to all involved that, to the best of my knowledge, such difficulties have been relatively infrequent in the first year of the Act's being in force.

Search standards

I have indicated previously, in orders and public statements, that I approach implementation of the Act with a standard expectation of everyone acting in good faith,

and that is how I am handling the current issue before me. In fact, I have been extremely pleased at the extent to which the community of persons involved in implementation of the Act have worked together in 1993 and 1994 to accomplish a very successful start-up.

The Ministry quoted to me, approvingly, the definition of "every reasonable effort" that appears in the government's own *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual (1993) (the Manual), which was prepared by the Information and Privacy Branch in the Ministry of Government Services. Although this definition appears in connection with section 28, I have no difficulty in accepting its relevance here as well:

> 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 accuracy and completeness of the personal information. (Manual, Section D.3.3)

In determining the "reasonableness" of the Ministry's search, I am moved by the testimony of the Policy Analyst who handled this case for the Ministry. She had previously spent nine years as a Ministry Records Officer, so she knows her way around records management and records managers. She said that she was "determined" to find the records. Among other things, she contacted the law firm for guidance. But she did not approach any private investigators, nor could she obtain a list of them. Out of ninety access requests that she has processed since October 1993, this was the first one for which she had no results. She testified that she did not receive any "political" instructions in this case. In her view, she investigated all possible options for finding the records, including the automated finding system of the B.C. Archives and Records Services (BCARS). She consulted with her supervisor about other possible options for locating the records. A specific example of her search efforts is that she conducted a page-by-page review of the records of the Deputy Attorney General of the time.

The seeming flaw in the Ministry's search was that it was not as coherent and wide-ranging in its quest for all responsive records as was the applicant's request. A search must be consistent with the scope of the request.

The Policy Analyst testified that this request for access was one of her early cases. The way in which she documents her search process has now changed, so that she writes down everything she does and prints out her electronic mail.

This case raises issues of record and information management for past and current public bodies. The initial letter to the applicant from the Attorney General explained the Administrative Records Management Classification System's procedures for handling Executive Records: "When there is a change in government administration, the Premier's Office and Ministers' files are sealed and transferred to the care and custody of the B.C. Archives and Records Services [BCARS]." (Submission of the Ministry, p. 10) This

raises the issue of how adequately such records were searched in connection with the current access request.

The Ministry submitted to me a memorandum from a Ministry Records Officer seeking to explain "why the information [requested by the applicant] could not be isolated, if it exists at all" (Affidavit of Jan Evans, p. 1 and Exhibit B). It largely explains why 1987 contracts were not accessible in the format the Policy Analyst had requested. There was a requirement for a supplier's name. The exhibit outlined additional efforts to locate the records at issue through BCARS, which provided a list of all records owned by the Finance and Administration part of the Ministry housed in an off-site storage facility: "Personnel within Administrative Services went through each application for records that have been destroyed. Both attempts were unsuccessful, indicating that the records may not have existed in the format you [the Ministry] are requesting." I cannot understand the meaning of this statement, although oral testimony may have indicated that these files existed in an alphabetical filing format only. Another explanation offered in this exhibit is that the originals of all 1987 contracts were at the Office of the Comptroller General. A listing of them exists on computer tape but "can no longer be read with the current technology." In my view, these preconditions create an almost insurmountable hurdle for any applicant, at least when it comes to a search for contracts. The burden of such a problem should be laid at the feet of the Ministry and not the applicant.

In January 1994 the Ministry sought some specific names from the applicant through our Office. Several of the names of private investigators and prominent law firms in Vancouver (identified as "Farris, Vaun, Willis and Murphy," instead of "Farris, Vaughn, Wills, & Murphy") were misspelled in both handwritten and typed communications to the Ministry Records Officer (Affidavit of Jan Evans, Exhibits C and D). I note that these searches were for February through April 1987. Since the convention occurred on April 11-12, 1987, a bill submitted after that time period by a law firm or a private investigator might not have been located, because of the search criteria.

What actually happened in this case?

As I note below, the Ministry concluded that any covert surveillance of the NDP convention occurred in the context of the government's interest in the activities of Concerned Citizens for Choice on Abortion (CCCA) between February and June 1987. Mention was made at this hearing of the Ombudsman of British Columbia's Public Report No. 13 (August 1988), the Abortion Clinic Investigation, and I have reviewed it. I am disappointed that neither party to this proceeding made specific use of this document during the oral review, since it seems to shed considerable light on the likely circumstances of the present case.

Then Ombudsman Stephen Owen set forth as a general fact that the Attorney General was concerned to enforce the *Criminal Code* provision against free-standing abortion clinics, perhaps by means of a civil injunction against the CCCA. The Attorney General therefore instructed the law firm of Farris, Vaughn, Wills & Murphy to obtain

evidence for such purpose, which led to the retention of a private investigator and several associates, who conducted covert surveillance of meetings and activities of the CCCA from February to June 1987: "By mid-June they had reported to the law firm that there was no evidence of an actual ability to open and operate a free-standing abortion clinic. The law firm reported this to the Attorney General and he reported similarly to the Principal Secretary to the Premier." (Ombudsman Public Report No. 13, pp. 3-4)

The Ombudsman had full access to the records of the law firm and the private investigators, including notes and tapes accumulated by the private investigators but not submitted to the law firm or the government. (Ombudsman Public Report No. 13, p. 2) He noted that all reports by the law firm to the Attorney General were oral, except for its statement of accounts: "No documentary evidence or details of persons or groups investigated were passed on," a condition that the Ombudsman described as "unsatisfactory."

> However common it might be for lawyers' civil files not to contain detailed written opinions, instructions and reports, cases of this type require different treatment. Here, the government was seeking an unusual remedy, employing intrusive means, using public funds and dealing with a matter which would become public and controversial as it went to court. The absence of a clear record of intentions, legal reasoning and results was likely to fuel public suspicions of impropriety, and this is not in the public interest. (Ombudsman Public Report No. 13, p. 9)

The private investigator employed was known to the law firm but billed for her services "under a newly incorporated and related company which did not yet have its security business licence. This was not known to the law firm...." (Ombudsman Public Report No. 13, p. 10) The Ombudsman also learned that all investigative services "were concluded and billed for" by July or August of 1987, which would probably set outside time limits for the searches in the present case, if the Ministry's interpretation of what happened is correct.

It seems likely to me that records responsive to this request for access only exist at the law firms and private investigators, which are outside the jurisdiction of the Act. It is possible, of course, for the Ministry to waive solicitor-client privilege in this case (as was done for the Ombudsman in 1987-88) and seek to disclose relevant records not directly in the custody of the Ministry.

In a letter to the applicant dated July 8, 1994, the Ministry offered its view of what had occurred:

> ... while we were searching for information for your request regarding investigators hired to infiltrate the B.C. Coalition for Abortion Clinics, we found references to the setting up of an information table for the coalition at the

> Leadership Convention. This is noted in the detailed backup of invoices released to you ....
>
> We have determined that the investigators' presence at the Leadership Convention was a result of their involvement with the B.C. Coalition for Abortion Clinics rather than a separate investigation. (Affidavit of Jan Evans, Exhibit F)

I note from this invoice record (that was mostly disclosed to the applicant) that the detective firm of Newcombe and Associates specifically billed Farris, Vaughn, Wills and Murphy for two days' work on April 11-12, 1987 "re: donation table - NDP Convention." The context of the rest of the invoice clearly establishes that this event occurred with respect to the ongoing activities of Concerned Citizens for Choice on Abortion (CCCA).

The issue of fees

The issue of fees arose in the present case because the Ministry on September 1, 1994 offered to search 309 boxes of 1987-88 Ministry contracts for possible information. The estimated fee was $6,900. (This further illustrates the contract focus of this request for review.) If a relevant contract were found in the fifth box, for example, the fee charged would be correspondingly reduced. This overall fee was properly calculated at the maximum rate allowed in accordance with the Regulation.

The issue remains whether it was appropriate for the Ministry, in the admittedly peculiar circumstances of the present case, to propose such a high fee to the applicant. At the hearing on December 2, 1994, I asked the Ministry for data about its experience to date in collecting fees for searches. In response, the Ministry provided me with cross-government fee data from the Request Tracking System of the Information and Privacy Branch, Ministry of Government Services. Despite various qualifications about their accuracy, I take this information as the best the government could provide and, despite representations to the contrary by the Ministry, I regard it as relevant to these proceedings. I am also assuming that the data cover approximately the fourteen months that the law has been in force.

During this period the Ministry of Attorney General made 7 fee estimates and collected on all of them for a total of $640 and thus an average fee of less than $100. A total of 21 government bodies made 119 estimates and collected on 42 of them in full for a total of $10,660, for an average fee of about $250. At the same time 67 fees were entirely waived, mostly by the Ministry of Health, which might have generated revenue of $14,836.

The government-wide data suggest at least two things. First, the applicant may perceive the proposed fee of almost $7,000 in the present case as excessive and indeed punitive in light of the experience of all recorded public bodies. (I do not know how many proposed high fees were rejected by applicants who did not ask me to review the

matter.) Second, I think that the cross-government data at least suggest that public bodies are, in general, acting responsibly in not charging excessive fees.

It would be useful, of course, to learn more about the circumstances under which fees are being waived by various public bodies, which is one reason why I intend to decide the issue of fees in the present case on as narrow a basis as possible. I am pleased that the Information and Privacy Branch currently has a committee at work on this issue. I accept that an applicant has an obligation to ask for a fee waiver and provide information to justify such treatment to a public body, such as how a waiver or reduction of a fee will serve the public interest. These points are supported by many decisions of the Ontario Information and Privacy Commissioner.

Counsel for the applicant contended that there is no need to ask for a fee waiver, but that seems to me a clear misreading of the implications of the language of section 75(5) of the Act. A public body can hardly consider waiving a fee if it is not supplied with reasons from the applicant that make it appear to be "fair to excuse payment."

In the present case, oral testimony from the Ministry indicated that the idea of searching through the 309 boxes for possible contracts was at best a fishing expedition and something of a wild goose chase to prove that there was no contract for surveillance of the NDP convention. The prospects of success were described as between zero and none. For this reason, I am unwilling to order the Ministry to conduct this particular search.

The issue arose at the inquiry as to whether the RTNDA should be treated as a commercial applicant. The Regulations issued under this Act define a "commercial applicant" to mean "a person who makes a request for access to a record to obtain information for use in connection with a trade, business, profession or other venture for profit." (B.C. Reg. 323/93) I am satisfied that the RTNDA in this sense is not a commercial applicant, and the Schedule of Maximum Fees set forth in the same Regulation indicates that the fee it was quoted is for applicants other than commercial applicants. Although the RTNDA is a non-profit operation, it could give out the results of this request for information for use by commercial media outlets. This point, as raised by the Ministry in oral testimony, seems irrelevant to the processing of any access request, since no one can control what any recipient of information does with it.

8. Conclusions

What constitutes a proper search?

As described above, I do not think that the Ministry conducted as comprehensive a search as was required in the present case. A public body must make every reasonable effort to search for the actual records that have been requested. I adopt the description of "every reasonable effort" contained in the Manual in Section D.3.3. These efforts must be made in accordance with the time limits set forth in the Act. Once a matter is under

review by this Office, public bodies should continue to search where it is reasonable to do so.

What constitutes a reasonable effort to assist an applicant?

A public body will meet its duty to assist an applicant where it makes every reasonable effort to search for the records requested and it informs the applicant in a timely way what it has done. In this connection, I have adopted above the three-part set of expectations for applicants set out by the RTNDA. (See page 4)

I am not satisfied that the Ministry of Attorney General made every reasonable effort to assist this applicant. Its written documentation of its search techniques were inadequate to meet the broad search criteria set forth by the applicant. The focus on contracts was too narrow. This judgment is somewhat mitigated by the oral testimony of the Policy Analyst who worked on this case. The Ministry did not meet its obligation to report to the applicant in a timely fashion about the progress (or lack thereof) of the request. As required by the Act, public bodies should make all reasonable efforts to document their search efforts in the event that no records can be located. Applicants need to be assured that "reasonable" efforts were made to help them.

How to obtain a fee waiver?

An applicant seeking a fee waiver must ask for it and provide a public body with reasons why such a request should be granted. The public body must then exercise its discretion by considering the reasons set forth by the applicant and ultimately furnish the grounds for its decision.

What is the next step?

Despite these conclusions, there is no order which I can make which would provide the applicant with a remedy. To the best of my knowledge, the applicant is not adequately appreciative of the findings of the 1988 Ombudsman's report of the 1987 surveillance of abortion advocates. It is also an explanation that the Ministry chose not to even mention at the hearing. It now makes sense to me that the surveillance at the 1987 NDP convention was for the purpose of watching pro-choice advocates who were present at the convention to elicit support.

The RTNDA should digest the information presented in this order and decide whether it still wishes to pursue the issue. The Ministry indicated that it would have to hear and think more about the waiving of fees for searching 309 boxes. I am not going to order it to do so, because the tack of looking for contracts may be a waste of time and resources. I am also inclined to think, based on the Ombudsman's report, that there are no written records in the hands of government that would document surveillance of the NDP convention, because the convention was not the direct target. If the applicant still

wishes the Ministry to search further afield for such records, it should request that the Ministry do so.

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David H. Flaherty January 12, 1995
Commissioner