

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-024

August 26, 1999

ALBERTA ENVIRONMENT

Review Number 1604

I. BACKGROUND

[para 1.] On February 23, 1999, Alberta Environment, formerly known as Albert Environmental Protection (the "Public Body") received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act") for access to all records and information related to the impact of the reconstruction of Highway 752 on fisheries habitat. On March 25, 1999 this request was narrowed to:

- (a) *Notes or observations made by [name], [name], [name], [name], [name], [name] (the "Employees") respecting the reconstruction of Highway 752 and its impact on fisheries habitat during the reconstruction;*
- (b) *Photographs taken by the Employees respecting the reconstruction of Highway 752 and its impact on fisheries habitat during the reconstruction;*
- (c) *Analytical reports made respecting any samples taken by the Employees respecting the reconstruction of Highway 752 and its impact on fisheries habitat during the reconstruction;*
- (d) *Maps marked by the Employees respecting the reconstruction of Highway 752 and its impact on fisheries habitat during the reconstruction;*

- (e) Statements made by the Employees respecting the reconstruction of Highway 752 and its impact on fisheries habitat during the reconstruction;*
- (f) Curriculae Vitae for the Employees.*

[para 2.] The Applicant requested this information for a private prosecution under the *Fisheries Act* (Canada) against the MD of Clearwater and an engineering company. The Public Body had, prior to the Request, provided some information to the counsel acting as the private prosecutor for the Applicant. The above formal request under the Act was made to obtain further information.

[para 3.] The Public Body processed the request on April 9, 1999 and charged \$477.50 on April 16, 1999. The Applicant paid the fees and received the records. On April 18, 1999 the Public Body received a request from the Applicant to retroactively waive the fees for this request pursuant to section 87(4)(b) (public interest) of the Act.

[para 4.] On April 30, 1999, the Public Body informed the Applicant that it had decided not to grant the fee waiver.

[para 5.] The Applicant requested that I review the fee waiver request. Mediation was unsuccessful and the matter was set down for a written inquiry on August 5, 1999.

[para 6.] The Information & Privacy Commissioner delegated to me the authority to hear this inquiry and decide the issues, as set out under section 59 of the Act.

[para 7.] This Order otherwise proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. PRELIMINARY MATTERS

[para 8.] The parties submitted initial and rebuttal submissions to this Office. In the Applicant's submission, the Applicant stated that the issues before the Commissioner were:

- *I ask the Commissioner to rule that the fees charged were excessive.*
- *Did the Public Body correctly apply section 87(4)(b) of the Freedom of Information and Protection of Privacy Act? and*
- *In the alternative, should the Commissioner excuse the applicant from paying the fee because the records relate to a matter of public interest?*

[para 9.] In Order 97-001, the Commissioner stated that section 87(4) of the Act allows an applicant to either request a review of the public body's decision to refuse a fee waiver request or, alternatively, to request an independent decision from the Commissioner regarding the fee waiver.

[para 10.] Since the Public Body's submissions did not specifically deal with the Commissioner's independent authority to excuse the Applicant from paying fees, I requested on August 5, 1999 that the Public Body provide further submissions regarding an independent decision from the Commissioner. On August 6, 1999, the Public Body informed my office that the Public Body had no further submission to make respecting the Applicant's request to have the Commissioner waive fees.

So, in this Order, I will be making an independent decision regarding the fee waiver. Consequently, it will not be necessary to deal with the review of the Public Body's decision to not excuse the Applicant from paying the fees.

III. RECORDS AT ISSUE

[para 11.] The records consist of photographs, analytical reports, maps, Employees' statements and Employees' curriculae vitae. There are approximately 265 pages in total. In this Order, I will refer to those pages as the "Records".

IV. ISSUES

[para 12.] There are two issues in this inquiry:

- A. Should I excuse the Applicant from paying all or part of the fees?
- B. Did the Public Body reasonably calculate the fee for service?

V. DISCUSSION

Issue A. Should I excuse the Applicant from paying all or part of the fees?

[para 13.] Section 87(4) states:

(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.

[para 14.] Under section 87(4)(b), the Commissioner or a public body must do two things: (1) they must form an opinion about whether the records relate to a matter of public interest; and (2) if the records relate to a matter of public interest, they must then exercise their discretion in deciding whether to grant a fee waiver.

[para 15.] I also note that, in Order 96-002, the Commissioner stated that an applicant has the burden of proof in a fee waiver application because an applicant is in the best position to argue as to why a fee waiver should be granted. The Applicant has the burden of proof in this inquiry.

i) In my opinion, do the records relate to a matter of public interest?

[para 16.] In Order 96-002, the Commissioner set out two principles and a non-exhaustive list of 13 criteria for determining whether a record relates to a matter of public interest under section 87(4)(b).

[para 17.] 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 18.] 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 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 record?

[para 19.] The Public Body says that while the general issue of fisheries habitat protection may be of interest to the public, the details contained in the records such as laboratory reports, samples and photographs are not. According to the Public Body, the Records relate to a matter of contention between the private prosecutor and the defendants. In the Public Body's view this matter is limited in interest to the Applicant.

[para 20.] Consequently, the Public Body argued against waiving the fees on the basis that the Applicant did not sufficiently demonstrate that there is a broad public interest in the impact of the reconstruction of

Highway 752 on fisheries habitat, or that the disclosure of the requested records would necessarily benefit that interest if it does exist.

[para 21.] According to the Applicant, the Records are related to a prosecution under the Federal *Fisheries Act* conducted on behalf on Her Majesty the Queen. Therefore, the records relate to a matter of public interest.

[para 22.] It is my understanding that a private prosecution is a prosecution of an information by a private citizen. The ability to conduct a private prosecution for an offence under the Federal *Fisheries Act* has been recognized in the decision, *Kostuch v. Alberta (Attorney General)* [1993] A.J. No. 635. In that decision, Justice Power stated the following with respect to the role of the Attorney-General in a private prosecution:

...When a prosecution has been commenced privately, the Attorney-General retains the right to intervene in the proceedings. Such intervention can have two purposes. It is open to the Attorney-General to intervene in a private prosecution in order to conduct the prosecution, for example, to continue the proceedings that a private prosecutor intends to abandon on the grounds that the proceedings are in the public interest...

[para 23.] In the case of *R. v. Osiovy* (1989), 50 C.C.C. (3d) 189, Vancise, J.A. of the Saskatchewan Court of Appeal stated:

...It is settled that an individual has the right to initiate a private prosecution. It is also settled that the Attorney General has the right to intervene and take control of a private prosecution...

[para 24.] There was no evidence presented in this inquiry to show whether the Attorney-General will intervene in this prosecution. However, in my view, if the Attorney-General assumed a role in a private prosecution, it would support the argument that a private prosecution may relate to a matter of public interest.

[para 25.] Even though a prosecution may be private, it is still a legal action to determine whether or not someone broke a law. Since laws are made in the public interest to begin with, the question of obedience to the law is, on the face of it, a matter of public interest. However, I will not say that every private prosecution would automatically be in the public interest.

[para 26.] In this case, however, the prosecution involves the environment, specifically a particular body of water and the fish habitat therein. Both the federal and provincial governments have passed legislation dealing extensively with the protection of the environment (ie the Alberta *Environmental Protection and Enhancement Act*, the Canada

Fisheries Act, among others). This also tells me that there is a public interest in the protection of the environment in accordance with those laws. As a result, this request appears to me to fall within criteria numbers 1, 2, 7, 8 and 13 respecting whether or not it is a matter of public interest.

[para 27.] The Applicant also presented evidence that a media release describing the information received as a result of the request had been distributed to a dozen media outlets and over 200 environmental groups. An article published in the *Red Deer Advocate* on May 25, 1999, regarding this issue was also presented as evidence to support the argument that the Records relate to a matter of public interest.

[para 28.] After carefully reviewing the Records, the submissions of both parties, and the above two principles and 13 criteria, it is my opinion that the Records relate to a matter of public interest. I am convinced that a sufficiently broad group of people will benefit from this information such that the Records can be said to relate to a matter of public interest under section 87(4)(b).

ii) Should I exercise my discretion to waive the fees?

[para 29.] Having decided 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? I have the discretion or choice of doing so or not, even though the Records relate to a matter of public interest.

[para 30.] In Order 97-001, the Commissioner set out the principles for exercising discretion properly. According to these principles, I intend to exercise my discretion in favour of the Applicant.

[para 31.] In exercising my discretion, I have considered that the Public Body stated that it does not make records relating to possible violations of the law generally available to the public. Therefore, it is unlikely that any of the Records would be available to the Applicant elsewhere.

[para 32.] Moreover, I also considered that, had this prosecution been conducted by the government, the taxpayers would pay for the fees associated with the retrieval and reproduction of these records in any event.

[para 33.] I excuse the Applicant from paying all of the fees for service (\$477.50). The Applicant has not requested waiver of the \$25 application fee, so I do not intend to consider it. In any event, the principle under

the Act that the user should pay is still being maintained for the application fee.

Issue B: Did the Public Body reasonably calculate the fee for service?

[para 34.] Given my finding under Issue A, it is not necessary for me to consider Issue B.

VI. ORDER

[para 35.] The Applicant is entitled to have the \$477.50 fee 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.

[para 36.] I order that the Public Body notify me in writing, within 45 days of being given a copy of this Order, that the Public Body has complied with this Order.

Frank J. Work
Assistant Information and Privacy Commissioner