

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-022

February 5, 1997

ALBERTA HEALTH

Review Number 1123

Background:

[1.] On May 27, 1996, Alberta Health ("the Public Body") received a request for access to information under the *Freedom of Information and Protection of Privacy Act* ("the Act") from the Applicant. The request included a list of 41 search questions that the Applicant had prepared. Generally, the request was for access to policies and regulations of a specific Alberta Hospital that were in effect in 1977.

[2.] The Public Body carried out a search for the information and on June 19, 1996, a fee estimate was presented to the Applicant. On June 21, 1996, the Applicant applied to the Information and Privacy Commissioner for a review of the fee estimate. The Applicant also asked that the Public Body be reviewed as to whether it was in breach of its duty to assist the Applicant.

[3.] Under section 65 of the Act, mediation was authorized between the Applicant and the Public Body, but was not successful.

[4.] The Applicant and the Public Body were subsequently notified that a two-part inquiry would take place: the first part in Calgary on October 18, 1996 (the Applicant only was present) and the second part in Edmonton on November 13, 1996 (both Applicant and Public Body were present).

Issue A: Did the Public Body make every reasonable effort to assist the Applicant, as provided by section 9(1) of the Act?

[5.] Section 9(1) of the Act reads:

9(1) The head of the public body must make every reasonable effort to assist applicants and respond to each applicant openly, accurately and completely.

[6.] There were two difficulties with this case: (i) the information requested by the Applicant is over 20 years old, and (ii) the individual who handled the request for the Public Body is no longer employed in Alberta, and cannot be consulted about how he or she proceeded with the search for the documents.

[7.] The age of the records presented a problem for the Public Body in that the Public Body was required to search both active and inactive records. This involved records held by the Provincial Archives. The Public Body noted that this was its first access request involving the Provincial Archives.

[8.] Without the assistance of the person who actually conducted the search, the Public Body had trouble piecing together the sequence of events with respect to this access request. The Public Body provided me with a timeline of events which was helpful. However, it became apparent that there were some discrepancies between the Applicant's account of the events and the account provided by the Public Body. The discrepancies involved the search of the Provincial Archives.

[9.] The relevant dates in the chronology are:

- May 27, 1996: date of request, fees not paid.
- Date uncertain but around May 31, 1996: Applicant was informed verbally by the Public Body that there were a number of boxes of archival records but that these were not likely going to be helpful (or words to that effect).
- June 6, 1996: review of records by public body.
- June 19, 1996: fee estimate provided. Agreement between Applicant and Public Body that the request does not include archival records.
- Date uncertain, but around July 4, 1996: Applicant attends Provincial Archives and views publicly available records there.

[10.] The Public Body was not under any obligation to include the Provincial Archives in the search request. Technically, a Provincial

Archives search is a separate request under the Act. However, the Public Body in this case initially included records in the Provincial Archives and in doing so assumed the duty to assist in that area. The Applicant said that the person who handled the request told the Applicant that the search had yielded 14 boxes of records containing potentially responsive records, 11 boxes of which were housed at the Provincial Archives. The Applicant asked whether or not the public could view the documents at the Provincial Archives. The Public Body representative did not know but later found out that this was possible.

[11.] The Public Body could have left the Applicant to search the Provincial Archives on the Applicant's own volition. It did not and I think that the Applicant initially relied on the Public Body to examine the archival records. By undertaking to search the archival records, the Public Body took responsibility in the matter. The alternative course of action is set out in paragraph 3.4.3 (page 34) of the *Freedom of Information and Protection of Privacy Policy Manual*, October 1, 1995, which states:

Where records have been transferred to the Provincial Archives of Alberta or another archives of a public body, the Senior Records Officer should inform the FOIP Coordinator, who can institute negotiations for the transfer of the request to the archival authority.

[12.] It was later agreed (June 19, 1996) by the parties that these 11 boxes would not form part of the request. However, the Applicant claimed that the Public Body representative discouraged the Applicant from going to the Provincial Archives and indicated to the Applicant that the records there would be of no value to the Applicant. During the inquiry, the Public Body stated that it could not provide any evidence to the contrary.

[13.] The Applicant did view the Provincial Archives records and found all the records the Applicant had originally requested. The Applicant said that the Provincial Archivist indicated that the boxes in which the Applicant found the records were boxes that were searched by the Public Body. If this is so, and I want to be cautious in accepting what amounts to hearsay evidence, the Public Body did not fulfill its duty to assist. The Public Body had reviewed records which were responsive and then did not bring to the Applicant's attention the fact that the records were available in the Provincial Archives. What is more, the Public Body may have actually discouraged the Applicant from looking at the records.

[14.] The Information and Privacy Commissioner in British Columbia has set out, in Order No. 30-1994, criteria for determining whether or not a

public body has carried out a proper search. The Commissioner stated that “[a] public body must make every reasonable effort to search for the actual records that have been requested.” The Commissioner added that “[a] public body will meet its duty to assist an applicant where it makes every reasonable effort to search for the records requested and it informs the applicant in a timely way what it has done.”

[15.] I will dispose of this issue by simply saying that the Public Body appears to have fallen short of its duty with respect to the archival records. I think the solution is for people handling applications to be mindful of the need to assist the applicant. In this case, the best assistance to the Applicant might have been to send the Applicant directly to the Provincial Archives, rather than the Public Body becoming involved as an intermediary.

[16.] Notwithstanding the Provincial Archives part of the search, the Public Body carried out a thorough search of the records located in its offices. This search produced 33 pages of records. The Applicant stated in the most forceful and unequivocal terms that the records found in the Public Body's possession were not useful. It is important to note that the Applicant found out that these records were not useful because the Applicant obtained a Court Order requiring the Public Body to allow the Applicant to view the 33 pages of records held by the Public Body. Had that unusual avenue not been open to the Applicant, the Applicant would had to have paid for the records, only to find that they were not useful.

Issue B: Is the Applicant entitled to a fee waiver under Section 87 of the Act?

[17.] Section 87 of the Act reads:

87(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 costs of producing the copy.

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

(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.

[18.] Several facts are significant. First, the fees which are sought to be waived did not include any fees for the archival records. Second, with respect to departmental records, the Public Body has reduced its fee by 75%. Third, the Applicant clearly stated that the records for which the fee is claimed are of no use. Fourth, the Applicant obtained the records needed by a combination of the Applicant's own search at the Provincial Archives and the Court Order previously mentioned. I note that the Court Order was issued as a part of separate, ongoing litigation.

[19.] In this case, the records requested by the Applicant did not contain personal information. The Applicant requested that the fee be waived on the grounds that access to such information was in the public interest pursuant to section 87(4)(b).

[20.] In Order 96-002, I discussed the issue of public interest:

“...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?"

[21.] Section 87(4)(b) of the Act says that an applicant may be excused from payment of a fee if the record relates to a matter of public interest. Consequently, the nature of the applicant (public interest group, media, Member of the Legislative Assembly) is not a direct consideration, although it may be a factor in whether the contents of the record will be disseminated and whether the applicant has a commercial motive. Similarly, the use to which the records will be put is only a public interest consideration to the extent that it may indicate whether the records will be disseminated. For example, I am not convinced that the mere fact that the records may be used in a lawsuit automatically means that the records relate to a matter of public interest and fees should therefore be waived.

[22.] The records of the Public Body in this case, and these do not include the records obtained from the Provincial Archives, consist of news releases, Orders in Council, general correspondence and some policy documents, all of which are between 10 and 20 years old. I am unable to find anything in these records which, in my opinion, relates to a matter of public interest, given the above criteria. The Applicant had stated that the departmental records, as opposed to the archival records, were not particularly useful.

[23.] However, section 87(4)(a) states that an applicant may be excused from the payment of fees if the applicant cannot afford to pay or if for any other reason it is fair to excuse payment. Given the possibility that the Applicant may have been sent down the wrong road by the Public Body with respect to the archival records, thereby occasioning delays to the Applicant, and given the fact that what responsive records the Applicant found were found largely due to the Applicant's own devices, and given the fact that the Applicant requested hospital policies and what the Public Body provided were letters and news releases (among other things), I am prepared, in this unique case, to order that the Applicant be excused from the payment of fees pursuant to section 87(4)(a).

Order:

[24.] For the reasons stated in this order, I find that the Public Body breached the duty to assist under section 9(1) of the Act. Under the authority of section 51(1)(i) of the Act, I am bringing this to the attention of the Minister of Health.

[25.] I order that the Applicant be excused from the payment of the fees claimed by the Public Body and that the Applicant's \$25.00 application fee be refunded.

[26.] It is suggested that public bodies develop a process to deal with requests that may involve information located at the Provincial Archives. A system needs to be in place that would alert an Applicant to the fact that information may exist at the Provincial Archives.

[27.] It is my understanding that the Public Body has now adopted the procedure of asking Applicants to exhaust the Provincial Archives resource prior to making a formal request for information under the Act. The public must be made aware of this resource and either instructed to pursue it via a separate access request under the Act or through their own personal search. If the Public Body includes the Provincial Archives in its search, then it must be prepared to assume the duty to assist with that search.

[28.] Applicants must also be aware that when requesting records that are numbers of years old, public bodies must carry out extensive searches. Records are often housed in enormous warehouses and cannot be readily located.

Robert C. Clark
Information and Privacy Commissioner