



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI - 11 - 002

**Re: Department of Agriculture
Prince Edward Island Information and Privacy Commissioner
Karen A. Rose, Supernumerary Commissioner**

June 30, 2011

Summary

Under the *Freedom of Information and Protection of Privacy Act* ("the *FOIPP Act*"), an applicant ("the Applicant") asked the Department of Agriculture (the "Public Body") for access to records relating to complaints against particular operating companion animal establishments. The Public Body provided a fee estimate to the Applicant in the total amount of \$4,303.33, approximating 5200 pages of records as being responsive to the Applicant's request. The Applicant requested a fee waiver on the basis that the records relate to a matter of public interest. The Public Body decided against a fee waiver. The Applicant argued that the records relate to a matter of public interest because poor government enforcement of animal protection laws is a longstanding and widespread problem, and that the records have a direct bearing on the public's understanding of current legislation and how the government enforces it. After examining the

records and gathering evidence regarding how the fee estimate was calculated, the Commissioner concluded that the fee estimate was excessive and reduced the fee to \$1,180.00. The Commissioner granted the Applicant's fee waiver, in part, as the records satisfied the criteria for a finding that they relate to a matter of public interest. The fee waiver was limited to fifty per cent (50%), however, as the records were so numerous, they would have to be summarized in order to be of useful interest to the public. The Commissioner confirmed that the Public Body was not required to permit the Applicant to examine all of the records in person, but that it was required to permit the Applicant to examine two binders of records that had been prepared for a court proceeding, as these records would not require redaction. The Commissioner also found that in failing to invite the Applicant to provide support for its fee waiver application, and in failing to exercise its discretion openly, the Public Body did not fulfill its duty to assist the Applicant under section 8 of the *FOIPP Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2001, c.37, R.S.P.E.I. 1988, c. F-15.01, ss.7, 8(1), 11, 60, 66 and 76; *Freedom of Information and Protection of Privacy Act General Regulations* (EC564/02), s. 3, 9(5) and Schedule 2; *Companion Animal Protection Act*, S.P.E.I, 2001, c. 4, R.S.P.E.I. 1988, c. C-14.1

Authorities Considered: PE: Orders 03-001, 04-004, 06-001, 06-002, 08-001, FI-10-002, FI-10-008, FI-11-001; AB: Orders 96-002, F-2007-010, F-2007-024, F-2006-032, F-2001-017; F2000-008; ON: Order MO-1614.

I. FACTUAL BACKGROUND

[1] This review arises out of a request to access information submitted by an applicant ("the Applicant") under the *Freedom of Information and Protection of Privacy Act* (the

"FOIPP Act"), dated October 8, 2010, and received by the Department of Agriculture ("the Public Body") on October 12, 2010. Specifically, the request is for:

Any and all records with respect either in part or in whole to complaints made and/or investigations and/or inspections conducted in relation to the care, welfare, housing and treatment of companion animals on the premises and/or for sale to the public and/or sold to the public regarding the following businesses:

1. Snookumpets.com
2. W.W. Holdings Inc.
3. Snookums Pets.com
4. 100427 P.E.I. Inc.
5. Snookums 2002 Pets
6. 100036 P.E.I. Inc.
7. Puppiesacrosscanada.com

- [2] The Applicant's request included but was not limited to complaints, inspection reports, veterinarian reports, photographs, recommendations and correspondence. The time period of the requested records was identified as January 1993 to present.
- [3] The Public Body acknowledged receipt of the Applicant's request by letter dated November 3, 2010. The Deputy Minister of the Public Body provided the Applicant with a fee estimate totaling \$4,303.33, estimating that 5200 pages would have to be copied, 62.5 hours would have to be spent searching records and 86.6 hours would be necessary to prepare the records for disclosure.
- [4] On November 18, 2010, the Applicant wrote to the Public Body questioning the fee estimate and inquiring as to how the 5200-page figure could be so high given the Public Body's response to her first (similar) request a year earlier. The Applicant also requested a fee waiver. The Public Body received the Applicant's letter on November 23, 2010, and responded on November 24, 2010. The Deputy Minister exercised his discretion not to waive the fee. In response to the Applicant's query regarding the number of records, the Deputy Minister stated that the time frame and number of businesses included in this

request was very broad and included a legal proceeding involving a large number of records.

- [5] By letter dated December 17, 2010, the Applicant set out in detail the reasons supporting her request for a fee waiver, relying on four previous orders of this office. The Public Body responded to the Applicant by letter on January 17, 2011, again refusing the request for a fee waiver and stating that the FOIPP Coordinator had made two attempts to contact the Applicant (by telephone) with a view to narrowing the request, but had been unable to reach the Applicant. In accordance with the *FOIPP Act*, the Deputy Minister pointed out that the Applicant could ask the Information and Privacy Commissioner to review the Public Body's decision.
- [6] On February 12, 2011, the Applicant wrote to the Public Body once again, pointing out that the Public Body had not conducted an evaluation of her request for a fee waiver using the criteria laid out in decisions of this office. She again requested that the Public Body provide the rationale for its decision. On the same date, the Applicant wrote to this office requesting a review of the Public Body's decision, which letter was received on February 14, 2011. The Public Body responded to the Applicant's letter on February 16, 2011, stating that the Public Body determined that this case is not a matter of public interest, as it had already been dealt with through the justice system.
- [7] On March 18, 2011, the Information and Privacy Commissioner wrote to both the Public Body and the Applicant, advising that the Request for Review had been received on March 2, 2011, and that it would be assigned to a Supernumerary Information and Privacy Commissioner ("the Commissioner").
- [8] On April 11, 2011, the Commissioner wrote to the Public Body requesting that all background documentation be provided within 10 days, including a summary of the categories of records referred to in the fee estimate and the approximate number of

records in each category. She further requested detailed submissions regarding sections 76 and 8 of the *FOIPP Act*, as well as the foundation for the fee estimate calculation, all to be provided by May 3, 2011.

[9] The Commissioner received the Public Body's response regarding background records on April 19, 2011. The Public Body's submissions were received by the Commissioner on May 2, 2011. On May 4, 2011, the Commissioner wrote to the Applicant, enclosing the Public Body's submissions and the background records, and asking the Applicant to respond to them by May 26, 2011. Also on May 4, 2011, the Commissioner contacted the Public Body seeking further submissions regarding the Applicant's request to examine the records at issue, and asking that these submissions be provided by May 11, 2011. The Public Body provided the supplementary submissions on May 6, 2011, which letter was forwarded to the Applicant on May 9, 2011, to be considered in her response.

[10] The Applicant's responding submissions were received on May 26, 2011. The Public Body was provided with a copy of the submissions and invited to make a reply by June 8, 2011. The Public Body replied on June 3, 2011, and its reply was forwarded to the Applicant for her information.

[11] On June 14, 2011, the Commissioner examined the records that are the subject of this review, in person, at the offices of the Public Body. On the following day, the Commissioner forwarded a summary of her factual findings to the FOIPP Coordinator of the Public Body for her approval. On June 17, 2011, the Commissioner forwarded the same summary to the Applicant for her information.

II. RECORDS

[12] Because we are still at the fee estimate stage of the Applicant's request, I do not have a copy of the records pertaining to the Applicant's request. Before I had the opportunity to

view the records, the Public Body advised that the records, numbering approximately 5200 pages, may be divided into three general categories:

(i) Records related to a court proceeding, including complaints, follow-ups to complaints, inspection reports, photographs, notes to file, correspondence, orders, veterinarian reports, and animal examination reports. These records make up approximately 70% of all records at issue.

(ii) Complaints, Inspection Reports, and Follow-ups. These records make up approximately 26% of all records at issue.

(iii) Miscellaneous records, such as license applications, Codes of Practice, Notice of Claims, newspaper articles, etc. These records make up approximately 4% of all records at issue.

[13] Upon examining the records, I confirm that these categories accurately describe the records in the Public Body's possession responsive to the Applicant's request. However, the Public Body's estimate of 5200 records included an extra copy of each record. Based upon my more detailed examination, I summarize the records as follows:

1. The records consist of:

- a. Approximately 1300 pages of records relating to the court proceeding involving PuppiesAcrossCanada.com, housed in three binders:
 - i. Binder #1 (approximately 400 pages) contains Department documents such as investigation reports, colour photographs, licencing information, and veterinarian reports;
 - ii. Binder #2 (approximately 200 pages) contains orders under the *Companion Animal Protection Act*, with attached veterinary reports and photographs.
 - iii. Binder # 3 (approximately 700 pages) contains photographic evidence of individual animals and their corresponding Humane Society Animal View reports.
- b. Approximately 1300 pages of loose records.

2. Although the three binders have records which span only one year, between August

2008 and August 2009, the loose records include but are not limited to the following:

- a. Emails from 2009 and 2010;
- b. License application (1 page) dated 2005;
- c. Two-page memo dated 2002;
- d. Emails regarding routine inspections dated 2005 to 2007;
- e. Notices of Claim in small claims court, dated 2000 (14 pages), 2001 (4 pages), and 2001 (2 pages);
- f. Documents relating to a removal order from Snookums dated 2002 (30-40 pages);
- g. Photographs dated 2003 (15-20 pages);
- h. 2004 report (10-15 pages);
- i. Notes, reports, emails, news items, website information relating to puppiesaccrosscanada.com;
- j. Orders from October 2009 (approximately 50 pages), photographs (approximately 30 pages);
- k. Complaint and correspondence from 1998 (approximately 10 pages);
- l. 1999 occurrence reports relating to Snookums and related correspondence (less than 100 pages);
- m. 2002 inspections (approximately 50-60 pages);
- n. 2003 inspections (approximately 50 pages);
- o. 2004-2007 documents/inspections (approximately 50-60 pages);
- p. 2008-2009 documents/inspections (approximately 100 pages);
- q. 1996 *Animal Cruelty Prevention Act* (10 pp);
- r. 1994 Code of Practice (25 pages); and
- s. Code of practice 2007 (33 pages).

III. ISSUES

[14] The issues to be decided in this review are as follows:

(1) Did the head of the Public Body reasonably calculate the fee estimate?

Calculation: Does the fee estimate conform to established guidelines outlined in the *FOIPP Act* and Regulations?

(2) Did the head of the Public Body reasonably apply the provisions of the *FOIPP Act* in reaching his decision to deny a fee waiver to the Applicant?

Public Interest: Do the records at issue constitute records relating to a matter of

public interest pursuant to clause 76(4)(b) of the *FOIPP Act*?

Exercise of Discretion: Should all or part of the fee estimate be waived by the Commissioner pursuant to subsection 66(3) of the *FOIPP Act*?

(3) Is the head of the Public Body required to permit the Applicant to examine the records in person pursuant to clause 11(4)(a) of the *FOIPP Act*?

(4) Did the head of the Public Body fulfill his duty to assist the Applicant pursuant to section 8 of the *FOIPP Act*?

IV. BURDEN OF PROOF

[15] As was determined in the first order of this office, Order 03-001, the burden of proof under clause 76(4)(b) belongs to both parties, each of whom must provide evidence supporting their position. However, in this case, the initial burden rests with the Applicant. As the party who raised the fee waiver issue, she must provide sufficient information to allow the head of the Public Body to exercise his discretion in a balanced, informed and reasonable fashion. In contrast, the Public Body has the burden of showing that its actual calculation of the fee estimate conforms to the *FOIPP Act* and Regulations.

[16] Under section 8, the burden of proof also rests with the Public Body, as was set out in a recent decision of this office in Order FI-11-001.

V. SUBMISSIONS OF THE PARTIES, ANALYSIS AND FINDINGS

Issue 1: Did the head of the Public Body reasonably calculate the fee estimate?

Calculation: Does the fee estimate conform to established guidelines outlined in the *FOIPP Act* and Regulations?

[17] As noted above, the Applicant has questioned the calculation of the fee estimate provided

to her by the Public Body. Subsection 60(1) of the *FOIPP Act* allows the Commissioner to review any decision of the head of the Public Body that relates to a request for access. Pursuant to subsection 66(3), the Commissioner may review the fee, including the manner in which the fees were calculated.

[18] The process for the calculation of fee estimates was discussed at length in Order 03-001, cited by the Applicant, and is set out at section 76 of the *FOIPP Act*, as follows:

76.(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.

(3) If an applicant is required to pay fees for services under subsection (1), the public body shall give the applicant an estimate of the total fee before providing the services.

(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).

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

(a) the applicant cannot afford the payment or for any other reason it is appropriate to excuse payment; or

(b) the record relates to a matter of public interest, including the environment or public health or safety.

(4.1) If an applicant has requested, under subsection (3.1), the head of a public body to excuse the applicant from paying all or part of a fee and the head of the public body has refused the applicant's request, the head of the public body shall notify the applicant that the applicant may ask for a review under Part IV of this Act.

(5) The fees referred to in subsection (1) shall not exceed the actual costs of the services.

[19] Pursuant to subsection 76(3) of the *FOIPP Act*, a public body must provide a fee estimate

before it searches for and retrieves the record requested. In this case, the Public Body provided the following fee estimate to the Applicant:

Item Description	Quantity	Amount
Search record fee @ \$10.00 per half hour in excess of 2 hours (staff time)	62.5 hrs.	\$1,250.00
Prepare a record (2 minutes per page)	86.6 hrs.	\$1,733.33
Copying a record – photocopies and laser printer (# of sheets @ .25/sheet)	5200 pgs.	\$1,300.00
Shipping costs		\$20.00
Total		\$4,303.33

[20] As was correctly pointed out by the head of the Public Body in his reply submissions, to determine whether the Public Body calculated the fee for service reasonably, the Commissioner must answer the following three questions:

1. Was the Public Body's time estimate for location and retrieval reasonable?
2. Was the Public Body's time estimate for handling and preparation reasonable?
3. Were other charges (in this review, photocopying and shipping charges) calculated reasonably?

[21] If the answers to these three questions is affirmative, then the Commissioner will conclude that the Public Body has met its burden of proof and that it calculated the fee estimate reasonably.

Locating and retrieval time:

[22] Schedule 2 of the *FOIPP Act* Regulations permits a public body to charge a maximum of \$10.00 per half hour for locating and retrieving a record. Because the estimate of fees must be an informed one, a preliminary search must be conducted by a public body. Location and retrieval refers to the time required to take the requested records out of the public body's record-keeping system.

[23] In addressing location and retrieval time, the Public Body provides the following evidence with regard to the fee estimate calculation:

- All records have been located, both hard copy and electronic documents, by eight staff members of the Public Body.
- Staff recorded the actual time spent gathering the records.
- The Public Body points out that the records requested span a significant period of time and were located in various offices.

[24] The Public Body provided access request review forms completed by eight individual employees once their search for records was performed, copies of which were provided to the Applicant. These forms indicate that the search time per staff member ranged from a low of one hour to a high of twenty hours.

[25] The Applicant responds with the following points, relying upon Ontario Order MO-1614:

- Duplication of records may be an issue given the number of employees who searched for the same material.
- There is little consistency among staff regarding how the records were identified or acquired, or how time frames were calculated. For example, one access request review form indicates that it took almost two hours to photocopy two files, whereas another indicates that although there were too many records to document, a search took three hours.

- The Public Body indicates that all of the records were located in its offices, which are in one building. Therefore, it should be possible to compare the Public Body's assessment of time frames to that indicated in Order FI-06-001 of this office.
- Based on the Public Body's evidence, a minimum of 70% of the records had been compiled by the Public Body before receiving this request in anticipation of a court proceeding. One access request review form supports this evidence, indicating that much of this material was searched, retrieved and compiled for the court proceeding and is now in binders, accompanied by another folder labeled "FOIPP." The implication of the hand-written note on this form is that the Public Body should consider the amount of time it took to do this and pass that cost on to the Applicant, which is contrary to Orders FI-10-002 and FI-04-004 of this office, that state that fees do not exist as a cost recovery mechanism.

Analysis and findings regarding locating and retrieval time:

[26] With regard to location and retrieval time, Order 03-001 of this office sets out guidelines to be followed by public bodies in calculating this portion of the fee estimate. I have also reviewed all of the orders referred to by the Applicant in my analysis of the fee calculation in this review. Although location and retrieval refers to the actual time required to take the responsive records out of a public body's files, a test of reasonableness should also be applied. In determining whether the estimate of location and retrieval time is reasonable, a public body should consider the breadth of the request and the efficiency of the record-keeping system.

[27] The evidence discloses that the Applicant's request is a broad one. The time span of the records to be located is 18 years, which would be expected to increase the search time required. In addition, the request involves seven companies, which fact would also be expected to increase the search time required. Contrary to the suggestion of the Applicant, duplicate records were not found during my examination of the records.

[28] Despite the breadth of the request, there are also factors which lighten the search burden on the Public Body. The Applicant has raised a good point that having all of the records housed in one area should make search time shorter. It is also notable that the companies

referred to in the Applicant's request are related to one another; in fact, all appear to be operated by the same individual. Further, my examination of the records garnered additional information regarding the search: most of the records are from 2008 and 2009, although a small number date back to 1999, and most of the records relate to one specific company.

[29] As noted above, the Public Body provided reports of the time staff spent locating and retrieving the records responsive to the Applicant's request. However, similar to Ontario Order MO-1614 (page 5), relied upon by the Applicant, there is no evidence regarding how these time estimates were made or what they include. In the absence of adequate details from the Public Body as to what staff were required to do in their extensive search times, I am left to draw my own reasonable conclusions based on a presumption of a well-organized filing system.

[30] In Order 03-001, the following comments were made regarding the reasonable expectation of an efficient record-keeping system of public bodies:

If a Public Body's filing system is less than efficient, the Applicant should not be penalized with a high time estimate. Instead, the Public Body should estimate the time based on a presumption of a reliable and organized system. Any additional time required as a result of a poor system (i.e. records not filed in an organized manner, records on one subject found in various locations), should be absorbed by the public body until the system is upgraded to a reasonable level. This approach ensures a consistent calculation of time across all public bodies.

[31] Given the breadth of the request, it is reasonable to expect that the Public Body in this review would have to spend a number of hours locating and retrieving the records requested. However, the combined search time of three of the eight employees of the Public Body has been reported to be 51 hours. Again, in the absence of an explanation from the Public Body, I find this estimate to be unreasonable in the circumstances. As the Applicant has again pointed out, half of the records, 1300 pages, were already

organized in binders for a court proceeding. It follows that the Applicant should not be charged more than a few minutes for the location and retrieval of these records. It is possible that the Public Body has charged for the time spent photocopying records, but as was pointed out clearly in Order 03-001, this is not permitted under the *FOIPP Act* Regulations.

[32] I must determine a reasonable estimate of location and retrieval time for the remaining loose 1300 pages of records. If the time span had been only two years, I would estimate five hours to be appropriate if they were retrieved from a well-organized filing system. However, given that at least 500 pages of records were retrieved from a time period spanning 10 years, it is reasonable to triple that time estimate to 15 hours. With the first two hours not chargeable, as noted below, this amounts to a \$260 charge for location and retrieval time.

Preparation time:

[33] Schedule 2 of the Regulations also provides for a maximum charge of \$10.00 per half hour for preparing and handling a record for disclosure. This refers to the time a public body must spend severing information from records pursuant to the exceptions set out in the *FOIPP Act*.

[34] The Public Body's evidence with regard to preparation time is as follows:

- The Public Body used the FOIPP Guidelines and Practice Manual to determine the fee estimate, including the "one inch rule" for measuring the thickness of documents, taking into account that there would be a copy of the original, a copy for severing and a final copy of the severed documents for the Applicant.
- It was determined that a significant portion of the records would require redacting. Although some of the animal examination reports stemming from the court case would contain no information that would require redacting, all other records would have to be reviewed to determine if redaction would be required.

[35] The Applicant responds as follows:

- If the Public Body is suggesting that its fee calculation includes not only original records, but also copies that it foresees as necessary for severing, and another set of severed copies to be provided to the Applicant, then this method of calculation is in error in accordance with Order FI-06-001.
- The Public Body indicates that it would need to review all of the records to determine a need for redaction; however, the Public Body later indicates that it has already determined the number of documents that would require severing and has included this in its estimate of existing records.
- The Public Body has not previously indicated an intention of redacting information. In order to do so, it would be required to inform the Applicant and present justification under the *FOIPP Act*.

Analysis and findings regarding preparation and handling time:

[36] In Order 03-001, I agreed that two minutes per page is a reasonable preparation time for making severances to records where only a few severances per page are being made. This time guideline brings objectivity to the calculation of preparation time. It is also notable that the time spent by a public body reviewing records to prepare them for disclosure cannot be passed on to an applicant. Subsection 9(5) of the Regulations specifically stipulates this.

[37] I agree with the Applicant that it is unclear whether the Public Body is charging for review time in its fee estimate. Upon an examination of the records, it is clear that the Public Body is charging the Applicant for two copies of each record: the copy for severing and the copy ultimately provided to the Applicant. It is also apparent that the Public Body is charging to redact every page of both copies of records, for a total of 5200 pages. The Public Body's fee estimate presumes that each page of the records will require preparation for disclosure.

[38] The Public Body has taken a misguided approach to calculating its preparation time for

the records in this review. It is incumbent upon the Public Body to estimate the number of pages of records which would require redaction and then to apply the "two minutes per page" rule described above and accepted by the Public Body according to its evidence. The Applicant is correct in her submission that the Public Body cannot charge for two copies of each record, but only for one. In addition, as noted above, the Public Body cannot charge for review time. As the Public Body has not made an estimation of the number of pages that will require redaction, except to say that a significant portion of the records will require redacting, I have made an informed estimate below.

[39] It is the Public Body's submission that 4% of the records would require no severances and 70% of the records relate to a public court proceeding. My examination of the binders alone lead me to the following observations:

- Binder # 3, approximately 700 pages, would have no redacted pages since it is filled with photographic evidence of individual animals and their corresponding Humane Society Animal View report.
- Binder #1, approximately 400 pages, contains departmental documents such as investigation reports which may have a very small amount of information redacted (see the recent Order FI-11-001 of this office). Three quarters of these records would not require any redaction, as they include photographs, licencing, and veterinarian reports.
- Binder #2, approximately 200 pages, contains orders under the *Companion Animal Protection Act*, with attached veterinary reports and photographs. None of these pages would require redaction, again considering Order FI-11-001.

[40] The remaining loose records are similar in type and will require occasional (usually single) severances, most likely to protect the personal information of third parties under section 15 of the *FOIPP Act*. Given this evidence, I agree that some information may require severing, but certainly not the majority of records. In my view, having examined the records in person, a reasonable estimate for severing the records at issue would be one-eighth of the records, or 325 pages. At two minutes per page, this would mean a preparation time of 650 minutes, or approximately 11 hours. At \$20 per hour, the amount

of preparation time charged to the Applicant would be \$220.

Photocopying costs:

[41] Schedule 2 of the Regulations allows public bodies to charge a maximum of \$0.25 per page for photocopies, which includes the time spent to perform the photocopying task. A fee of \$0.25 per page was included in the Public Body's fee estimate to the Applicant on the basis that the Applicant would be provided with 5200 pages of records. In its reply, the Public Body also points out that to reduce the cost to the Applicant it estimated only photocopy costs for copying the many photographs in the records, rather than the more costly photograph charge.

[42] Since the coming into force of the *FOIPP Act* in November 2002, public bodies have had a policy not to charge applicants for the first two hours of time spent searching and retrieving records. The Public Body in this review has applied this policy to the fee estimate, as have I. The Public Body's use of regular photocopying charges for photographs has been adopted in my calculation as well.

[43] Clause 66(3)(c) of the *FOIPP Act* permits the Commissioner to confirm or reduce a fee, or order a refund. I have reduced the fee estimate as follows:

Search and Preparation Fee	26 hours at \$20 per hour (first two hours free)	\$260.00 <u>+ \$220.00</u> = \$480.00
Copy charges	2600 pages at \$.25 per page	650.00
Shipping costs	Unless picked up	20.00
TOTAL FEE ESTIMATE		\$1,150.00

Narrowing the request:

[44] Sometimes an applicant is invited to reduce the field of their request in the interests of reducing the fee. It is the Public Body's undisputed evidence in this review that its FOIPP Coordinator contacted the Applicant on two occasions, with a view to narrowing the request for this purpose. The Applicant responded that she would prefer that all communication with the Public Body be in writing. It is worthy of note that the Applicant's response was made at a time in the review process when she had posed many questions to the Public Body regarding the fee estimate, and had received very little response. It is fair to say that communication between the parties had already been compromised. This will be discussed below in the analysis of the Public Body's duty to assist. At that time, it was incumbent upon the Public Body, in my view, to contact the Applicant, in writing, with a proposal which might lead to narrowing the Applicant's request to reduce her cost.

[45] I would encourage the parties to work toward narrowing the Applicant's request, if possible, to reduce her overall fee. In addition, if, in the end, fewer than 2600 pages of records are actually provided to the Applicant, then the photocopy costs will be reduced accordingly.

[46] In Order 03-001, the applicant in one of the fee estimates under review pointed out that applicants are often forced to make decisions blindly when it comes to narrowing their request to keep costs down. This is because a public body is not required to provide any type of summary to applicants. In that order, it was found as follows:

I suggest that in order to alleviate such concerns, the Public Bodies may be able to help out the Applicant in such situations by providing the Applicant with some information regarding the type of records in its possession. Sample documents may be provided in some cases, to enable the Applicant to come to a more informed decision before narrowing his or her request.

[47] In the review before me, via the process of collecting evidence, a summary of records has been provided by me which will help the Applicant to make decisions about narrowing her request, if desired. The Public Body should bear in mind that in future such summaries are a necessary part of the Applicant's decision-making process in narrowing requests to reduce costs to both the Applicant and the Public Body.

Issue 2: Did the head of the Public Body reasonably apply the provisions of the *FOIPP Act* in reaching his decision to deny a fee waiver to the Applicant?

[48] Subsection 76(4.1) of the *FOIPP Act* permits an applicant to ask for a review of a public body's refusal to waive a fee.

Public Interest: Do the records at issue constitute records relating to a matter of public interest pursuant to clause 76(4)(b) of the *FOIPP Act*?

[49] The Applicant submits that the records at issue relate to a matter of public interest. This is the basis of her request for a fee waiver from the Public Body. The Public Body has refused the Applicant's request for a fee waiver.

[50] Before the Applicant requested this review, the Public Body had already responded to the Applicant's request for a fee waiver, as it should, advising that it was not prepared to waive the fee for her FOIPP request. In his letter dated January 17, 2011, the Deputy Minister of the Public Body responded to the Applicant as follows:

I do understand that the fee estimate is a concern to you, and for this reason, the FOIPP coordinator tried on two separate occasions to contact you to discuss possible approaches for narrowing your request that may have resulted in reducing the fees, but unfortunately she was unsuccessful in reaching you.

[51] The Public Body submits that the records at issue are not related to a matter of public

health or safety, and have no environmental implications. In addition, the Public Body states that it used the FOIPP Guidelines and Practice Manual to make its determination, considering the following factors:

- Because this matter has already undergone a court process, the public would not benefit from the records being disclosed. The Public Body has taken steps, including stakeholder consultations, to address the issues and improve the process for the future.
- The records will not contribute to the public understanding of the issue, because legislation was followed, tested and upheld in the court system, leading to a conviction.
- No access has been given to similar records at no cost. The only request for these records has come from the Applicant.
- The records would not clarify public understanding of the issues, as the legislation followed is available to the public already, and has been tested in a court.
- Waiving the fee would shift an unreasonable burden of the cost to the Public Body and cause significant interference with the operations of the Public Body as it will take substantial time and resources to copy and redact the records.
- The Public Body did not consider the Applicant's motivation in making its decision.
- Disclosure of the records at issue will not add to public research on the operations of the Public Body. No further insight will be obtained into the workings of government. Not only has the Public Body already been scrutinized through court proceedings, but government is taking steps to improve policies, procedures and legislation, and will be meeting with industry stakeholders for additional input.

[52] The Public Body submits that the welfare of dogs is not considered a matter of public health or safety, and noted that companion animals do not fall within the parameters of the *Public Health Act*. The Public Body also points out that decisions of this office suggest that a public body must decide whether the records in question relate to matter of public interest before deciding whether to waive the fee. The Public Body's evidence is that it followed such a process.

[53] In determining whether the records relate to a matter of public interest, the Public Body states that it considered that there was no risk of future harm as the business concerned was closed and the operator had been sentenced by a court. In addition, the Public Body points out that government processes and procedures had already been scrutinized during the court proceedings (which are public) and that government is also taking measures to address shortfalls. Therefore, submits the Public Body, the disclosure of the records will provide no further insight or opportunity for further discourse.

[54] In her responding submissions, the Applicant relies upon Order FI-10-002, referred to in a document disclosed by the Public Body, stating that, at page 12 of the order, an applicant made a request for records relating to warnings and fines given by the public body and the Commissioner determined that it was in the public interest to know that legislation is actively enforced and that the matter merited a fee waiver. She further submits, as follows:

- Public health is not the sole criterion that the Public Body should consider. In addition, Orders FI-03-001 (page 14) and FI-10-002 (page 9) make it clear that public health, safety and the environment are examples of public interest matters only, and not meant to be used to exclude all other matters.
- The operation of a third party business is not the issue about which the Applicant seeks information. Rather, her request focuses on the operations of the Public Body. Poor government enforcement of animal protection laws is a longstanding and widespread problem. This is reflected in the Canadian Federation of Humane Societies' ongoing efforts to ensure that the federal government meets its responsibilities in overseeing animal welfare.
- The Public Body's argument that there is no need for the public to have any further involvement in this matter indicates that it does not appreciate the purpose of the *FOIPP Act*, the seriousness of crimes against animals, or the degree to which the public finds abuse of animals unacceptable.
- The records have a direct bearing on the public's understanding of current legislation and how the government enforces it. It should always be considered a matter of public interest when the government has not met its responsibilities in enforcing legislation. Referring to several news items, the Applicant points out

that the Public Body's failure to enforce animal protection legislation has been publicly noted. In early submissions, the Applicant submitted that the provincial court judge who heard the case against the owner of the companion animal establishment stated that it is inconceivable that the Public Body allowed the establishment to operate without a license for 15 months. The records at issue will demonstrate the degree to which the Public Body is responsive to the public's concerns, and the degree to which it enforces regulations.

- The Public Body asserts that its operations have been sufficiently scrutinized through court proceedings. While these proceedings led to significant criticism of the Public Body's operations, there was no public examination because the defendant pleaded guilty and there was no extended trial. These proceedings have served as the beginning of public examination of the Public Body's failings, not the conclusion. The problems within the Public Body's operations have yet to be resolved.

[55] As further evidence that the records relate to a matter of public interest, the Applicant also incorporates into her submissions points she raised in her letter of December 17, 2010, including the following:

- Crown counsel who prosecuted the owner of the companion animal establishment to which the records relate stated that she hoped that the message received by the public is that the Legislature considers animal cruelty a very serious matter, thus suggesting that this matter is one of public interest.
- This matter has been reported in the media for several years, with reports of complaints made and not addressed, reports of public protests and media coverage of the court proceeding referred to by the Public Body.

[56] Addressing whether there is a reasonable expectation that the public could benefit from disclosure of the records, the Applicant states:

The public benefit is to animals requiring the Department's protection; it is the public's responsibility to ensure that animals receive this benefit in future. If the Department does not consider the welfare of animals serious enough to merit open and free disclosure, then it is reasonable to conclude that it has not considered their abuse serious enough to merit enforcing regulations to protect them. It is reasonable to expect that disclosure of these records will assist in ensuring that these regulations will be enforced

in future so that animals receive the full benefit of protective legislation.

Analysis and findings regarding public interest test:

[57] In Order 03-001, drawing on research from other provinces, I found that when considering whether a record is one of public interest, a public body should consider the following:

- a. Does the subject of the records relate directly to the environment, public health or safety?
- b. Has the subject of the records been a matter of recent public debate?
- c. Do the records disclose how the public body is allocating financial or other resources?
- d. Will the records contribute to the public understanding of an important issue, i.e. open and transparent government?
- e. Will disclosure add to public research on the operation of government?
- f. Has access been given to similar records at no cost?
- g. Have there been persistent efforts by the applicant or others to obtain the records?

[58] I will address each of the above questions individually, considering fully the submissions of both parties.

Does the subject of the records relate directly to the environment, public health or safety?

[59] I agree with the Public Body that the answer to this question is negative. The Applicant has conceded that the protection of companion animals is not directly related to any of these three categories.

Has the subject of the records been a matter of recent public debate?

[60] The Applicant has provided supported evidence that the investigation of these particular companion animal establishments has been the subject of ongoing media reports. The Public Body itself has provided evidence that it has consulted with stakeholders and is continuing to seek input into how its processes can be improved to best protect companion animals in Prince Edward Island.

[61] There is some evidence provided by both the Public Body and the Applicant that the subject of the records at issue has been a matter of recent public debate. The Public Body advises that due to the process of investigation and outcome of the related court proceeding, substantive changes have been brought forward to the *Companion Animal Protection Act*. The subject of the records at issue was a local news item during part of the time period covered by the Applicant's request. As recently as April 2011, the Applicant's request has been the subject of questions in the provincial Legislature and newspaper coverage. In early May 2001, a public opinion letter addressed this topic in the Guardian newspaper.

[62] Based on the evidence provided by both parties, I conclude that the subject of these records has been a matter of recent public debate.

Do the records disclose how the Public Body is allocating financial or other resources?

Will the records contribute to the public understanding of an important issue, i.e. open and transparent government?

Will disclosure add to public research on the operation of government?

[63] I have grouped these questions together as they contain overlapping queries and

supporting evidence. The records themselves disclose, in part, how the Public Body is allocating its inspection resources to protect companion animals. There is no indication within the records of how funds are being expended by the Public Body.

[64] It is also reasonable to expect the records at issue to make a contribution to the public understanding of an important issue. In this case, the protection of companion animals and the steps the Public Body has taken to carry out that protection is the important issue which the Applicant seeks to better understand. The importance of this issue is underscored by the evidence of the Applicant regarding comments of crown counsel confirming that the Legislature considers animal cruelty a very serious matter. I agree with the Public Body that its investigative processes have already been tested in a public court proceeding, to some extent; however, I am also mindful of the Applicant's uncontested evidence that a trial of the matter did not take place, as the accused pleaded guilty.

[65] Based on my review of these records, I conclude that they would provide an understanding of the processes the Public Body has followed over the past 10 years to fulfill its obligations under the *Companion Animal Protection Act*. Contrary to the submission of the Public Body that the legislation followed is already available to the public, even a brief review of the records indicates how the Public Body has carried out its mandate under the *Companion Animal Protection Act*. I agree with the Applicant that the records will contribute to the public's understanding of how government enforces its legislation. Having made this conclusion, however, I am compelled to add that not every record would contribute to such an understanding but, rather, that the records read as a whole would help to provide such an understanding.

[66] Similarly, the records would contribute to public research on the operation of the Public Body within this narrow portion of its mandate. The records provide a mirror into the activities of inspections of companion animal establishments. In addition, although I

have considered the Public Body's evidence that legislation was followed, tested and upheld in the court system, this is not the same as having the Public Body's processes followed, tested or upheld in a court system.

Has access been given to similar records at no cost?

[67] I accept the Public Body's evidence that it has given no access to similar records.

Have there been persistent efforts by the Applicant or others to obtain the records?

[68] The Applicant has made persistent efforts to obtain the records at issue. Her first request dates back to August 2009. When she did not receive the number of records she expected, she expanded her request, presumably with the expectation of receiving a more detailed picture of the process of investigation of companion animal establishments by the Public Body.

[69] In Order 03-001 of this office, I pointed out that the records at issue need only relate to a matter of public interest in order to satisfy the requirement of clause 76(4)(b). At page 14 of that order I noted that, "determining whether a matter is a public interest matter is what is expected, rather than determining whether each page of a record is in the public interest."

Findings:

[70] Given the responses to the guiding questions above, the evidence favours a finding that the records in this review relate to a matter of public interest. However, when exercising my discretion below, I will be mindful of the large number of records that are responsive to the Applicant's request and whether a full fee waiver is warranted in these circumstances.

[71] As noted above, both parties have referred to Order FI-10-002 of this office in their submissions. This order warrants an analysis. It can be distinguished from the review before me due to the narrow scope of its request for access. It dealt with a request for all of the warnings and fines given out by the public body's enforcement officers during a period of one year. Based on a total of 334 pages of responsive records, the total fee estimate amounted to \$126.50. A fee waiver was requested. Commissioner Haldemann made the following findings, at page 12 of the order:

In my opinion, it is reasonable to expect that the public could benefit from the disclosure of these records. In this case, I believe it is in the public interest to provide information on enforcement measures taken by the Public Body with enough detail to encourage public debate on the effectiveness of such enforcement. It should be noted, however, that not all cases in which a fee waiver is applied for would have the same result. Each case must be considered on the circumstances of the file.

Improving the public interest test:

[72] It is notable that the Alberta Information and Privacy Commissioner's office has adopted slightly different criteria in the determination of whether fee waivers should be allowed when records relate to a matter of public interest. In Alberta Order F2006-032, the Chief Adjudicator provided the following test, at paragraph 43, which has since been adopted in other orders of that office:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:

- Have others besides the applicant sought or expressed an interest in the records?
- Are there other indicators that the public has or would have an interest in the records?

2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:

- Do the records relate to a conflict between the applicant and government?
- What is the likelihood the applicant will disseminate the contents of the records?

3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:

- Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
- Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
- Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?

[73] I find the first and third questions above to be particularly relevant to the broader question of whether the records requested by an applicant relate to a matter of public interest. In my view, these two guidelines are a succinct and sufficient test for this office to use in future determinations of this issue, if it so decides.

Exercise of Discretion: Should all or part of the fee estimate be waived by the Commissioner pursuant to subsection 66(3) of the *FOIPP Act*?

[74] The Applicant made several submissions concerning the Public Body's exercise of discretion in refusing the fee waiver. Her key arguments are listed below:

- The Applicant suggests that the Public Body decided against a fee waiver before adequately applying the public interest test.

- The Public Body has not been consistent in its reasons for deciding that this issue is not a matter of public interest. In its letter of 17 Jan. 2010, it does not provide a reason. In its letter of 16 Feb. 2011, it decides against public interest because the owner of the business to which the records relate had been through the court system. In its current response, it adds that animal welfare does not meet the definition of public health and safety.
- There is no indication that the Public Body impartially assessed the points raised in the Applicant's letter of 17 Dec. 2010, or that it sincerely considered the question of public interest. There is also no evidence that it sought clarification or considered any other matters raised in the Applicant's letter. Instead, the Public Body's subsequent response to the Applicant (17 Jan. 2011) makes no reference to the matter of public interest.
- In line with a similar review, Order FI-10-002, (p. 5), the Public Body appears to have determined by subjective assessment and selective criteria, contrary to both the *FOIPP Act* and public opinion on this issue, that this matter is not in the public interest.

[75] The Public Body did not ask the Applicant for submissions or any other information at the time of her request for a fee waiver; however, it states that it considered the information submitted by the Applicant before making its decision to refuse the fee waiver request. Before making its final decision, the Public Body also consulted with the Provincial Access and Privacy Manager and legal counsel. In addition, as noted above, the FOIPP Coordinator of the Public Body made two attempts to contact the Applicant to discuss the possibility of narrowing the request.

[76] A public body has an obligation to exercise its discretion fairly and judiciously, taking into consideration the relevant facts and circumstances surrounding the issue, as well as the principles and objects of the *FOIPP Act*.

[77] When considering whether to use discretion to waive fees, the head of a public body should balance the answers to a host of questions, including:

1. Is there a reasonable expectation that the public could benefit from disclosure of this

record?

2. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?

3. Would the records contribute to debate on or resolution of the matter of public interest?

4. During the request for access process:

(a) Was the public body timely in responding to the request, and did it fulfill its duty to assist?

(b) Did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested, during the processing of the access request, including narrowing or clarifying the access request where it was reasonable to do so?

(c) Has the applicant unreasonably rejected a proposal by the public body which would reduce the costs of responding to the access request?

[78] Before exercising his discretion, the head of the Public Body states that he considered the provisions of the *FOIPP Act*, as well as four past orders of this office, namely, 03-001, 06-002, 08-001 and FI-10-002. The Public Body noted that, unlike the records in this review, the records in those orders involved matters of public health or safety.

[79] Alberta's Information and Privacy Commissioner has also considered the issue of public interest fee waivers. In Order F2007-024, at paragraph 16, the Adjudicator reiterated that the two over-riding principles for public interest are:

1. The Act was intended to foster open, transparent and accountable government, subject to the limits contained in the *FOIP* (OIPC External Adjudication Order #2 (May 24, 2002) (para. 26)), and

2. The Act contains the principle that the user seeking records should pay (Order 96-002 (page 16)).

[80] These principles should be borne in mind by the Public Body when exercising its

discretion. I have considered them, along with the four questions listed above, in my decision of this review.

Reasonable expectation of public benefit and contribution to debate:

[81] It has already been established that the records in this review relate to a matter of public interest. In my view, there is a reasonable expectation that the public could benefit from disclosure of the records. In addition, it is reasonable to expect that the records would contribute to debate on the issue of whether the provincial government is protecting companion animals adequately and what, if any, changes should be made.

Unreasonable cost burden:

[82] In making my determination of the fee estimate calculation in this review, I also bear in mind the following submission of the Applicant:

While the PB has estimated a significant cost to me of \$4,303.33 for this request, there does not appear to be any substantiated cost to them. . . . The PB states that handling this request would cause significant interference with their operations. Whatever remaining work is required in order to provide openness and accountability is not likely to interfere significantly with the PB's more pressing priorities.

[83] I disagree with the Public Body that a waiver of the fee would shift an unreasonable cost burden for responding from the Applicant to the Public Body. Given the public interest in these records, the cost burden to the Public Body if the fee waiver is allowed is not an unreasonable one.

Request for access process:

[84] Looking to the request for access process, I note that the Public Body was always timely in responding to the Applicant's request; however, my finding below is that it did not

fulfill its duty to assist. While the Applicant did not work with the Public Body to narrow her request, I find that she was not given a full opportunity to do so, as is also found below in the discussion of duty to assist. No proposal was made by the Public Body to the Applicant to reduce costs.

[85] The above conclusions are supported by the principle that the *FOIPP Act* is intended to foster open, accountable and transparent government; however, I must also consider the principle that the user seeking the records should pay. In my view, this is the principle that tips the balance in favour of providing only a partial fee waiver.

[86] The Public Body has pointed out that the *FOIPP Act* process is one in which the user must pay. It is accurate that accessing information under the *FOIPP Act* is not intended to be free of charge under the legislation, and this is further borne out by the Regulations. On this subject of users paying, I refer to Alberta Order 2000-008, which held as follows:

It is a simple fact that retrieval and copying of records costs the Public Body both human and material resources. The Public Body is funded by the taxes of Albertans. Are the records of significant importance that the cost should be passed on to all Albertans? After reviewing the records, my answer to this question is no (para 44).

[87] It is clear from a review of the records provided to this office by the Public Body that the concept of "user pay" was a key consideration in the exercise of the Public Body's discretion regarding a fee waiver. Fifteen years ago, the Alberta Information and Privacy Commissioner analyzed the issue of a public interest fee waiver in Order 96-002 and concluded:

Part of the balancing act involves the burden of the cost of disclosure to the taxpayer on one side and open and transparent government on the other side. In a given case, it is possible that the weight of public interest considerations might not outweigh the public interest in favour of the \$25.00 initial fee, but might be such as to outweigh any further fees. That is to say, I do not think that a decision that there is not enough public interest to justify waiving the initial fee necessarily means that there is not

enough public interest to justify waiving further fees. The decision of the Legislature in levying an initial fee has to be respected and given some weight, but the principle that money should not be a bar to access which is in the public interest must also be considered. (at page 17)

[88] Despite my finding that the records in this review relate to a matter of public interest, I must balance all relevant factors in the exercise of my discretion regarding whether to grant a fee waiver, a partial fee waiver, or no fee waiver at all. A relevant factor in this review is that there are approximately 2600 records responsive to the Applicant's request. Alberta's Order 2001-017 considered whether the disclosure of a large amount of detailed information would be in the public interest. Considering a large volume of records, as in this review, the Adjudicator stated:

I understand that the Applicant is motivated by what he views as his public duty to Albertans. However, I accept Environment's key argument that disclosing the records will not benefit the public unless the Applicant can analyze the vast quantity of raw information that would rain down on him. The Applicant's agent indicated at inquiry that, as a member of the Opposition, only modest financial and human resources were available to analyze the records. ...If the Applicant cannot properly analyze the records, then he cannot disseminate the information contained in them in a way that contributes to open and transparent government. At that point the Applicant's public interest argument breaks down and his argument for a fee waiver fails (paragraph 29).

[89] Despite the large number of records in this review, I am also mindful that the Applicant's request is broad, but not unnecessarily so. I recognize the logic in seeking records over a period of years to track the evolution of the investigatory processes of the Public Body under the *Companion Animal Protection Act*. I also reiterate that, although it appears that the Applicant is seeking records relating to several companies, these companies are related in that they have common management. In addition, contrary to Order 2001-017 cited above, I find that the records in this review are, as a whole, manageable from the point of view of an applicant's ability to summarize them and draw useful conclusions. These records do not contain the "vast quantity of raw information" referred to in Order 2001-017, *supra*.

Other appropriate reasons:

[90] The Applicant requested that a fee waiver be allowed because it is appropriate in the circumstances of this review. She points out that clause 76(4)(a) of the *FOIPP Act* makes provision for excusing fees where appropriate. The Applicant submits that it is appropriate to excuse the fee for the following reasons: (i) the Public Body's faulty calculation of the fee estimate; (ii) the fact that the Public Body provided no option to refine the request when it provided the fee estimate; and (iii) the fact that the Public Body has already searched, retrieved and compiled the records.

[91] I will address the first two points raised by the Applicant in my discussion of the Public Body's duty to assist below.

[92] As for the third point, I find that the Public Body has actually exceeded its duty to the Applicant in conducting a full search for records when it is not required to do so. Under ordinary circumstances, an applicant should benefit from such an approach by a public body.

[93] As a result of the foregoing analysis and findings, and balancing the factors in favour of a fee waiver against the factors in favour of refusal, I exercise my discretion to grant the Applicant a partial fee waiver. I conclude that the Applicant should pay fifty percent of the fee ultimately owed by her to the Public Body on the basis that the records relate to a matter of public interest pursuant to section 76 of the *FOIPP Act*.

Issue 3: Is the head of the Public Body required to permit the Applicant to examine the records in person, pursuant to clause 11(4)(a) of the *FOIPP Act*?

[94] The Applicant requested access to personal information by way of examination. As set out in Commissioner MacDonald's Order FI-10-008, the issue of access by examination

of records is dealt with in sections 7 and 11 of the *FOIPP Act* and section 3 of the Regulations to the *FOIPP Act*. Sections 7 and 11 appear to require examination in person when it is requested, as follows:

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

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

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

...

11. (1) If an applicant is told under subsection 10(1) that access will be granted, the head of the public body shall comply with this section.

(2) If the applicant has asked for a copy of a record and the record can reasonably be reproduced,
(a) a copy of the record or part of it shall be provided with the response; or
(b) the applicant shall be given reasons for any delay in providing the copy.

(3) If there will be a delay in providing the copy under subsection (2), the applicant shall be informed as to where, when and how the copy will be provided.

(4) **If the applicant has asked to examine a record** or for a copy of a record that cannot reasonably be reproduced, the applicant
(a) **shall be permitted to examine the record or part of it;** or
(b) shall be given access in accordance with the regulations.

[emphasis added]

[95] Despite the above-emphasized subsection, the Regulations to the *FOIPP Act* allow a public body, in prescribed circumstances, to give an applicant a copy of a record rather than the opportunity to examine the record. Section 3 of the Regulations states, as follows:

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

- (a) providing for examination of the record would unreasonably interfere with the operations of the public body; or
- (b) providing examination of the record could reasonably be expected to result in the disclosure of information that is restricted or prohibited from disclosure under section 5 of the Act or Part 1, Division 2 of the Act.

[96] As Commissioner MacDonald stated in the above-noted Order FI-10-008, a request by an applicant to examine the record is a request to examine the original record; however, the public body may still be required to sever information pursuant to an exemption set out in the *FOIPP Act*. In the circumstances before me, I have already observed that Binder #3 and Binder #2 contain records that will not require redaction under the *FOIPP Act*. In my view, there would be no prejudice to the Public Body to allow the Applicant to examine these two binders in person. [amended]

[97] As the Public Body has pointed out, Commissioner MacDonald did not require the public body to permit the applicant to examine the records in the above-noted Order FI-10-008.

[98] For the remainder of the records in this review, and pursuant to my earlier findings in the fee calculation analysis, I accept the Public Body's evidence that the remaining records will require review by the Public Body to determine whether the *FOIPP Act* exemptions to disclosure may apply. It is neither reasonable nor practical for the Public Body to permit the Applicant to review the remainder of the records in person. Therefore, I conclude that the Public Body is not required to permit the Applicant to examine the remaining records in person.

Issue 4: Did the head of the Public Body fulfill its duty to assist the Applicant pursuant to section 8 of the *FOIPP Act*?

[99] The duty to assist under section 8 of the *FOIPP Act* was discussed at length recently in Order FI-11-001 of this office. Section 8 states:

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

[100] As noted in Order FI-11-001, a public body has the burden of proof under subsection 8(1). However, while Order FI-11-001 focused on the adequacy of a public body's search, this review may only look at the early stages of the freedom of information process. A similar analysis was used in Alberta Order F2007-010. The Adjudicator pointed out that prior to a fee waiver request, a public body has two duties under [our] section 8:

The first step requires a public body to clarify with an applicant, if clarification is required, the nature of the access request. As part of this step a public body has a duty to engage in discussions with an applicant leading up to a formal fee estimate and assist an applicant in narrowing the request. The second step requires a public body to provide an applicant with a fee estimate and agree upon fees [para 54].

[101] The Public Body submits that it considered the issues raised in the Applicant's two initial letters dated November 18, 2010 and December 17, 2010. It states that, even after its second review, it was unable to find a reason to change its position that the records were not a matter of public interest. It submits that it further fulfilled its duty to assist by the following actions:

- In an effort to be accommodating, the FOIPP Coordinator extended the Applicant's deadline and accepted her December 17, 2010 letter, as it was not received within the time frame outlined in the Public Body's November 24, 2010, response.

- To discuss possible approaches to narrowing the request, in mid-January, 2011, the FOIPP Coordinator attempted to contact the Applicant on two consecutive days by telephone, leaving voicemail messages to which there was no response. The Applicant indicated in her February 12, 2011, letter that she would prefer communication in writing; and
- All deadlines were met by the Public Body.

[102] The Applicant responds with the following points:

- The Applicant's letter of February 12, 2011, asks the Public Body to explain its assessment and to indicate that its decision was based on a public interest test. The Public Body's response did not address any of the points that the Applicant raised, and did not provide any assessment based on the criteria it now indicates was provided by the Department of Justice. Its justification was solely that the matter had been dealt with through the justice system.
- In attempting to identify ways in which the Public Body believes that it has met its duty to assist, it states that it was accommodating in extending the deadline for the Applicant's request. In fact, it was the Commissioner's office that extended the deadline by recommending that the Applicant contact the Public Body again, as the Public Body had not fully explained the options.
- The Public Body indicates that the FOIPP Coordinator attempted to contact the Applicant to narrow the request. This effort should have been made when the Public Body initially provided its fee estimate, as suggested in Order FI-03-001, at page 6-7. An attempt does not appear to have been made until after the Public Body was advised by the provincial Access and Privacy Coordinator to do so.

Analysis and findings regarding duty to assist:

[103] I find that the Public Body has shown that it has fulfilled its duty of timeliness during the request process. The Public Body responded very promptly to the request. It also took the extra step of gathering all the records that were responsive to the Applicant's request, although its duty at this point was only to estimate. In addition, in an effort to reduce the cost to the Applicant, the Public Body attempted to contact her with a view to possibly reducing the cost to her by narrowing the request. All of these factors weigh in favour of a finding that the Public Body fulfilled its duty to assist under section 8 of the *FOIPP Act*.

[104] Despite the above factors, evidence has also been provided to support the Applicant's submission that the Public Body has failed in its duty to assist her. I agree with the Applicant that the Public Body's effort to contact her was very late in the freedom of information process. This review was already underway, the fee estimate had been provided months before and a fee waiver had been refused by the Public Body twice. The Public Body's phone messages appear to have been an afterthought. It was open to the Public Body to suggest options to the Applicant to narrow her request, even if such advice was in writing, in accordance with the Applicant's request, rather than by telephone.

[105] The underpinnings of public bodies' duty to engage in discussions with applicants and to assist in narrowing requests flow naturally from the circumstances of each access request. A public body is the party that has the background knowledge and familiarity, not only with the records in its possession, but also with the *FOIPP Act* and its Regulations. An applicant is at a disadvantage as a newcomer to this process, and it is up to the public body to guide the applicant. I find that this is an integral part of a public body's duty to assist applicants. In Ontario Order MO-1614, relied upon by the Applicant, Assistant Commissioner Mitchenson made the following comments with regard to a very large fee estimate that had been provided to an applicant:

At a minimum, I would expect the City to have either entered into detailed discussions with the appellant in an effort to clarify and narrow the scope of the request, or to provide a detailed and comprehensive outline of how the required search activities for the various components of the request were calculated.(page 6)

[106] I also note that the Public Body did not seek submissions from the Applicant regarding her fee waiver request. It is incumbent upon the Public Body to do so. In addition, because the Public Body responded to the Applicant's request for a fee waiver within one day of receiving it, and without seeking submissions, I find that the Public Body was not in a position to properly exercise its discretion. In Order 03-001, the duty of a public

body to seek submissions from applicants in support of their requests for a fee waiver was discussed, as follows:

In my view, the Public Body also has an obligation to request from an Applicant the basis of his or her fee waiver request. I note that this Act is new to everyone, especially the Applicants requesting records. Most would not be familiar with the procedures or their burden of proof. As part of their normal procedure, it is advisable for the Public Bodies to request reasons from the Applicant when the Applicant requests a fee waiver. This would also allow the Public Bodies to more fully exercise the discretion discussed below.

[107] In addition to the above findings, I am not convinced that the Public Body properly considered the underlying principles of the *FOIPP Act* to determine whether to grant a fee waiver to the Applicant. In particular, there is no evidence before me that the Public Body considered that the *FOIPP Act* is intended to foster open, transparent and accountable government, subject to the limits contained in the *FOIPP Act*. In addition, I am certain that the Public Body did not, in any of its correspondence, indicate to the Applicant how it had weighed the factors for and against granting a fee waiver before exercising its discretion.

[108] As a result of my findings, I conclude that the Public Body has not fulfilled its duty to assist the Applicant in accordance with section 8 of the *FOIPP Act*. As in Order FI-11-001, it is not practical to ask the Public Body to remedy all of its deficiencies for this particular access request at this time, in part because some of the errors have already been remedied in this order. However, as noted earlier in this order, it is not too late to require the head of the Public Body to work with the Applicant to narrow her request, if that is what she desires to do. With the description of the records provided in this order, the Applicant is now in a position to determine whether all of the responsive records are necessary for her purposes.

FOIPP Act Training

[109] As I reviewed the orders relied upon by the parties in this review, I noted that the public bodies who were the subject of the first order of this office, Order 03-001, appeared to have followed accepted practices for the calculation of fee estimates and for the exercise of their discretion relating to fee waiver requests. While not all of their decisions were upheld in the order, their duty to assist was not in question. I observed a comment made at page 8 of that order, as follows:

I agree that our Regulation and Schedule 2 of same should be read narrowly, and that the time spent making a decision as to whether severances should be made should not be included in the calculation of preparation time. This approach has been adopted in the Guidelines and Practices Manual, at page 36, which states, "No fee may be assessed for time spent in reviewing a record to determine whether or not all or part of it should be disclosed." All public bodies, in these cases, appeared to adhere to this approach, and I commend them for not making the presumptions which public bodies in other provinces have done.

[110] In Order 03-001, it is notable that when the public bodies applied correct processes for fee calculations and the exercise of their discretion under section 76, the *FOIPP Act* had just been proclaimed as law in this province. All FOIPP coordinators had received training carried out by the Provincial Access and Privacy Coordinator's office, which had been operating for two years in anticipation of the new *FOIPP Act*.

[111] I am struck by the contrast between my observations eight years ago and what I have observed of the Public Body in this review. Fundamental errors have been made in the calculation of the fee estimate, in the exercise of the Public Body's discretion under section 76 and, most markedly, in the lack of adequate communication by the Public Body with the Applicant. Particular sections of the *FOIPP Act*, most notably sections 8, 14, 15 and 76, are frequently considered by public bodies in this province. There is an expectation by this office and by the public that all provincial government departments

have ready expertise in these sections sufficient to guide applicants. In the review before me, I have observed that, at times, the Applicant was guiding the Public Body.

[112] Under clause 66(3)(a) of the *FOIPP Act*, I am ordering the head of the Public Body to fulfill his duty to assist the Applicant. I recognize that the failure of the head of the Public Body to fulfill his duty to assist is borne out of a lack of familiarity with all of the responsibilities of this duty. Therefore, under subsection 66(4) of the *FOIPP Act*, I am ordering the head of the Public Body to ensure that all of his staff who are responsible for responding to applicants are adequately trained in the application of the *FOIPP Act* and their related duties.

VI. ORDER

[113] Based on my findings set out above, I order the head of the Public Body to reduce the fee estimate charged to the Applicant to \$1,150.00.

[114] I find the head of the Public Body's decision to disallow a fee waiver to be unreasonable in all of the circumstances. I order the head of the Public Body to allow a partial fee waiver, as the records relate to a matter of public interest. As a result of my findings, I order the head of the Public Body to waive fifty per cent of the fees charged to the Applicant in this review.

[115] I confirm the decision of the head of the Public Body to refuse the Applicant access by examination to all records, except for the records contained in Binder #2 and Binder #3 described above. I order the head of the Public Body to allow the Applicant access to Binder #2 and Binder #3 by examination. In the event that the Applicant, after examination, does not require copies of the records, her photocopy charge will be reduced accordingly. [amended]

[116] I find that although the head of the Public Body responded to the Applicant in good faith, he did not fulfill his duty to assist the Applicant under section 8 of the *FOIPP Act*. I order the head of the Public Body to contact the Applicant, in writing, with a view to narrowing her request and thereby possibly reducing further the amount of the fee estimate. I also order the head of the Public Body to ensure that all staff who are responsible for responding to applicants are adequately trained in the application of the *FOIPP Act* and their related duties.

[117] In accordance with subsection 68(1.1) of the *FOIPP Act*, the head of the Department of Agriculture shall not take any steps to comply with this order until the end of the period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*.

Karen A. Rose
Supernumerary Information and Privacy Commissioner