ORDER 96-002

March 21, 1996

TREASURY DEPARTMENT

REVIEW NUMBER 1043

NATURE OF THE REQUEST FOR REVIEW:

On September 29, 1995, a request for access under the *Freedom of Information and Protection of Privacy Act* (hereafter referred to as the "Act") was submitted to the Treasury Department, signed by Kevin J. Bosch on behalf of Michael Percy, M.L.A. The application requested access to the following:

> Copies of the following documents cited in the Auditor General's Report of Loss to the Province from its Involvement with Gainers Inc., March 23, 1994:
>
> (1) The January 1990 report prepared by members of the Executive Council responsible for monitoring the Province's involvement with Gainers, estimating the province's exposure to loss at $143 million;
>
> (2) Copies of all proposals and business plans submitted by three potential buyer (sic) during July 1992;
>
> (3) The August 1990 memorandum from Alberta Treasury Branch staff to its Executive Credit Committee commenting on the feasibility of participating as a 50% partner in the $28 million line of credit provided through the Banque Nationale du Paris (Canada);
>
> (4) A copy of the agreement between the Government of Alberta, the Alberta Treasury Branches, and the Banque Nationale de Paris (Canada) in which an operating line of credit to Gainers was increased to $28 million as a result of the Treasury Branches becoming a 50% participant in the loan.
>
> (5) The December 17, 1993 agreement in which the Government of Alberta provided the Banque Nationale de Paris (Canada) with an indemnity from losses on the line of credit in excess of the $10 million provincial loan guarantee.

The Applicant also requested "that fees be waived pursuant to section 87 of the Act."

On October 17, 1995, the Freedom of Information and Protection of Privacy Coordinator (FOIP Coordinator) for Treasury wrote to Dr. Percy to request that the Applicant provide specific comments as to his grounds for seeking a waiver of fees pursuant to section 87. The FOIP Coordinator also advised the Applicant that under section 10(3) of the Freedom of Information and Protection of Privacy Regulations, the public body would not commence processing the request until the $25.00 initial fee was paid.

Dr. Percy responded on October 20, 1995. He referred to the three criteria for fee waiver that are set out in section 87(4) of the Act as follows:

1. *The applicant cannot afford the payment* -- Dr. Percy suggested that it was not the intention of the Legislature in passing the *Freedom of Information and*

Protection of Privacy Act that fees be used as a means to block access to government information.

2. *For any reason that it is fair to excuse payment* -- The nature of the role of Members of the Legislative Assembly requires access to information to understand the function and operation of the Government and the Official Opposition has a unique responsibility to oversee Government operations on behalf of all Albertans.

3. *Public interest* -- The information requested was not for the Applicant's personal use but instead relates directly to his role as Opposition critic.

Dr. Percy was advised by letter dated December 5, 1995, that the public body had considered his representations regarding the request for a fee waiver and it was the decision of the public body that the $25.00 initial fee would not be waived in this case.

A review of the public body's decision was requested on January 5, 1996, by letter signed by Gary Dickson, Q.C., M.L.A., Freedom of Information and Privacy Critic for the Alberta Liberal Opposition. The Applicant and the public body were notified on January 11, 1996, that mediation had been authorized under section 65 of the Act.

By letter dated January 23, 1996, notice was provided to the head of the public body and to the Applicant that mediation had not been successful and that an inquiry would be necessary. The Commissioner decided that the inquiry should be public and would be held on Monday, February 12, 1996.

The parties to this inquiry were:

Applicant:	Dr. Michael Percy Member of the Legislative Assembly for Edmonton-Whitemud Finance Critic
	Mr. Gary Dickson, Q.C. (as agent for the Applicant) Member of the Legislative Assembly for Calgary-Buffalo Freedom of Information and Protection of Privacy Critic
Public Body:	Ms Tannis Carlson, Department of Justice
	Mr. Michael Aston, FOIP Coordinator, Treasury Department
Intervenor:	Mr. Herman Kirchmeir

ISSUES:

The immediate issue was whether or not this Applicant should be excused from paying the $25.00 initial fee with respect to this application. A number of related issues were raised at the inquiry.

The requirement of a $25.00 initial fee comes about by virtue of section 10 of the *Freedom of Information and Protection of Privacy Regulation* (A.R. 200/95) made under authority of section 88(1)(l) of the Act.

Dr. Percy, as Applicant, and Mr. Dickson, as agent, made a joint presentation to the inquiry. They are collectively referred to as the "Applicant" in this order. The public body was represented by Ms Tannis Carlson, Department of Justice, and is referred to as "Treasury" in this order. Mr. Michael Aston, the FOIP Coordinator for Treasury, also gave evidence on behalf of Treasury and ably submitted to questions from the Applicant. Both parties submitted binders containing the materials upon which they wished to rely in this inquiry. At the outset, I wish to thank both the Applicant and Treasury for their efforts.

The issues raised are summarized as follows. The body of this order consists of my consideration of those issues and the arguments raised by each side.

1. *In an application under section 87(4) of the Act, should the applicant or the public body bear the burden of proof?*

2 *What do the words "no one is entitled to be present during" an inquiry in section 66(3) mean?*

3. *Do the same considerations with respect to the waiver of fees pertain to an "initial fee" (i.e. the $25.00) as to an "access fee" (i.e. what the public body charges to actually assemble and provide the records requested)?*

4. *Must the $25.00 initial fee be paid before an applicant can seek a waiver of fees under section 87(4)?*

5. *Is there any difference between the powers of the head of a public body to grant a waiver under section 87(4) and the powers of the Commissioner to grant a waiver?*

6. *In section 87(4), to what extent is the applicant required to make the argument on grounds for a waiver?*

7. *What does the word "including" in section 87(4)(b) mean?*

8. *What constitutes "public interest" for the purposes of section 87(4)(b)?*

9. *Should public interest be determined in relation to the subject matter of the records being requested or the specific content of the documents being requested?*

10. *Should Members of the Legislative Assembly be categorically given a waiver of fees?*

11. *In the present case, should the Applicant be excused from paying the $25.00 initial fee pursuant to section 87(4)?*

PRELIMINARY MATTERS

The Burden of Proof

The Applicant asked that the issue of the burden of proof in fee waiver requests be dealt with first. The Applicant stated that, while section 67 of the Act places the burden of proof on the public body in cases where access is refused, the Act is silent on the burden of proof for fee waiver requests. The Applicant stated that, while other jurisdictions had ruled that the burden of proof in cases of fee waiver was to be borne by the applicant, the Commissioner was not bound by those decisions. The Applicant claimed that there is a basic imbalance between the resources of Government and the resources available to the average citizen. The Act goes some distance to correct that imbalance. It would be consistent with that correction to place the burden of proof on the Government since they have the resources to discharge the burden. Finally, relying upon the stated purposes of the Act to allow access and the espoused principle of openness in Government, which he said was fundamental to the Act, the Applicant urged me to rule that the public body should show why it was not in the public interest to waive fees.

Treasury argued that since the Act is silent on the issue of burden of proof for the waiver of fees, the burden reverts to the party asserting the right. In support of this, Treasury referred to Order P-463 from the Ontario Information and Privacy Commission (IPC) and Order 55-1995 from the British Columbia IPC.

It is my view that, the Applicant's arguments regarding the purpose of the Act and the importance of ensuring openness in Government are well founded. However, they do not overcome a very practical problem; namely that, while the head of the public body should turn his mind to the public interest at issue, he cannot specifically know whether the applicant can afford the payment, what other reasons the applicant might have that make it fair to excuse payment or why it is in the public interest to excuse payment. These are the grounds for excusing payment stipulated in section 87(4), and it is only on the basis of one of these that payment can be excused. This situation is distinct from those cases under section 67 where the head of the public body has made a decision not to give access and, knowing why access was refused, is called upon to justify the refusal.

I therefore ruled that, in the case of an application to be excused from paying fees, the burden of proof must be carried by the applicant.

To what extent should this inquiry deal with the waiver of fees?

Treasury stated that it was only prepared to deal with the issue of the initial fee at this inquiry. In this regard, the public body relied upon section 6(3) of the Act, which states:

> **6**(3) The right of access to a record is subject to the payment of any fee required by the regulations.

and section 10(3) of the Regulation which states:

> **10**(3) Processing of a request will not commence until the initial fee has been paid.

As Treasury had not begun to process the request or prepare an estimate of fees as required by section 87(3) of the Act, it was not prepared to deal with any issue relating to a fee waiver beyond the initial $25.00 fee.

Treasury's position is legitimate. However, that should not preclude the Applicant from making arguments that might also pertain to being excused from payment of such fees as might subsequently be assessed by Treasury. It seems to me that the same arguments about ability to pay, fairness or public interest could apply to both the initial fee and the fee for the service of providing the records. However, I agreed that I would not make any order with respect to any subsequent fees for service at this time.

Application of Section 87(4)

A number of issues relating to section 87 were raised during the inquiry. That section states:

> **87**(4) The head of a public body, or the Commissioner at the request of an applicant, may excuse the applicant from paying all or part of a fee if, in the opinion of the head or the Commissioner, as the case may be,
>
> (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 PARTIES' SUBMISSIONS

Applicant

With respect to the criteria set out in section 87(4) respecting being excused from the payment of fees, my understanding of the Applicant's representations is summarized as follows:

1. The Applicant is a Member of the Legislative Assembly. He is the Opposition critic for Treasury. In that capacity, his role is to focus on the budget and finances of the Province and to act as a watchdog on the spending of public funds. As such, he provides a mechanism to ensure accountability as to government spending. It is clearly in the public interest that he performs this function, but he cannot perform it effectively without having the relevant information.

2. The Applicant claimed that disclosure of the documents was in the public interest for several reasons:

    a) The records referred to in the request pertain to the matter of Gainers Inc. and the moneys lost by the Government with respect to that enterprise.

    b) Due to the recent imposition of balanced budget legislation and consolidated accounting, losses incurred by Government in one area would inevitably impact the amount of money available for other programs and policies, such as health, education and social services. Consequently, the impact of such losses would be felt by a broad section of the public.

    c) The Office of the Auditor General, in a publication entitled "Government Accountability" clearly establishes transparency and the availability of full information as basic ingredients of accountability.

    d) When the Auditor General reported on the losses incurred with respect to Gainers, no comment was made on the sources of the losses as the terms of reference for his investigation did not include that responsibility. The Gainers' Inc. investigation was narrower in scope than similar investigations. In his report, the Auditor General called upon the Government to release any information on matters not covered by the report. That information has not been provided to date.

    e) The information requested would facilitate an understanding, by the public, of the relationship between Treasury and the Alberta Treasury Branches.

    f) It is the role of the Opposition to know how the losses were incurred in order to ensure that the same mistakes are not made again and to hold Government accountable for any mistakes that were made.

    g) The avenues available for the Opposition to have access to these records are limited. The Opposition has availed itself of such avenues as Oral

Question Period, Written Questions and Motions for Return. Parliamentary practice does not require the Government to respond. The Opposition informally requested this information as well.

3. As to ability to pay, MLAs have such allowances as they are allotted by the Legislative Assembly. The amount of these allowances is effectively determined by Government since Government has the majority of the seats in the Assembly and on its committees. The allowances remain at their 1993 level. No increase has been made to allow for requests under the Act.

4. The Applicant proposed four criteria which should determine whether a record requested by an MLA is in the public interest:

   a) the record sought must not relate to the personal interest of the MLA;

   b) the record sought should not afford the MLA any personal advantage;

   c) if the record is sought by an MLA who has a role as a critic, no further inquiry as to the public interest involved should be necessary; and,

   d) the MLA should have tried and failed to obtain the record by other means.

Public Body

I would summarize Treasury's representations as follows:

1. The report of the all-party committee which led to the introduction of the Act recommended that reasonable fees be charged but not on a full cost recovery basis.

2. The initial fee is modest and does not approach full cost recovery.

3. As value for the $25.00 fee, an applicant gets a review of records to identify those requested, the identification of the requested records, retrieval, a fee estimate prepared, identification of third parties, any necessary severing and the reproduction of the records.

4. The application at issue in this case was one of 18 received by Treasury from this Applicant on October 3, 1995. All applications requested a waiver of fees. The process applied to the applications was:

   a) determination of whether a formal request under the Act was involved or whether the information was available outside the Act;

   b) determination of whether the records sought were subject to the Act;

c) determination of whether the records sought were in the custody or under the control of Treasury.

5. The request to be excused from paying fees did not state which of the three grounds specified in section 87 was being claimed nor was it implicit which was claimed. No evidence was provided by the Applicant to support a fee waiver request.

6. On October 17, 1995, further details were requested from the Applicant as to the request for a fee waiver. A response, dated October 20, 1995, cited all three grounds in section 87(4) and indicated that this should apply to all 18 of the Applicant's requests.

7. Regarding the Applicant's ability to pay, the total number of requests made to public bodies under the Act by the Opposition should not be relevant since Treasury could only deal with the requests it received. The Applicant has, according to budget documents presented, resources available to afford to pay the $25.00 fee. This was not a case of a request by an indigent person or a person involved in a social benefit program who might require the information to press individual or group rights. This Applicant did not therefore meet the broad test of "need".

8. As to "fairness to excuse", based on the Applicant's role as an Opposition MLA, the application of such a consideration on a universal basis would require a government-wide policy which should properly be implemented through either the Act or the Regulation.

9. In the absence of specific grounds respecting the nature of the public interest involved, Treasury developed a public interest test using the following criteria:

a) Urgency. There was no evidence of pressing, compelling or overriding need for immediate release of records in the public interest. In answer to the question of whether the man in the street would view the production of these records as urgent, the answer was "No".

b) Scope. There was no indication of what persons or groups would be interested in or would benefit from production of these records. It did not appear to Treasury that the scope of interest would be very broad.

c) Financial or other interests. There was no indication whether these records would affect such interests of any person or group.

As a result, no evidence that the records related to "a matter of public interest" was found and the decision was made not to excuse the payment of the fee.

10. Treasury has not received any additional funding in consideration of its responsibilities under the Act. Funds have been internally reallocated to cover the cost of compliance with the Act.

11. Referring to Ontario IPC Orders 185 and P-463, each case of a request to be excused from the payment of fees must be considered on its own merits and the Commissioner lacks the jurisdiction to make a categorical order that all fees pertaining to requests from MLAs should be waived. If the Commissioner was to create such a category, he would in effect be legislating or amending the Act. The Commissioner has no jurisdiction to do this.

12. MLAs are not, solely by virtue of being MLAs, excused from paying fees for Alberta Registries, Land Titles, Vital Statistics, Corporate Registry and Securities Commission. Treasury undertook to find out what public sources of information do not charge MLAs for services.

    In response to the above undertaking, Treasury outlined in a submission dated March 8, 1996, that amendments made to the *Financial Administration Act* now places accountability regarding fees on individual deputy ministers so no government-wide policy exists. Additionally, the *Government Accountability Act* places greater emphasis on accountability and, in particular, reviewing income received or to be received by departments. These changes may bring about reviews of search and copying provided as a courtesy on a department by department basis.

    The submission also argues that information contained in the records of the bodies named above contain essentially public information and that the records are easily identifiable and require little discretion on the part of staff in making copies. Requests made under the Act, however, often require a line-by-line review of the records and notices must be sent to third parties and consents obtained in order to release information.

13. The particular records requested, pertaining to Gainers Inc., may be of interest to the public but they do not disclose a matter of "public interest". A significant interest to a large portion of Albertans has not been demonstrated. Other than requests from MLAs, no requests for these specific documents have been received from members of the public since the Auditor General made his report.

14. As a matter of interpretation, "public interest" should be construed in the context of the words which follow that phrase in section 87(4), i.e. "including the environment or public health or safety."

15. A number of "Gainers'" documents have already been made public by Government (a list of these was presented). In his report, the Auditor General made no specific reference to the documents requested in this application.

16. In dealing with a request to be excused from paying fees under section 87(4), the head of a public body is exercising discretion. "Discretion" is defined by deVillars Jones in *Principles of Administrative Law* as a power to make a decision that cannot be determined to be right or wrong in any objective way." By addressing his mind to the issue, the head exercises discretion. Such exercise of discretion should not be overruled unless the discretion was improperly exercised. There are five generic types of improper exercise of discretion:

- improper intention of mind,
- acting on inadequate material,
- improper result,
- erroneous view of the law, and
- failure to consider the matter with an open mind.

There was no evidence that any of these abuses had occurred and in the absence of such evidence, the Commissioner should not disturb the head's decision.

Intervenor

Mr. H. Kirchmeir of Edmonton attended the inquiry as an intervenor. The essence of the Mr. Kirchmeir's submission, as I understand it, is that all law-makers (i.e., MLAs) should perform their roles on a level field, and that those Members that are Ministers should not maintain an information advantage over those that are ordinary Members. It follows from this notion that charging an ordinary Member for access to information, or even questioning the ordinary Member's reasons without having firm grounds for doing so, would be to impede that Member's ability to be an effective law-maker by interfering with his or her duty to keep informed of the issues.

In the abstract, it is hard to disagree with Mr. Kirchmeir. However, our task is to apply a statute as the lawmakers have given it to us to a specific set of facts. Part of that statute is the notion that those who avail themselves of the Act must pay some the costs of applying the Act.

Following the main submissions by the parties, each was invited to ask questions of the other, through the Chair. I will not summarize the questions and answers here but will deal with their substance under the heading "Discussion of Issues".

DISCUSSION OF ISSUES

What follows is a discussion of the issues set out at the beginning of this Order. I have attempted to set this discussion out in as plain language as possible. I would like this Order to be helpful to those who use the Act.

1. In an application under section 87(4) of the Act, should the applicant or the public body bear the burden of proof?

As stated, I am of the view that it would be difficult, if not impossible, for the public body to put forward the grounds upon which an applicant seeks relief from the payment of fees. The applicant will be in the best position to argue why the applicant cannot afford the payment; why it is fair to excuse the applicant from payment; or why it is in the public interest to excuse payment. These are the grounds for excusing payment stipulated in section 87(4), and it is only on the basis of one of these that payment can be excused. Therefore the burden of proof in section 87(4) must be borne by the applicant.

This situation is distinct from those cases under section 67 where it is the public body which has precipitated the issue by making a decision not to give access. In that case, the public body knows why it has refused access and is called upon to justify the refusal.

2. *What do the words "no one is entitled to be present during" an inquiry in section 66(3) mean?*

Treasury suggested that section 66(3) means that I may use an inquiry as a vehicle to undertake further mediation. That is a possible use of that section. However, section 65 allows me to authorize mediation and investigation. Section 66 starts from the point where mediation and investigation have failed and allows me to settle all questions of fact and law. I think that subsection abrogates some of the common law rules of natural justice, particularly the right to call witnesses and cross examine them: see *Principles of Administrative Law*, deVillars Jones, 2nd ed. p. 260. To that extent, the subsection seems to have been intended to protect the procedure I adopt in an inquiry from judicial review. I am somewhat reinforced in this by my reading of the decision of the Federal Court of Appeal in *Rubin v. Canada (Privy Council, Clerk)* ((1994) F.C.J. No. 316 at paragraph 12).

3. *Do the same considerations with respect to the waiver of fees pertain to an "initial fee" (i.e. the $25.00) as to an "access fee" (i.e. what the public body charges to actually assemble and provide the records requested)?*

It is possible that the same grounds would pertain. Regardless, in this kind of proceeding, there is no reason to exclude such considerations from being presented. It is my task to attach the appropriate weight to such considerations in making my decision.

4. *Must the $25.00 initial fee be paid before an applicant can seek a waiver of fees under section 87(4)?*

I think all the parties are agreed that the initial fee need not be paid prior to requesting waiver of the initial fee. That is my interpretation. However, given section 87(3) of the Act and section 10(3) of the Regulation, the initial fee must either be paid or payment of it excused before the public body is required to prepare a fee estimate. A fee estimate would be required before I could confirm or reduce a fee or order a refund pursuant to section 68(3)(c). Treasury pointed out that the initial fee could be ordered refunded as well pursuant to an application to waive all fees, and I think that is correct.

5. *Is there any difference between the powers of the head of a public body to grant a waiver under section 87(4) and the powers of the Commissioner to grant a waiver?*

This issue takes me into the shadowy world of the relationship between the Commissioner and the head of the public body given section 87(4) and the Commissioner's powers of review in section 62(1) and section 68(3). I will not be able to anticipate here all the possible combinations and permutations, but I will attempt to rationalize that relationship. I will go beyond the narrow issue of this inquiry because I believe that there is a great deal of uncertainty about how this works among the people assigned the task of making it work. We might as well try to settle this here or in court from the outset.

Treasury urged that, where the head exercises that discretion reasonably and in good faith and without any extraneous considerations, the decision of the head should not be disturbed. This is the practice in British Columbia and Ontario. However, in those provinces, the Commissioner does not have his own original and independent jurisdiction to waive fees (section 87(4)). Section 75(5) of the British Columbia *Freedom of Information and Protection of Privacy Act* clearly gives the head of the public body and only the head of the public body the discretion to excuse an applicant from paying fees. That being the case, the Commissioner may then only review the exercise of that discretion by the head of the public body. That is not the case in Alberta. Section 87(4) says, in part, "The head of a public body, or the Commissioner ..."

Section 87(4) gives the power to reduce fees to two separate people: the head and the Commissioner. Each has the same discretionary power and each has the authority to exercise it. While it may cause difficulties, no conflict is created by this double grant. The fact that one person (say the head) exercises his discretion under section 87(4) does not mean that the other person no longer has the power to exercise his discretion. This of course opens up the possibility that there could be two different decisions.

If the head exercises his section 87(4) power first, then an avenue for appeal lies through section 62(1) or 68(3) to the Commissioner. This would require the Commissioner to follow the mediation and inquiry process before making an order under section 68(3). Section 69 makes it clear that the Commissioner's order under section 68(3) is final, so it must take precedence over any previous decision by the head, and would prevent the head from subsequently making another decision which was inconsistent with the Commissioner's. Section 68(3) appears to give the Commissioner the power to review not only the head's decision refusing to excuse all or part of the fees under section 87(4), but also the power to review the correctness of how the fees were calculated (because that would also be a matter that "relates to" the application for review under section 62(1)).

The next question is whether the Commissioner could deal with an application to excuse fees directly under section 87(4) without having to go through the mediation/inquiry process leading up to an order under section 68(3). This would encompass both (i) an

initial application to the Commissioner without any prior application to the head, as well as (ii) a subsequent application to the Commissioner after the head had exercised his discretion under section 87(4). Since section 87(4) grants an autonomous power to two different people, the Commissioner always has the power to hear both of these types of applications.

The other possibility is that an application to excuse fees could be made to the Commissioner under section 87(4) after the head had exercised his discretion under that section. I am of the opinion that the wording of section 87(4) gives the Commissioner full discretion to deal with this. The Commissioner is not bound to treat such an application as a review under section 62(1), which would require the mediation/inquiry process. I would rely on section 68(3)(b) as the basis for dealing with fees and on section 69 as the basis for my decision being final. Since the head had exercised his discretion under section 87(4) first, he would be discharged (*functus officio*). Accordingly, a subsequent application to the Commissioner under section 87(4) would make my decision the final one. However, I think I could only use my discretion in these circumstances to reduce the then-existing fee, that is, the fee as it stood after the head's decision. I do not think that the Commissioner could increase that then-existing fee or decide to excuse an amount less than the head was prepared to excuse.

It is possible that an initial application under section 87(4) could be made to the Commissioner and a subsequent application made to the head to excuse whatever fees remain as a result of the Commissioner's exercise of his discretion. In that case, the decision of the head would be the final one because the Commissioner would have exhausted his discretion (again, he would be *functus officio*). It is possible that an applicant might then attempt to appeal the head's decision under section 62(1). I am unable to see any practical advantage to this approach.

I believe that the position I have taken here overcomes the concern, raised by the Applicant, that there may be an apprehension of bias on the part of the head of the public body in determining whether an applicant should be excused from paying fees on the basis of public interest. By exercising my own original jurisdiction, I can act as an appellate body where it is apprehended that a decision by the head was motivated by improper considerations including bias.

Finally, I will insist that applicants approach the head of the public body first under section 87(4). I will do this in order to try to avoid the situation where the head and the Commissioner make two simultaneous and different decisions or the applicant tries to shop for a decision between the head and me. I am of the opinion that while natural justice requires me to exercise my discretion open-mindedly in each case, without fettering how I will exercise my discretion (i.e. the outcome), there is nothing to prevent me from prescribing a reasonable procedure to be followed before I exercise my discretion, including the requirement that the applicant ask the head first.

6. In section 87(4), to what extent is the applicant required to make the argument on grounds for a waiver?

First, with respect to whether the applicant can afford the payment, the applicant should present information as to his financial position, such as income and expenses. I will not comment on the extent to which this should be documented. If the applicant is on a fixed income, pension, disability payment and so on, that should be presented for consideration.

Second, as to other reasons it is fair to excuse, the applicant must give the head of the public body enough of an explanation to allow the head to make an informed and reasonable decision. The applicant must remember that the head of the public body is accountable for the use of public resources.

Third, it must be recognized that an applicant, in making an argument as to "public interest" in the record, will have to do so without knowing exactly what the record contains. The applicant should make an argument that relates to specific aspects of public interest, such as those I have set out under Issue 8 below.

7. What does the word "including" in section 87(4)(b) mean?

For convenience I will set out section 87(4) again.

> **87**(4) The head of a public body, or the Commissioner at the request of an applicant, may excuse the applicant from paying all or part of a fee if, in the opinion of the head or the Commissioner, as the case may be,
>
> (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.

Treasury argued that the use of the word "including" after "public interest" meant that "public interest" should be limited to the kinds of things that follow "public interest", namely things of the same class as "environment or public health or safety". Lawyers call this the *ejusdem generis* rule or, in English, the limited class rule.

I do not agree. I prefer the reasoning of Justice La Forest in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th), at 203 (S.C.C.):

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes. But it would be illogical to proceed in the same manner when the general term

> precedes an enumeration of specific examples. In this situation, it is logical to infer that the purpose of providing specific examples from within a broad category is to remove any ambiguity as to whether those examples are in fact included in the category.

I think it must be the case here that the inclusion of the specific examples is to say "These are things that are of public interest, but there may be others as well." I therefore think that "public interest" can be as broad as the term itself indicates. Again, the applicant should define the public interest in such a way that the head of the public body can understand the issue being processed.

8. What constitutes "public interest" for the purposes of section 87(4)(b)?

The Applicant made reference to an Ontario report entitled *Public Government for Private People",* the Report of the Commission on Freedom of Information and Individual Privacy, 1980 which contains a list of criteria which might be applied in considering a fee waiver request. These criteria are:

- the size of the public to be benefited;
- the significance of the benefit;
- the private interest of the requester which the disclosure may further;
- the usefulness of the material to be released;
- the likelihood that a tangible public good will be realized.

Treasury developed its own list of three criteria, which were set out above:

- urgency;
- scope; and,
- financial or other interests.

I would like to make some general comments on the concept of "public interest". It is possible to have the term "public" apply to everyone ("the public good") and to anyone (John or Jane Public who are the objects of government programs and policies). Similarly "interest" can range between individual curiousity and the notion of interest as a benefit, as in a collective interest in something. The weight of public interest will depend on a balancing of the weights afforded "curiosity," "benefit" and "broad" versus "narrow" publics. Where an access request relates to a matter that is of "interest" in both the sense of curiosity and benefit and the relevant "public" is broad, the case for removing all obstacles to access is very strong. So a matter that is the subject of curiosity to the larger public and also relates to a benefit to the broad public would present a very strong case for the waiver of fees. A matter which is of curiosity to many but affects no general benefit would present a less compelling case. Similarly, a matter that affects a benefit but in which few citizens are interested may present a less compelling case. In

the less compelling cases, the importance of respecting the integrity of the legislated fee structure could outweigh the public interest dimension.

Upon a review of relevant decisions from other jurisdictions, I have developed a list of criteria that I believe are relevant to the issue of public interest. I do not purport that these are exhaustive. In preparing this list, I was mindful of two principles and I will be mindful of these principles in applying the criteria. These principles are:

1. the Act was intended to foster open and transparent government, subject to the limits contained in the Act, and

2. the Act contains the principle that the user should pay.

The criteria that I believe are relevant are:

- Is the applicant motivated by commercial or other private interests?

- Will members of the public, other than the applicant, benefit from disclosure? (This does not create a numbers game, however.)

- Will the records contribute to the public understanding of an issue (that is, will they contribute to open and transparent government)?

- Will disclosure add to public research on the operation of Government?

- Has access been given to similar records at no cost?

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

- Would the records contribute to debate on or resolution of events of public interest?

- Would the records be useful in clarifying public understanding of issues where Government has itself established that public understanding?

- Do the records relate to a conflict between the applicant and Government?

- Should the public body have anticipated the need of the public to have the record?

- How responsive has the public body been to the applicant's request? For example, were some records made available at no cost or did the public body help the applicant find other less expensive sources of the information or did the public body help the applicant narrow the request so as to reduce costs?

- Would the waiver of the fee shift an unreasonable burden of the cost from the applicant to the public body, such that there would be significant interference with the operations of the public body, including other programs of the public body?

- What is the probability that the applicant will disseminate the contents of the record?

I deliberately called these things "criteria" and not a "test". I do not think that there can be a specific test for "public interest". I agree with Treasury that the head of a public body, in exercising his discretion to waive fees, may apply such criteria as he sees fit. These are criteria I see as relevant and this list is not exhaustive.

As I tried to say at the beginning of this section, public interest is not black and white: it is a matter of degree. There is always a balance to be struck. Part of the balancing act involves the merits of the "user pay" principle and the use of the initial fee to screen requests on one side and the disclosure to the public on the other side. 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.

9. Should public interest be determined in relation to the subject matter of the records being requested or the specific content of the documents being requested?

The answer to this depends on the facts of the case. There will be cases where the public interest can be measured against the face of the record or the subject to which the record pertains. In other cases, it may be necessary to consider the contents of the particular record to measure public interest. I do not believe that the head of a public body should never, as a matter of policy, look at the record requested when considering a section 87(4) request. While it may not be necessary to be aware of every detail in the record, how can the head say there is no public interest in excusing fees if the head has no idea of what the records contain? To do so might even be seen as acting on inadequate material.

10. Should Members of the Legislative Assembly be categorically given a waiver of fees?

I do not have the jurisdiction under the Act to grant such a waiver. If I were to purport to do so, I would in effect be amending the Act and I have no jurisdiction to make legislation. The Legislature has made it a principle of the Act and a fact of life that there

is an initial fee to be paid. The status, role or occupation of the applicant is but one factor which must considered in each case.

Having said that, I will also say that many of the Applicant's arguments about his role as a Member of the Legislative Assembly and Finance critic were very persuasive. This applies to Mr. Kirchmeir's submissions as well. In a parliamentary democracy, an informed Opposition is critical. So, while all applicants are equal under the Act, the fact of being a Member of the Legislative Assembly would, in my view be relevant in terms of the criteria to be considered in assessing "public interest".

11. In the present case, should the Applicant be excused from paying the $25.00 initial fee pursuant to section 87(4)?

Since this is my first order on this subject, I want to point out a couple of issues. First, it is extremely difficult to assess "public interest". Because of the difference in the wording of the sections, my counterparts in other Provinces do not have this responsibility so there is not much in the way of precedence to guide me. This applies as much, if not more so, to the heads of public bodies as it does to me. Every Albertan will have his own idea of public interest. I think the Legislature was wise to allow the Commissioner to look at hardship, fairness and public interest with respect to fees because it affords a second opinion, perhaps coming from a different perspective.

I find myself on the horns of a dilemma on this issue. I do not think that the Applicant has shown that he cannot afford to pay the $25.00 fee. I do not find any other reason why it is fair to waive the $25.00 fee. My own view is that the public interest in the documents requested would be marginal. Given the criteria I set out above, I do not think that the public interest is clear.

However, I must take into account the fact that this Applicant may very well see something in these records that I do not or may be able to put them in a context that I cannot. So it may be what the Applicant does with the documents will fulfill a public interest function, more than what the documents themselves say or are. The Applicant alluded to the fact that these might be informative as to the relationship between Government and Treasury Branches.

On the other hand, since the Applicant has not seen these records, they may turn out to be of no value to the Applicant either. Realistically, we all know that, as a Member of the Opposition, the Applicant may just be hoping that there is something in these records that will make Government look bad and make the Opposition look good. That is exactly one of the things that an Opposition should try to do. But who should finance these efforts on the part of the Opposition? I must return to the fact that the Legislature passed an Act that requires people to pay as they use. Again, the level of "hardship" and the apparent degree of public interest in these records is not sufficient for me to override that requirement. If I thought that having to pay the $25.00 initial fee alone would prevent these documents from being seen, I might rule otherwise, but under these circumstances,

I have decided that, in this case, the Applicant should not be excused from the payment of the $25.00 initial fee.

ORDER

I do not excuse the Applicant from paying the $25.00 initial fee.

Robert C. Clark
Information and Privacy Commissioner

Postscript:

I am borrowing the device of a Postscript from the Ontario Information and Privacy Commissioner to offer those who read this lengthy order a suggestion as to practice.

This is not in any way critical of the Applicant in this case. I think that if applicants who feel that they have a claim to be excused from payment on the basis of public interest pay the initial fee before seeking a waiver, the process will become easier for everyone.

By paying the initial fee a number of things happen, as Mr. Aston for Treasury stated. First, the public body has to locate the record. If there is no record, there may not be an issue. Second, if they find it, they will know what it is and whether or not it falls within the Act (section 4, for example, excludes certain records from the Act). Third, if it falls within the Act, they will look at it for exceptions to disclosure, identify any third parties, assess the amount of severing, if any, and prepare a fee estimate. By this time, the public body will be quite familiar with the record and in assisting the applicant to narrow or define his request, both the public body and the applicant should be better able to discuss public interest issues centering on that record.

Since the applicant will not yet have asked for any waiver of fees from the head of the public body or myself, the way will be clear to do so, including asking for a refund of the initial fee on public interest grounds.

I do not feel that I can require anyone to follow this procedure.