ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-008

May 12, 2000

ALBERTA GOVERNMENT SERVICES

Review Number 1786

I. BACKGROUND

[para. 1] On September 24, 1999, Alberta Government Services, formerly a part of Alberta Municipal Affairs (the "Public Body"), received a request from the Applicant pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act") for access to the following records:

> *... copies of letters of reprimand by the administrator of collection practices, along with the department's statement of facts and recommendations regarding the punishment of collectors and collection agencies for breaching the Collection Practices Act.*

[para. 2] The submission from the Public Body indicates that the request was later narrowed to the last five years (dates not specified) and clarified to include the following:

> *... the actions/order* [sic] *of the past five years that (some of which) are contained in a binder held by the Administrator of Collection Practices;*
>
> *the recommendations that led to those orders/actions; and,*
>
> *the number of complaints over the last five years by industry.*

[para. 3] The Public Body prepared a fee estimate (not dated). It included 19 hours for locating and retrieving records @ $6.75 per 1/4 hour ($513.00) and photocopying 200 pages @ $.25/page ($50.00) for a total estimate of $563.00.

[para. 4] On October 18, 1999, the Applicant wrote to the Public Body requesting a fee waiver on the following grounds:

1) *I feel $6.75 per hour* [sic] *for the work the people in Government Services do is too high.*

2) *It would be fair to excuse the fees as the Government was to provide me with any and all information relative to my hearing, which is being held under the pretext of public interest, as any punishment, if improperly levied against me, could be referenced to other punishments.*

3) *The Government is holding an illegal hearing against me and because of the legal tactics on* [the] *part of the Government I have spent thousands and thousands on three lawyers; therefore, hardship is being imposed on me, and for me to pay the amount would mean my ability to fund a proper defense would be hindered.*

4) *The records relate to public interest and it is only fair to waive the charges.*

[para. 5] On November 16, 1999, the Public Body wrote to the Applicant indicating that the request for a fee waiver had been denied. The Public Body advised the Applicant of the right under section 62 of the Act to request a review by the Information and Privacy Commissioner.

[para. 6] On December 16, 1999, the Applicant wrote to the Information and Privacy Commissioner and requested a review of the Public Body's decision. This letter was originally sent to the Public Body. A copy was faxed to the Commissioner's Office December 21, 1999. Mediation was authorized but was not successful.

[para. 7] On March 1, 2000, the Applicant advised the Information and Privacy Commissioner's Office that the fees would be paid to the Public Body and that he wanted to proceed to an inquiry to request a refund.

[para. 8] On March 6, 2000, the Information and Privacy Commissioner delegated to me the authority to hear this inquiry and decide the issues, as set out in section 59 of the Act.

[para. 9] This inquiry was conducted in writing. Both parties submitted initial briefs, which were then exchanged. Both parties then provided rebuttal submissions. The rebuttals were likewise exchanged on April 5, 2000. No further submissions were allowed or requested.

II. PRELIMINARY MATTERS

[para. 10] All of the events related to this access request and fee waiver occurred after the amendments to the Act came into force on May 19, 1999. Prior to that date, section 87(4) of the Act allowed the head of a public body or the Commissioner to excuse fees. Section 87(4) was amended and now states:

> *87(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,…*

[para. 11] The intended effect of this amendment was to require applicants to make their initial request to the head of a public body and not be in a position to by-pass the head and make an initial request to the Commissioner. To further clarify this procedural requirement, section 87(4.1) was added, which states:

> *87(4.1) If an applicant has requested the head of public body to excuse the applicant from paying all or part of a fee and the head of a public body has refused the applicant's request, the head must notify the applicant that the applicant may ask for a review under Part 4.*

[para. 12] The amendment to section 87(4) of the Act has removed the uncertainty about whether an applicant can apply directly to the Commissioner for a fee waiver. An applicant cannot. Section 87(4.1) of the Act requires the Commissioner to conduct a review and inquiry when requested to by an applicant who has been denied a fee waiver by a public body.

[para. 13] It would reasonably follow that the Commissioner would then be restricted to a review of the public body's exercise of discretion. In most cases, where the Commissioner notes a deficiency, he would order the public body to reconsider its decision. However, the remedy in section 68(3)(c) of the Act, which allows the Commissioner to substitute his decision for that of the head of the public body under section 87(4), remained unchanged after the May 19,1999 amendment. Section 68(3)(c) states:

> *68(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:*
>
> > *(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*

[para. 14] Consequently, I conclude that the Commissioner or his designate may still make a "fresh decision" on fees under section 87(4). The words *in the appropriate circumstances* can be interpreted very broadly to give the Commissioner a great deal of discretion when deciding to *confirm or reduce a fee or order a refund*. This would include, but is not restricted to, situations where new evidence is presented by an applicant at an inquiry that was not available to the public body at the time of its decision regarding the fee waiver.

[para. 15] Consequently, in this Order, I will first look at whether the Public Body has reasonably applied the provisions of the Act in reaching its decision to deny a fee waiver to the Applicant and whether the Public Body had reasonably calculated the fees. I will then consider all information available to me to determine whether the appropriate circumstances exist to alter the fees charged to the Applicant.

[para. 16] In Order 96-002, the Commissioner stated that the applicant has the burden of proof in a fee waiver application because an applicant is in the best position to argue why a fee waiver should be granted. Therefore, the Applicant has the burden of proof in this inquiry as it relates to the fee waiver. On the matter of proper calculation of the fees, it is the Public Body that will have the burden of proof, because it is in the best position to explain how it arrived at the estimate.

III. RECORDS AT ISSUE

[para. 17] The records consist of 286 pages consisting of memoranda, letters, charts containing statistical data, email messages, Decisions of the Administrator of the *Collection Practices Act*, Agreed Statements of Fact, Appeal Board Decisions, and criminal record checks. Third party personal information was severed. However, severing is not an issue before me in this inquiry.

IV. ISSUES

[para. 18] The Portfolio Officer in this matter set out the issues as follows:

> *The Applicant requested access to records from the Public Body and was advised that the fees associated with the request were $563.00. The Applicant paid the fees but has requested that the Commissioner review the fees to determine if a partial or total refund is appropriate.*

[para. 19] The Applicant's request for a fee waiver to the Public Body sets out several issues that do not correlate directly with section 87(4). There is an indication that the Applicant believes the fees are too high. The Applicant talks about financial hardship and sets out reasons that may fit the wording *for any reason it is fair to excuse payment* under section 87(4)(a). The Applicant concludes that the records relate to a matter of public interest. Consequently, I will deal with the following issues:

A. Is the Applicant entitled to a fee waiver, as provided for by section 87(4) of the Act?

B. Did the Public Body properly calculate the fees?

V. DISCUSSION

Issue A Is the Applicant entitled to a fee waiver, as provided for by section 87(4) of the Act?

[para. 20] Section 87(4) states:

> *87(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,*
>
> *(a) the applicant cannot afford the payment or for any reason it is fair to excuse payment, or*
> *(b) the record relates to a matter of public interest, including the environment or public health and safety.*

[para. 21] Under section 87(4), the head of a public body is granted the discretion to excuse fees if one or more of the following criteria are present:

- the Applicant cannot afford to pay
- for any other reason it is fair to excuse the fees
- the record relates to a matter of public interest

i) Has the Applicant requested a fee waiver on the grounds that the Applicant cannot afford to pay?

[para. 22] In the Applicant's letter of October 18, 1999, the Applicant does not specifically state which of the three criteria set out in section 87(4) were used to make the request to the Public Body. Likewise, the Public Body, in its letter of November 16, 1999, did not give specific reasons for refusing a fee waiver. Additionally, both parties used a general approach in their written submissions in this inquiry. Therefore, it is necessary for me to decide which arguments are aimed at which criteria.

[para. 23] In the initial fee waiver request to the Public Body on October 18, 1999, the Applicant stated:

> *The Government is holding an illegal hearing against me and because of the legal tactics on part of the Government I have spent thousands and thousands on three lawyers; therefore, hardship is being imposed on me, and for me to pay the amount would mean my ability to fund a proper defense would be hindered.*

[para. 24] The Applicant states in the opening sentence of his initial brief that the grounds set out in previous correspondence apply to his submissions in this inquiry. In that brief, the Applicant also indicates that, as a result of ongoing litigation with the Government, a judgment was rendered on March 15, 2000, in favour of the Applicant regarding legal fees. The Applicant alleges hardship as a result of the Government not yet paying the fees set out in the judgment.

[para. 25] There is no evidence offered by the Applicant specifically relating to the Applicant's ability to pay the fees. Typically, an applicant would have to offer some personal financial information to demonstrate an inability to pay. The Applicant does not state in any of the evidence that there is an inability to pay, only that it would be unfair. I note that the Applicant has paid the fees to the Public Body and has received the records. This would lead me to believe that the Applicant has the ability to pay. The references to financial hardship made by the Applicant appear more to fit the second criteria *for any other reason it is fair to excuse the fees.* Therefore, I conclude that the Applicant has not requested a fee waiver on the specific grounds of inability to pay.

ii) Are there any other reasons why it is fair for the Public Body to excuse the fees?

[para. 26] It is evident from the Applicant's submissions that he does not trust the Public Body. The Applicant describes in a great deal more detail why it is the Applicant's belief that the Public Body is not dealing with the Applicant in a fair and unbiased manner. However, this inquiry was convened to determine if the Applicant is entitled to have fees excused for records requested from the Public Body under the Act. I do not have jurisdiction to decide on issues of administrative fairness or whether another administrative tribunal properly applied the rules of natural justice. Consequently, I have concluded that many of the Applicant's statements are irrelevant to the matter before me. I have pulled from the Applicant's submissions those arguments that may have some influence in the matter at issue. In doing so, I have allowed a great deal of latitude.

[para. 27] Much of the information provided by the Applicant appears to be targeted at why it is fair to excuse fees. In addition to the statements previously examined, there is a significant amount of information that relates to ongoing administrative justice and associated court actions between the two parties. This information is offered by the Applicant as argument for why it would be fair to excuse the fees. As I understand them, the Applicant's arguments that relate to this criterion can be summarized as follows:

- The Applicant is a Collector and operates a Collection Agency (both licensed under the *Fair Trading Act*, formerly the *Collection Practices Act*).

- The Public Body is attempting to hold an administrative hearing regarding the actions of the Applicant and/or his company.

- The Applicant has taken the Public Body to court in an attempt to stop what the Applicant believes is an illegal and biased hearing. (Evidence was provided by both parties that a judgment was received in favour of the Applicant where bias is raised as an issue. The court ordered that an independent third party conduct the hearing).

- The Applicant has asked for the records in question to assist in his defense before the hearing and to assist in the associated actions in court.

- The Administrator told the Applicant that the rules of natural justice require that the Applicant have the same information as the Public Body. Refusal to supply the records is evidence of further bias against the Applicant.

- It is the Applicant's position that the Public Body is refusing to waive the fees in order to keep the information from him. In support of this, he offers information that the records were not given to him until March 15, 2000, the same day as a recent court appearance.

- The hearing and associated actions have cost the Applicant a great deal of money. It is unfair that the Applicant should have to pay for information to mount a defense. Likewise, it would be unfair to have to pay the police for information when they have charged you.

[para. 28] With regard to the Applicant's position that the Applicant is being denied full disclosure, the Public Body counters the Applicant's arguments as follows:

> *The Court order of Madam Justice Phillips of March 26, 1998, stated that the Department "shall obtain all information that exists pertaining to the appeal" of the Applicant. Her Court Order of November 4, 1998, states that the requirement "…of the Order of March 26, 1998, has been met in that all of the information that exists" … "has been produced to counsel…" for the Applicant. The Applicant has been provided with complete evidence binders including full disclosure of the case against* [the Applicant] *and the company. The information requested under the FOIP Act --other decisions by the Administrator-- is not part of the actions against him.*

[para. 29] With regard to the Applicant's allegation of an illegal hearing, the Public Body submits:

> *…the November 1998, Court Order also stated that the motion on behalf of the Applicant to prohibit the hearing against the said applicants "…is denied and the hearing shall proceed in accordance with the terms of this Order …". The government is attempting to provide the Applicant with an opportunity to present his defense to the allegations that have been raised. Following the hearing, the Administrator's delegate will decide on what actions, if any, are appropriate. It is this first step that the Applicant is opposing and all actions to prevent this process from proceeding have been initiated by the Applicant.*

[para. 30] In rebuttal, the Applicant countered the Public Body's disclosure position by saying that it should be the Applicant or the Applicant's legal counsel that decides what is relevant. Therefore, not even the court should be able to decide that full disclosure has been made.

[para. 31] Section 6 of the Act sets out access rights. Section 6(3) states:

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

[para. 32] The Act is not inconsistent with other legal processes. A party to a legal proceeding is generally entitled to full disclosure. In a criminal proceeding, the accused is entitled to full disclosure of the evidence against him or her. However, if the accused wants copies of all similar judgments, either for the same offence or by the judge they are facing, they must pay a fee to the Clerk of the Court for searching and copying the material. This is likewise the case in civil court proceedings. The information is readily available to the public, but the requestor pays for the service of searching and copying. Public registries also apply the same "user pays" principle.

[para. 33] There is no evidence to support the Applicant's position that the Public Body was purposely trying to withhold the records. Once the fee was paid on March 2, 2000, the records were processed and released March 15. I am satisfied that processing of the records was not purposely held up to coincide with the court date, as alleged by the Applicant.

[para. 34] The Applicant relies heavily on arguments of bias. The Applicant points out that twice the courts have determined that there is a sufficient apprehension of bias to require the Public Body first to assign an independent person to conduct the hearing, and later to replace that person. Proper recourse for the issue of bias is with the courts. I note that the Applicant has availed himself of this remedy. There is nothing in the requested records that either supports or refutes the issue of bias. It must also be stated that the Applicant was not refused access to the records. The Public Body has only refused to waive the fees.

[para. 35] The Public Body based its decision not to waive the fees on the Applicant's letter of October 18, 1999. There is evidence before this inquiry that the Public Body considered all the arguments presented by the Applicant. The arguments presented in the Applicant's submissions do not offer sufficient new information to convince me to substitute my decision, as permitted by section 68(3)(c) of the Act. I find that the Public Body has properly applied section 87(4)(a) of the Act as it relates to *any other reason it is fair to excuse the fees.*

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

[para. 36] 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. 37] 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. 38] 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. 39] The Applicant has indicated in several places in his letter and submissions that waiving the fees is in the public interest. The Applicant points out that the Administrator of the *Collection Practices Act* uses the phrase "not in the public interest" when reaching a decision to find a collector or agency in breach of the *Collection Practices Act*. The Applicant argues that, "if it is in the public interest that these decisions are being made, then clearly my request for information must logically be deemed to fall under the stated label of public interest." I am not persuaded by this argument. The actions of an individual or agency can be outside the public interest without making the resulting warning letter or decision a matter of public interest.

[para. 40] The Applicant argued that the records seem to indicate that the Administrator has improperly used information governed by the *Young Offenders Act*. The Applicant argued, "it is clearly in the public interest if the Administrator is not following the plain letter and spirit of the law." The Public Body indicated that this situation is as a result of the Administrator finding that a collector breached the *Collection Practices Act* by not including a Youth Record on an

application for a Collector's License. The decision was overturned on appeal. From my review of the records, I find that this was an isolated incident, which was appropriately dealt with on appeal.

[para. 41] The Applicant argues that new cases under the *Fair Trading Act* are placed in a binder and are publicly available. It is the Applicant's position that this is evidence that free access should also be granted to the historical records that he requested. The Public Body states in its submission:

> *Administrator's decisions under the Fair Trading Act can be made public under section 150 which allows for the publication of information obtained in the course of an investigation under the Act. However, these are currently not made public. Currently public are the undertakings entered into under section 152 of the Fair Trading Act which are required to be made public under section 152(3). This process was also followed under the Collection Practices Act and has been in place since 1974.*

[para. 42] The Public Body worked through the 13 criteria set out in Order 96-002 in their written submission and determined that the weight of the answers is against characterizing the records as being in the public interest. In particular, they note that the information requested was primarily for the personal use of the Applicant in his conflict with the Public Body. Regarding the need for open government operations, the Public Body notes that policy, practices and procedures were not within the scope of the request.

[para. 43] After reviewing the records, I have considered the 13 criteria in determining whether the records relate to a matter of public interest. I determined that the answers weigh heavily against finding the records to be a matter of public interest. I have concluded that the records are primarily of interest to the Applicant because of his ongoing dispute with the Public Body. The Applicant has indicated that the Association of Collection Agencies and the Credit grantors Association of Canada – Calgary Chapter are interested in obtaining copies of the records. While I respect the Applicant's position, it is doubtful that either of these organizations would find the records particularly useful.

[para. 44] It is a simple fact that retrieval and copying of records costs the Public Body both human and material resources. The Public Body is funded by the taxes of Albertans. Are the records of significant importance that the cost should be passed on to all Albertans? After reviewing the records, my answer to this question is no.

[para. 45] With regard to the public interest issue, I find that the Public Body has properly applied section 87(4)(b) of the Act.

Issue B Did the Public Body reasonably calculate the fees?

[para. 46] In his letter of October 18, 1999, the Applicant indicated that he felt that the stated fee of 6.75 per 1/4 hour was excessive. In his submission, The Applicant argues that this amount ($27.00/hour):

> *... by far exceeds the average wage in virtually all public and private sectors and especially for a function that does not require some form of specialized training and skill. In fact, I believe that a vast majority of the public would find such charges to be extreme when viewed against their own wages/salary.*

[para. 47] The Applicant does not challenge the amount of time (19 hours) estimated or the cost of photocopying (200 pages @ $.25/page = $50.00).

[para. 48] The Public Body submitted that the rate charged is in accordance with Schedule 2 of *Alberta Regulation 200/95*, *Freedom of Information and Protection of Privacy Regulation* (the Regulation).

[para. 49] The Public Body submitted details regarding the reason it took 19 hours to locate and retrieve the records. The Public Body indicated that the actual time taken was 19 hours, which coincided with their estimate. The Public Body also submitted that it took three hours to sever third party information. This was not charged for. Since the Applicant has not challenged the amount of time taken, I accept the Public Body's submission regarding the time required to locate and retrieve the records.

[para. 50] The Public Body indicated in its submission that the Applicant was charged for photocopying 200 pages of records, in accordance with the fee estimate. The Public Body indicated that the actual number of pages totaled 296. My count of the records was 286 pages. It is likely that there is an error in the Public Body's submission. For the purposes of this Order, I will rely on my count. The Additional 86 pages could have resulted in an additional cost to the Applicant of $21.50. The Public Body also indicated that the Applicant requested that the records be sent to him as quickly as possible. The records were sent by Priority Post. These costs were not charged to the Applicant.

[para. 51] I find that the Public Body reasonably calculated the fees.

VI. ORDER

[para. 52] For the reasons stated in the Order, I find that the Public Body properly applied section 87(4) of the Act and reasonably calculated the fees. Therefore, under section 68(3)(c), I confirm the $563.00 fee charged to the Applicant by the Public Body.

Dave Bell
Inquiry Officer