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ADJUDICATION PRACTICE NOTE 2

(replaces former FOIP Practice Note 10)

EVIDENCE AND ARGUMENTS FOR INQUIRIES

In this Practice Note, “Commissioner” means the Commissioner or his delegated Adjudicator.

“Evidence” is the material that parties must submit in inquiries to establish the facts on which they are relying. “Arguments” are the reasons why a party thinks that the evidence shows certain facts to be true, or why the Commissioner should interpret the law in a particular way, so as to make the decision that the party wants him to make. This may include relying on earlier decisions of this office or of information and privacy offices in other jurisdictions, as well as on decisions of the courts.

In most inquiries, the public body, organization or custodian has the burden of proof. Because the Commissioner is typically reviewing whether a decision was made in accordance with the applicable Act, public bodies, organizations and custodians are usually in the best position to support their decisions even when they do not formally have the burden of proof.

Parties may not succeed in an inquiry if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts, providing the argument alone is not sufficient. The underlying facts must be established by evidence. As well, evidence should not be provided in the form of unattributed assertions made in the context of an argument. If a fact is being put forward, it must be shown how this fact is known to be true (e.g., by way of a statement, preferably sworn, of someone who knows the fact, or by other, objective evidence such as documents).

It is also not sufficient to provide the Commissioner with records and leave it up to him to try to draw from the records the facts on which he will base his decisions. The Commissioner requires that persons representing the public body, organization or custodian provide evidence by speaking to the contents of the records, for example by explaining how each part of a record for which an exception to disclosure is claimed falls within the exception. If the explanation depends on certain facts being true, the public body, organization or custodian must provide evidence of these facts.

Parties that do not provide the evidence that is necessary to support their arguments risk having decisions go against them. See, e.g., *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593 at para. 42.

Practice Notes are prepared by the Office of the Information and Privacy Commissioner to assist persons in using the applicable Act. These notes do not constitute Orders under the Act and are not binding. They are intended as advice only. Copies of all Practice Notes and the *Inquiry Procedures* are available on the Office's website at www.oipc.ab.ca.
