

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-016

November 4, 1999

**ALBERTA AGRICULTURE, FOOD and RURAL
DEVELOPMENT**

Review Number 1527

I. BACKGROUND

[para 1.] The Applicant's cattle contracted a number of diseases and developed certain cancers, allegedly from eating contaminants left behind by an oil company when it was drilling on the Applicant's lands.

[para 2.] On September 25, 1998, Alberta Agriculture, Food and Rural Development (the "Public Body") received an access request from a solicitor who represented the Applicant. The Applicant's solicitor asked for the following records under the *Freedom of Information and Protection of Privacy Act* (the "Act"):

[A]ll records in your custody and control relating to [the Applicant], formerly of [the Applicant's former address], now of [the Applicant's current address]. By record we mean all information relating to [the Applicant] of [the Applicant's] farming/ranch operation. This information may be in any form including book, document, map, drawing, photograph, letter, memos of any type, voucher, paper or any other written document.

[para 3.] The Public Body provided a fee estimate. The final fee was \$760.20, which the Applicant paid.

[para 4.] The Applicant subsequently asked for a fee waiver, which the Public Body refused. By letter received December 18, 1998, the Applicant asked me to make a “fresh” decision to waive the fee under section 87(4)(b) of the Act, on the ground that the records relate to a matter of public interest. The Applicant provided a written submission at that time.

[para 5.] The matter was set down for a written inquiry. The Public Body provided a written submission on April 23, 1999. As the Applicant had the burden of proof, I allowed the Applicant to provide a reply submission, which the Applicant provided on May 11, 1999.

[para 6.] This Order proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 7.] The Public Body charged the Applicant for providing approximately 1464 pages of records. As the issue is one of a fee waiver under section 87(4)(b), the records are at issue only as to whether they relate to a matter of public interest.

[para 8.] In this Order, I will refer to all the pages of records as the “Records”.

[para 9.] Roughly speaking, the Records break down into the following categories relating specifically to the Applicant’s cattle problems (except where noted):

- laboratory reports (toxicology reports, soil analyses, Animal Health Laboratory reports
- veterinary reports
- Public Body’s internal communications and employees’ notes
- correspondence between the Applicant or the Applicant’s solicitor and the Public Body, Alberta Energy and Utilities Board, the Government of Canada, and the oil company in question
- other third party correspondence, relating directly or indirectly to the Applicant’s cattle problems
- newspaper article about the Applicant
- Energy Resources Conservation Board/journal/internet/text information and articles related to animal health issues and the energy industry generally (not relating to the Applicant’s cattle problems)

III. ISSUE

[para 10.] There is one issue in this inquiry:

Do the records relate to a matter of public interest, as provided by section 87(4)(b) of the Act?

IV. DISCUSSION OF THE ISSUE

[para 11.] The Applicant has asked that I make a “fresh” decision under section 87(4)(b) to excuse the fee, rather than review the Public Body decision not to excuse the fee.

[para 12.] Section 87(4)(b) reads:

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,

...

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

[para 13.] To exercise my discretion to excuse the fee or any part of it, I must first form an opinion that the Records relate to a matter of public interest.

[para 14.] In Order 96-002, I discussed the concept of “public interest” under section 87(4)(b). I said that the weight of public interest will depend on balancing the weights afforded “broad” versus “narrow” (when considering “public”) and “curiosity” versus “benefit” (when considering “interest”). Where an access request relates to a matter that is of interest in the sense of benefit, and the relevant public is broad, that would be the most compelling case for a fee waiver. Where a matter is of curiosity only and the relevant public is narrow, that would not be a compelling case for a fee waiver. In the latter case, it would be important to respect the integrity of the legislated fee structure.

[para 15.] In Order 96-002, I then set out a non-exhaustive list of 13 criteria I believe are relevant to the issue of public interest under section 87(4)(b), as well as two principles to consider in applying the criteria.

[para 16.] 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.

[para 17.] The 13 criteria are:

1. Is the applicant motivated by commercial or other private interests?
2. Will members of the public, other than the applicant, benefit from disclosure? (This does not create a numbers game, however.)
3. Will the records contribute to the public understanding of an issue (that is, will they contribute to open and transparent government)?
4. Will disclosure add to public research on the operation of government?
5. Has access been given to similar records at no cost?
6. Have there been persistent efforts by the applicant or others to obtain the records?
7. Would the records contribute to debate on or resolution of events of public interest?
8. Would the records be useful in clarifying public understanding of issues where Government has itself established that public understanding?
9. Do the records relate to a conflict between the applicant and the Government?
10. Should the public body have anticipated the need of the public to have the record?
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 information or did the public body help the applicant narrow the request so as to reduce costs?

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 a significant interference with the operations of the public body, including other programs of the public body?

13. What is the probability that the applicant will disseminate the contents of the records?

[para 18.] The parties' main arguments can be summarized as follows.

[para 19.] The Applicant says that the primary motivation for seeking the Records is to determine fully and finally whether the Applicant's cattle pose a significant health concern for the public. The secondary motivation is to determine whether and how the Applicant should get rid of the cattle in such a way as to prevent harm to the cattle industry.

[para 20.] The Applicant therefore maintains that the public interest issue concerns the health of Albertans and the health of the cattle industry. The Applicant says:

The FOIP request was made to gain a better understanding of the risks of selling [the Applicant's] animals to the public. Disclosure will benefit the public because if it is correctly determined by [the Applicant] after [the Applicant's] health advisors' review not to sell the meat, then the public is protected. So is the cattle industry from the related controversy if tainted meat is sold. Clearly there are public benefits from private producers cautiously examining their products before release to the public.

[para 21.] The Applicant argues that members of the public, other than the Applicant, will benefit from disclosure, such as the general public who purchase and consume beef, the cattle producers of Alberta, and the processors of beef in Alberta.

[para 22.] The Applicant concludes that disclosure in this case assists a private person to determine obligations that are public in nature and of paramount importance to the health of Albertans.

[para 23.] However, the Applicant admits that the Applicant is suing the oil company. Nevertheless, the Applicant says that the lawsuit is incidental to the primary motivation, which is to ensure the health and safety of the public.

[para 24.] The Public Body argues that, in December 1998, there was no proven public health risk or food safety problem with the Applicant's cattle, as follows:

(i) Results of all toxicology and pathology tests, as well as professional interpretations of those results, had previously been supplied to the Applicant, as a matter of routine procedure.

(ii) As of April 1997, the Public Body had the same marketing directions as the Applicant was given in a Canadian Food Inspection Agency letter to the Applicant.

(iii) The Public Body's test results indicated that, as of October 1997, the animals did not present a food safety problem. The suggestion that the Applicant present the animals for sale at the Brooks plant is consistent with the advice from the Canadian Food Inspection Agency in April 1997.

[para 25.] The Public Body says it attempted to assist the Applicant's solicitor to narrow the request and reduce costs, but the solicitor insisted upon having all the information related to the Applicant's ranching operations, despite the cost. The Public Body says the Applicant told its FOIP staff that the Applicant's objective was to gather evidence for the Applicant's lawsuit against the oil company. The Public Body believes that the request was not narrowed for that reason.

[para 26.] Furthermore, the Public Body says it gave the Applicant the benefit of a fee reduction, from a possible \$1651.20 to \$760.20, using the Archives of Canada standard for search and retrieval time rather than the actual time.

[para 27.] The Public Body also provided me with its responses to the 13 criteria for public interest, set out in Order 96-002. In general, the Public Body acknowledges that public interest is apparent as to issues related to the oil industry and agriculture generally. The Public Body indicated that it is involved in several initiatives involving food safety and environmental safety. However, the Public Body notes that the Applicant did not request any data not related to the Applicant's operation. The Applicant's solicitor asked only for the records about the Applicant's situation and did not wish to see those of others who have participated in similar investigations.

[para 28.] I have no doubt that the safety of the food supply and related health concerns are public interest issues. The impact of the energy industry on agriculture, and specifically on the cattle industry, is a more specific public interest issue. I also have no doubt that the Applicant's particular issue concerning the Applicant's cattle problems, allegedly resulting from the oil company's operations, is a serious issue. However, I am of the view that the Applicant's particular issue is not a public

interest issue as contemplated by section 87(4)(b), for the following reasons.

- (i) The Applicant is essentially requesting the Applicant's own information. The majority of the Records relate only to the Applicant.
- (ii) There is an overriding private interest that centres around liability: the Applicant's liability if the cattle are sold for slaughter, and the oil company's liability if the Applicant can show that the oil company's operations resulted in contamination of the cattle.
- (iii) It is unlikely that the Applicant will disseminate the Records to the public as the Records contain the Applicant's proprietary information. Furthermore, by the Applicant's own admission, disclosure is intended to be used by the Applicant and the Applicant's health and legal advisors to determine further steps to take with respect to the Applicant's cattle.
- (iv) It is unlikely that the public would be able to get access to the Applicant's proprietary information on an access request to the Public Body. Consequently, the Public Body could not have anticipated the need of the public to have the Records.
- (v) Even if the Applicant were to disseminate the Records to the public, the general public would not understand many of the records, which are technical records about the test results on the Applicant's cattle and the interpretation of those test results. Therefore, it is unlikely that the majority of the Records would contribute to public understanding of the impact of the energy industry on cattle operations.
- (vi) The Public Body tried to help the Applicant narrow the request by pointing out that the Applicant had already received a number of the Records routinely. The Applicant got the toxicology and pathology reports routinely from the Public Body (although the Applicant denies getting some other reports), comprising 244 pages (by the Public Body's count), or approximately 17 per cent of the Records. I also note that there are duplicates of many records the Applicant received, and that the Applicant had provided some of the Records. The Applicant could have reduced costs by not asking for either of those types of Records. The Public Body noted that cost did not appear to be a factor in the Applicant's request, as the Applicant nevertheless wanted all the records. The Applicant also asked the Public Body for a second set of the Records.

(vii) There are a number of records that are already in the public domain. I counted 248 pages of such records, which amounts to approximately 17 per cent of the total records the Applicant asked for. Those pages of the Records, some of which the Applicant supplied to the Public Body, include the Energy Resources Conservation Board/journal/internet/text information and articles referred to above. Given the Applicant's private interest, I do not think that the Public Body should bear the cost of records, such as these, that are otherwise readily available to the public.

[para 29.] I conclude that the relevant public in this case consists primarily of the Applicant and that the Records would be of little benefit to the broader public.

[para 30.] Given all the foregoing reasons, I am of the opinion that the Records do not relate to a matter of public interest, as provided by section 87(4)(b) of the Act. Having formed that opinion, and not finding any other reason to excuse the fee, I exercise my discretion to not excuse the Applicant from paying the \$760.20 fee.

V. ORDER

[para 31.] I make the following Order under section 68(3)(c) of the Act.

[para 32.] I find that the Records do not relate to a matter of public interest, as provided by section 87(4)(b) of the Act. Therefore, I confirm the \$760.20 fee the Public Body charged the Applicant.

Robert C. Clark
Information and Privacy Commissioner