ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-001

June 12, 1997

ALBERTA LABOUR

Review Number 1133

BACKGROUND:

[1.] On June 19, 1996, the Applicant applied to Alberta Labour (the "Public Body") for information on accident reports concerning elevators and escalators. In that letter, the Applicant also requested that fees be waived under s. 87(4) of the *Freedom of Information and Protection of Privacy Act* (the "Act"), "Given that the records requested relate to an issue of public health and safety...."

[2.] The Public Body asked the Applicant to provide additional reasons to support the fee waiver request. In a response letter, the Applicant stated that the issue of incidents involving escalators is clearly a matter of public health and safety under the Act, and that:

> *Specifically, the records requested are relevant to the broad public, who use escalators and other elevating devices regularly. Figures obtained by the Applicant show that more than 300 persons, most of them young children, have been injured on escalators in Canada over the last five years...The Applicant is researching the topic with an eye to finding out why and to producing a story that might increase public awareness of the issue and perhaps shed light on how these injuries might be reduced or prevented...Disclosure will assist the public in learning*

about this safety issue and understanding better the Government's role in regulating these elevating devices.

[3.] Subsequently, the Public Body rejected the Applicant's request for a fee waiver.

[4.] On July 8, 1996, the Applicant requested that this office review whether some or all of the records requested should entitle the Applicant to a waiver of fees under s. 87(4) of the Act, since "…the records relate to an issue of abiding public interest, specifically the safety of escalators." In that letter, the Applicant also indicated an intent to submit half the estimated fees so that the Public Body could continue processing the request while this Office was conducting the review.

[5.] Mediation was authorized but was not successful. The Public Body confirmed that the total fee to be charged would be $275, which included the $25 application fee but excluded copying charges. The Applicant then requested an inquiry. The matter was set down for inquiry on January 9, 1997.

[6.] The Applicant's brief for the inquiry proceeded on the basis that the Applicant was seeking a review of the Public Body's decision to refuse to waive fees. During the inquiry, the Applicant informed me that the Applicant was not asking me to review the Public Body's decision, but was asking me, as Commissioner, to make a "fresh decision" under section 87(4) of the Act. In this Order, I will consider what significance, if any, the Applicant's change of request has for this inquiry and Order.

[7.] During the inquiry, the Applicant showed a videotape of the news broadcast it had produced, using the information from the records as well as other information obtained from its research generally.

RECORDS AT ISSUE:

[8.] The records consist of incident and accident reports concerning escalators in Alberta, from 1991 through 1996. Because I must determine whether the records relate to a matter of public interest, I have reviewed all the records.

ISSUES:

[9.] There are three issues in this inquiry:

A. Do I, as Commissioner, have jurisdiction, at this stage of the inquiry, to make a "fresh decision" under section 87(4) of the Act?

B. Is the Applicant entitled to have the fee waived under section 87(4) of the Act?

C. What standard should be applied to my exercise of discretion as Commissioner under section 87(4) of the Act?

DISCUSSION:

A. Do I, as Commissioner, have jurisdiction, at this stage of the inquiry, to make a "fresh decision" under section 87(4) of the Act?

[10.] The Public Body claimed that I should uphold its decision not to waive fees if the Public Body has exercised its discretion under section 87(4) in good faith, without regard to extraneous considerations and without discrimination. In Order 96-002, I indicated that that was the practice in British Columbia and Ontario. However, in Order 96-002, I also said that Alberta is different because the Commissioner has his own original and independent jurisdiction to waive fees under section 87(4) of the Act. Consequently, if I do make a "fresh decision" under section 87(4), I do not need to consider either the Public Body's original decision or its exercise of discretion under section 87(4).

[11.] Because I have the authority to deal independently with an application to excuse fees under section 87(4), I believe that I may exercise that jurisdiction at any time an applicant requests that I do so, subject to the condition I set out in Order 96-002 that the Applicant must first ask the Public Body for a fee waiver. Therefore, the fact that the Applicant has requested, during the inquiry, that I make a "fresh decision", does not prevent me from making an independent decision now (although, in the future, I would ask that an applicant inform me, before this Office schedules an oral inquiry, that the applicant intends to make such a request).

[12.] When the Applicant made its request during the inquiry, the Public Body did not object. In fact, the Public Body acknowledged that even if "public interest" exists, the Commissioner still has discretion with respect to the fee waiver. In any event, I do not believe that there can be any prejudice to the Public Body when, as here, I have decided to exercise my own jurisdiction. I believe that the Public Body's arguments regarding "public interest" would be the same, whether I am reviewing the Public Body's decision under section 87(4) or making an independent decision, because a determination of "public

interest" requires that the records be reviewed in light of the thirteen criteria for "public interest", as set out in Order 96-002.

[13.] To make an independent decision under section 87(4)(b), I have reviewed the records, the evidence presented at the inquiry, and the Applicant's and the Public Body's arguments presented both in their written submissions and at the inquiry.

ISSUE B: Is the Applicant entitled to have the fee waived under section 87(4) of the Act?

[14.] Section 87(4) provides:

> *s. 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.*

[15.] The Applicant relies on section 87(4)(b) of the Act. In Order 96-002, I said that the burden of proof under section 87(4) is on an applicant. Therefore, under section 87(4)(b), the Applicant must provide evidence to show both that the record relates to public health or safety and that the record relates to a matter of public interest.

[16.] In its written submission, the Applicant stated that the test to apply under section 87(4)(b) is whether "it is in the public interest to excuse payment". This is not the test. Furthermore, I want to make it clear that there is no test, in the strict sense of that word, but rather criteria to be applied to determine public interest. The focus under s. 87(4)(b) is on the record; therefore, the criteria are to be applied to assist in determining whether the record relates to a matter of public interest.

[17.] The Applicant submits that because the records relate to public health or safety, this is by definition a matter of public interest under section 87(4)(b). Consequently, the Applicant believes that it should only be necessary to show that the records, on their face, relate to public health or safety, and that should

be the end of the matter; it should not be necessary to also show that the records relate to a matter of public interest.

[18.] In Order 96-002, I said that the word "including" in section 87(4)(b) means that the list of records that may relate to a matter of public interest is not exhaustive. There may be other kinds of records that would also relate to a matter of public interest. "Including" is used to signify that records relating to public health or safety are the kinds of records the Legislature had in mind when it was contemplating what records might relate to a matter of public interest.

[19.] Because the list under section 87(4)(b) can be added to, the criteria for determining "public interest" must apply to each item in the list. If it were not necessary to prove "public interest", any record could be added to the list, and the newly added record would automatically relate to a matter of public interest. That would be an absurd consequence, one that I'm certain the Legislature did not intend. Therefore, although records may relate to public health or safety, the Applicant must still show that the records relate to a matter of public interest.

(a) Do the records relate to public health or safety?

[20.] As previously stated, the records consist of incident and accident reports concerning escalators in Alberta, from 1991 through 1996. The Public Body and the Applicant agreed that the records relate to public health or safety.

[21.] I have conducted an independent review of the records. Both the subject and the content of the records clearly indicate that the records relate to public health or safety.

(b) Do the records relate to a matter of public interest?

[22.] In Order 96-002, I set out two principles and a non-exhaustive list of thirteen criteria for determining whether a record relates to a matter of public interest under section 87(4)(b).

[23.] The two 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.

[24.] The thirteen criteria are listed in the discussion that follows.

[25.] In Order 96-002, I then went on to comment on the concept of "public interest". I said that "public" can encompass a narrow or broad group of people, and "interest" can range from individual curiosity to a collective interest or benefit. I then said that "public interest" consists of balancing the weights afforded "narrow" versus "broad", on the one hand, and "curiosity" versus "benefit", on the other hand. The broader the group of people and the greater the benefit, the greater the "public interest", thereby creating a strong case for the waiver of fees.

[26.] In this case, I will also balance "narrow" versus "broad" and "curiosity" versus "benefit" to determine "public interest". To do that balancing, I will use the thirteen criteria which I set out in Order 96-002.

[27.] Because of the unusual circumstances of this case, I have considered all thirteen criteria. However, I do not consider that I am bound to do so in all future cases.

[28.] In the following discussion, I have summarized what I consider to be the Applicant's and the Public Body's main arguments relating to the thirteen criteria. Even though I have not summarized all the arguments, I have taken all of them into consideration in coming to my decision. Those arguments that may relate to more than one criterion have been slotted under the most relevant criterion, for the sake of avoiding repetition in this Order.

[29.] Finally, I have set out my findings regarding the criteria and indicated whether the Applicant's or the Public Body's arguments had the greater weight in making my decision.

(c) Order 96-002 criteria for determining "public interest"

1. Is the Applicant motivated by commercial or other private interests?

Applicant's position

[30.] The media plays the role of overseeing whether problems are being investigated and proper actions taken. The motivation behind broadcast news is to gather information and disseminate it to the public. Although the commercial element is to broadcast stories that generate high viewership and attract advertisers, thereby defraying costs to the public, the Applicant's primary motivation is not commercial because the Applicant is publicly subsidized. Only about 20 per cent of its budget comes from commercial revenue.

Public Body's position

[31.] Although the Applicant may claim to represent the public interest, it is still involved in commercial ventures. News reports such as that which the Applicant broadcast likely contribute to the Applicant's revenue, thereby placing a commercial value on the information for the Applicant.

My finding

[32.] Because the Applicant is publicly subsidized, the Applicant's commercial interests do not outweigh its primary motivation of making information public.

Weight in favour of

[33.] Applicant

2. Will members of the public, other than the Applicant, benefit from disclosure?

Applicant's position

[34.] To meet this criterion, a public body should look to see if any identifiable group in the public would benefit from disclosure, and not simply ask whether the whole of the public would benefit. The public here is people who take small children on escalators. The risk of harm to children cannot be characterized as anything less than significant. Government requirements placed on manufacturers to minimize the risk of injury have not eliminated the risk. Injuries still occur. Information relating to escalator safety (or lack thereof) is information the public has an interest in knowing.

[35.] The story that was broadcast is important to Albertans regardless of how many of the Alberta records were used in the story. There is benefit to the public in improving information, standards and policies.

[36.] About one-half of the story's $40,000 budget was spent in Alberta.

Public Body's position

[37.] There should be a foreseeable, tangible benefit to Albertans from the release of the Alberta records. That benefit is not just a review of the Public Body's policies. If the taxpayer is to fund the release, then the taxpayer should see some improvement in health or safety as the ultimate objective. The question to be answered is whether there's enough public interest to warrant taxpayers paying for the Applicant to have the information. Consequently, the actual statistical risk is an issue, and the Public Body did a statistical risk estimate to decide whether the public interest was sufficient to justify a 100 per cent fee waiver. The Public Body balanced public interest (public health or safety) and risk. In light of the extremely low risk of injury on an escalator in Alberta and the clear warning requirements of the Safety Code, the likelihood of improving escalator safety by the release of these records is extremely low. A 75 per cent subsidy was sufficient to satisfy the Public Body's obligations with regard to health and safety.

My finding

[38.] A broad segment of the general public is able to benefit from disclosure of this information by becoming educated about the dangers escalators pose to children, thereby altering habits regarding the care taken with children on escalators. Although such education is an intangible benefit that may not be quantifiable as to reduction of injuries, it is no less a benefit to public health or safety than an improvement in the design of escalators, which benefit may also not be quantifiable. The low statistical risk of injury does not in any way minimize the benefit that may be obtained from educating the public about the risk.

Weight in favour of

[39.] Applicant

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

Applicant's position

[40.] The popular press has not previously done an in-depth study of this issue, but has concentrated on incident-based reporting. The Applicant could not find any studies on escalator safety, nor

did there appear to be any in-depth research. The Applicant's own research showed that in over 300 injuries resulting from escalators, nearly half involved children, and a significant number of those involved entrapments. The Applicant wanted to know, and the Applicant's story focused on, where, when and how injuries were occurring on escalators. The discrepancy in the number of incidents found by the Applicant and the Public Body upon reviewing the reports indicates that it is not easy to discern information from the reports. The records relating to escalator inspection and maintenance were vital in reaching the conclusion that injuries do not result from improper escalator maintenance, but from design. The records have contributed to public understanding that current design and permitted uses are dangerous to child riders, that parents need to be aware, and that new design and safety standards should be introduced.

Public Body's position

[41.] The Public Body is not hiding information. The Public Body's annual reports, including statistical accident data, are accessible to the public. The records do not contain information about the escalator safety management process in Alberta, policies and procedures that govern that process, or issues and factors impinging on it. The records raise nothing new or significant and make no significant contribution to public understanding of escalator safety. The Applicant did not establish that its report would have a discernible impact on escalator safety.

My finding

[42.] If I were to focus only on the raw information in the records themselves, it would be true that the records may not contribute to the public understanding of an issue. However, there is nothing in this criterion to suggest that the benefit has to flow directly from the disclosure of the records. Because the records need only "contribute" to that public understanding, it is sufficient that the records are used and summarized in a way that contributes to that understanding. By doing an analysis of the records, the Applicant has transformed raw data into information that the public can understand.

Weight in favour of

[43.] Applicant

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

Applicant's position

[44.] The Applicant wanted to know how good a job government was doing in investigating and monitoring the situation, and what was being done as to prevention. It was apparent to the Applicant that nothing was happening to prevent injuries. Disclosure might cause individuals to mobilize and press government for a response as to what it is doing to address the issues raised.

Public Body's position

[45.] There is no particular potential in this regard. The records released contain no information about government operations.

My finding

[46.] The Public Body is correct in its statement that the records contain no information about government operations, so there is no potential to add to public research in this regard. The Applicant's statements are speculative.

Weight in favour of

[47.] Public Body

5. Has access been given to similar records at no cost?

Applicant's position

[48.] Unknown as to Alberta. The Applicant got similar records, at no cost, from Ontario Consumer and Corporate Relations, without having to go through the FOIP process. The Applicant also got free information from the Canadian Hospital Injury and Prevention Program. In the United States, the media have a "blanket" exemption for this kind of information.

Public Body's position

[49.] Access to investigation records in other areas has been given, but only to individuals personally involved in incidents or to third parties requesting individual incident records whose request costs were estimated to be less than the $150 cutoff below which fees may not be charged.

My finding

[50.] It is significant that similar records are available at no cost in other jurisdictions. It appears that some records have been given in this jurisdiction, but only under certain circumstances that are not the same as the Applicant's circumstances.

Weight in favour of

[51.] Applicant

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

Applicant's position

[52.] The Applicant was persistent. The Applicant also made extensive attempts to discuss issues with industry representatives, who were less than cooperative.

Public Body's position

[53.] There had been no earlier requests for the records outside FOIP, and no recent efforts by others to obtain the records.

[54.] A request for information regarding installing devices would normally come to the province. No requests have come in recent years.

[55.] The Public Body, on its own initiative, provided certain records to the Applicant.

My finding

[56.] The Public Body's evidence of no earlier requests and no subsequent requests is persuasive.

Weight in favour of

[57.] Public Body

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

Applicant's Position

[58.] Because the Applicant is publicly subsidized, it focuses on the relevancy of the story to viewers. The Applicant is interested in issues that would result in public debate and discussion. The records contribute to the debate on the issue of escalator safety, and to resolution of that debate. Disclosure may generate public discussion about the costs of preventive measures.

Public Body's position

[59.] On issues of substantial public curiosity, there are usually follow-up requests, but there were none here. Public debate was not stirred. The records will not contribute to debate or resolution of events of public interest.

My finding

[60.] The Public Body equated no follow-up requests with no public debate. I do not support this proposition because I do not think that a direct correlation can be made. While it is very difficult to define or measure "debate", in my opinion it is probable that the records used for the Applicant's broadcast, which was viewed by many thousands of Albertans, would contribute to debate on the safety of escalators with regard to children in particular.

Weight in favour of

[61.] Applicant

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

Applicant's position

[62.] An area in which government finds it important to legislate is an area where public interest exists. By establishing a code and by failing to require the use of certain safety devices, the government has warranted to the public that escalators are safe for all riders. The records are useful in highlighting significant risks posed to children.

[63.] Up to the time the request was made, the Public Body had not done an analysis of the information it held. The Public Body's annual reporting of statistics combined escalator and elevator incidents. There was no analysis regarding falls, sidewall entrapments and comb plate entrapments, and no breakdown by age.

Public Body's position

[64.] The Public Body doesn't know to what extent release of the records could improve escalator safety. No particular or general public understanding concerning escalator safety has been established. Therefore, no clarification of such an understanding is possible. Issues relating to escalator safety are currently addressed in the requirements of the Canadian Standards Association Safety Code. The Public Body also participates in a national standards organization, and works with American counterparts to ensure that suggested safety improvements are properly tested, reviewed and applied where possible.

[65.] The Public Body did an analysis after the fact as part of a response on behalf of government to whatever story followed from the release. Otherwise, the Public Body does not monitor incidents by maintaining statistics.

[66.] Self-analysis shouldn't be taken as an indication of public interest. Matters of health or safety would be considered whether the area was regulated or not.

My finding

[67.] To my way of thinking, the fact that the Public Body regulates this area is an indication of public interest.

Weight in favour of

[68.] Applicant

9. Do the records relate to a conflict between the Applicant and Government?

Applicant's position

[69.] No conflict

Public Body's position

[70.] No

My finding

[71.] The records do not relate to any conflict between the parties, which is in the Applicant's favour.

Weight in favour of

[72.] Applicant

10. Should the Public Body have anticipated the need of the public to have the records?

Applicant's position

[73.] The Public Body should have anticipated the need because the Act deals with public health and safety matters differently from other information. Health and safety are considered to be public interest issues under both section 31 and section 87(4). Therefore, access to public health and safety records should be a third principle under the Act, along with user pay and open and transparent government.

[74.] The Public Body should be putting out educational stories.

Public Body's position

[75.] Since there were no previous requests for such information, and there have been no subsequent requests, there is no reason for the Public Body to have anticipated any such need on the part of the public. Furthermore, five months passed from the time the records were available to the time the news report was aired. This time lag suggests that the risk was insignificant.

[76.] There is no urgent problem or urgent need to address escalator safety issues. Since the story was broadcast, no procedures have changed.

[77.] The story did not involve imminent danger. It wasn't an urgent story.

[78.] It's difficult to know when an application is submitted what information will be found. It's difficult to demonstrate at the front end what the end result will be.

My finding

[79.] The Applicant's argument about the special treatment of health and safety records under the Act is compelling, and weighs heavily on the "public interest" scale. Although I appreciate the Public Body's position that it's difficult to know at the outset whether the Public Body should anticipate the public need for the information, I do not think that "public need" always implies an urgent need to have the information.

Weight in favour of

[80.] Applicant

11. 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?

Applicant's position

[81.] The Public Body worked with the Applicant to narrow the request. The Public Body treated the Applicant well, and its response was reasonable. The Public Body was amenable to the Applicant's requests.

Public Body's position

[82.] The Public Body worked with the Applicant to narrow the request, and assumed any error in the estimate. The request as originally stated would have cost the Applicant between $6,600 and $8,700, including about 292 staff hours (that request involved 65 cubic feet of records, including 24 cubic feet relating to escalator and elevator incidents). Employees discussed the request at length, both with the Applicant and internally, provided statistics and a file list to help narrow the request, allowed the Applicant to take away severed duplicate copies to do the Applicant's own photocopying, developed a conservative cost estimate and agreed to waive the $25 application fee for a subsequent request if the first request was too narrow. The

Applicant ultimately received .25 cubic feet of records. The final cost is estimated to be about $1,200 to $1,600, including 54 staff hours. The Applicant was charged $250, plus the $25 application fee.

My finding

[83.] The Public Body did its utmost to assist the Applicant. The Public Body is to be commended for more than meeting its duty to assist.

Weight in favour of

[84.] Public Body

12. 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?

Applicant's position

[85.] No. Information helps the public to avoid accidents, thereby reducing present and future health care costs (e.g., $10,000 immediate health care costs for treating a child who loses all fingers on one hand as a result of a sidewall entrapment).

[86.] There was no waiver of any part of the $250 fee that the Public Body, under its fee agreement with the Applicant, was entitled to charge. That agreement excluded supervision, full copy charges and future application fees.

[87.] As to the "floodgate" argument, in the U.S., the media have a blanket exemption because it is assumed that their stories involve the public interest.

[88.] There's a cost to the Public Body, but an attendant benefit to the public regarding improving information, standards and policies.

[89.] The public body has a duty to narrow a request to make it effective.

Public Body's position

[90.] The decision arising from this review can affect the volume and nature of information that news-gathering organizations can obtain without cost from public bodies. Although waiver of the fee may not shift an unreasonable burden of cost to the Public Body, it will shift the burden of that cost from commercial businesses to Alberta taxpayers.

[91.] It is unreasonable to waive the fee, given the principle of "user pay", no evidence of public interest, the fact that the Public Body has already absorbed about 75% to 81% of the cost (the "non-chargeable costs"), and that the Applicant hasn't claimed inability to pay the remaining 19% to 25% (the "chargeable costs"). The "non-chargeable costs" absorbed by the Public Body include page-by-page reviews, time to discuss the request, field staff time to provide the records, photocopying pages for severing, correspondence and administration (about $825 to $1,125).

[92.] The Applicant was more willing to narrow the request as the estimate was provided. The ability to charge fees aided in narrowing the request and in reducing the amount of work necessary to respond to the request. If fees are waived, there is no incentive for an applicant to narrow the request.

[93.] The regulations require payment of fees, except if there's a waiver. The fee in this case was reasonable.

My finding

[94.] It would appear that the Public Body, by agreement, has shifted costs to itself. The Public Body did not present any evidence about how this shift of costs, voluntarily or not, would affect its operations. Presumably, the Public Body does not wish to shift any more such costs because it thinks that would open the "floodgates" to requests for such information and would jeopardize its accountability to taxpayers.

[95.] Although the use of fees to narrow a request is justified under a user pay system, the regulations do not require payment of a fee. Section 87(1) of the Act gives the Public Body a discretion ("may") to charge a fee for services. Fees are not mandatory.

Weight in favour of

[96.] Applicant

13. What is the probability that the Applicant will disseminate the contents of the record?

Applicant's position

[97.] The contents have already been disseminated in a news broadcast (total viewership estimated to be 1,040,000 people Canada-wide). The broadcast was viewed by about 100,000 Albertans (estimated) on Marketplace, and by about 60,000 Albertans (estimated) on the news broadcast.

Public Body's position

[98.] The news reports did not focus on Alberta and disclosed very limited amounts of the Alberta records. Particular incidents related by the broadcast had previously been reported in the media.

My finding

[99.] The Applicant has disseminated the contents of the records. I do not think it necessary that the dissemination focus either specifically on the Alberta records or on the Alberta records alone.

[100.] I realize that I have the benefit of hindsight on this issue, in that the Public Body didn't know for certain, when it released the records, that the Applicant would disseminate the contents.

Weight in favour of

[101.] Applicant

(d) Conclusion as to "public interest"

[102.] I have balanced "narrow" versus "broad" and "curiosity" versus "benefit" to determine "public interest". Public interest is a matter of degree, of striking a balance between user pay and disclosure on the one hand, and the cost to the taxpayer and open and transparent government on the other hand. Based on the records, the evidence, and Applicant's and the Public Body's arguments, I find that the records relate to a matter of public interest. An absence of

muckraking, minimal speculation, and government regulation are all strong indicators of public interest in this case.

C. What standard should be applied to my exercise of discretion as Commissioner under section 87(4) of the Act?

[103.] Having found that the records relate to a matter of public interest, should I now excuse the Applicant from paying all or part of the fee; in other words, should I waive the Applicant's fee, including either or both the $25 application fee and the $250 fee for the service of providing the records? I have the discretion or choice of doing so or not, even though the Applicant has shown that the records relate to a matter of public interest.

[104.] Because I am acting as an independent decision-maker under section 87(4), I believe that to exercise my discretion properly, I must do more than consider the access principles under the Act. I refer to David Jones and Anne de Villars, *Principles of Administrative Law* (Carswell: Scarborough, Ontario, 1994), p. 174, which sets out the principles for exercising discretion properly:

(i) having the proper intention
(ii) acting on adequate material
(iii) exercising the discretion to obtain a proper result
(iv) apprehending the law
(v) not fettering discretion by adopting a policy

[105.] I intend to exercise my discretion in favour of the Applicant. In so doing, I believe that I have not breached any of the foregoing principles.

[106.] The Public Body said that, at this stage, the Commissioner has the whole picture, and although the Applicant's news broadcast may involve the public interest, that does not warrant a fee waiver. Considering all its effort and labour, the Public Body contends that the Commissioner should acknowledge the expertise of the head of the Public Body in deciding against the fee waiver.

[107.] As Commissioner, I would certainly acknowledge the expertise of the Public Body in coming to a decision based on the Public Body's view of public interest. However, I believe that I can legitimately form my own view of what is in the public interest, and that both the Public Body and I can be right.

[108.] I must still exercise my own discretion. In this case, I am exercising that discretion in favour of the Applicant to waive the $250 fee for services, which are the chargeable costs. The public body said that it would normally waive all or none of these costs. However, I exercise my discretion not to waive the $25 application fee because of the principle under the Act that the user should pay.

[109.] In exercising my discretion, I realize that I do so with the benefit of hindsight. When a public body receives an application for a fee waiver, it sometimes doesn't know whether it has all the records at that point, as the Public Body indicated in this case. Consequently, the Public Body did not know how many people had been injured by sidewall entrapment when the decision was made not to waive the fees. In my case, having the benefit of seeing all the records gathered by the Public Body, as well as the Applicant's analysis of those records, and knowing the number of injuries, it is easier to exercise my discretion because I have adequate material on which to act.

[110.] Inadvertently, the Applicant also touched on this issue when the Applicant said that it was difficult to demonstrate at the front end of an application what the end result will be as concerns the public interest. I would say that it is also difficult for a public body to know at the front end of an application how the record relates to a matter of public interest. I empathize with the Public Body in this regard.

[111.] My decision in this case should not be read as a "blanket" waiver of fees for the media. Each case for a fee waiver must be decided on its own facts. I do not accept the proposition that the media should always get a fee waiver because everything the media does relates to public interest. The standard must be whether the record relates to a matter of public interest; the standard is not public curiosity.

[112.] Nor should my decision be read as an indictment of the Public Body's decision to refuse to waive the fee. The Public Body was not wrong in deciding to charge the fee. It did not have the benefit of the viewpoint I now have when making my independent decision.

ORDER:

[113.] The Applicant is entitled to have the $250 fee for services waived. Since the Applicant has already paid that fee, I order the Public Body to refund the fee to the Applicant, as provided by section 68(3)(c) of the Act.

[114.] I order that the Public Body notify me, within 30 days of receiving a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner