

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-011

June 5, 2000

CITY OF CALGARY

Review Number 1799

I. BACKGROUND

[para 1.] On November 19, 1999, the City of Calgary (the “Public Body”) received a request from the Applicant under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for the following records:

“All minutes for the Centre Street Bridge from all departments, directors, commissioners, and all private meetings regarding the Bridge (all aspects) from 1989 to present.”

[para 2.] The Applicant paid the \$25.00 initial fee.

[para 3.] On December 9, 1999, the Public Body provided the Applicant with a fee estimate of \$4,309.50 for the cost of searching, retrieving, preparing, copying and shipping 2,205 pages.

[para 4.] In its submission, the Public Body stated it offered to assist the Applicant in narrowing the request and thereby reducing the fees. However, the Applicant did not wish to narrow the request.

[para 5.] The Public Body informed the Applicant of the three criteria under which fees could be reduced or waived under section 87(4). The Applicant was invited to contact the Public Body if a circumstance specified in Section 87(4) applied.

[para 6.] On January 5, 2000, the Public Body received a request by e-mail for a fee waiver from the Applicant and a co-Applicant.

[para 7.] The Applicants provided the following in support of the request for a fee waiver:

“It concerns me greatly that in a democracy that we have (a) to go to great lengths to find out information regarding areas that are funded by taxpayers dollars; (b) that freedom of information is only for the individuals that have the money to pay.”

[para 8.] In a January 5, 2000 e-mail response, the Public Body asked the Applicants to clarify whether the request for a fee waiver was on the grounds of inability to pay or another circumstance specified in Section 87(4). The Public Body advised it would provide assistance if the Applicants were unfamiliar with conditions in which fees could be waived.

[para 9.] On January 7, 2000, the Public Body informed the Applicants that the request for a fee waiver was denied. In its letter, the Public Body stated the Applicants had not cited a reason for the request for a fee waiver. The Applicants were informed of the right under section 62 of the Act to request a review by the Information and Privacy Commissioner.

[para 10.] On January 11, 2000, the Applicants wrote to the Public Body stating they had not understood they were required to provide reasons for the request for a fee waiver. They stated the reasons for the request were that (1) they could not afford the fees and (2) the records relate to a matter of public interest.

[para 11.] With respect to inability to pay the fees, the Applicants provided the following. One Applicant was described as “for the most part” a single parent with dependent children living on a modest income. The other Applicant was described as employed part-time and as having personal debts as a result of an unresolved disability claim. No further information or supporting documentation was submitted.

[para 12.] With respect to public interest, the Applicants provided the following:

“It is considered that the delay of the bridge and the reasons for the delay are to the public interest at large, as the bridge is a major transportation route, as well as the historical artifacts, the disposition, ownership, and preservation is directly related to the public at large.”

[para 13.] By e-mail and letter dated January 11, 2000, the Public Body again informed the Applicants the request for a fee waiver was denied.

[para 14.] On January 12, 2000, the Information and Privacy Commissioner received a request for a review of the Public Body’s decision not to waive fees. Mediation was authorized;

however, the parties were unable to reach a mutually satisfactory resolution and the Applicants requested that the matter proceed to inquiry. The matter was set for written inquiry.

[para 15.] Pursuant to section 59 of the Act, on March 6, 2000, the Information and Privacy Commissioner delegated to me authority to hear this inquiry and render a decision on all matters at issue.

[para 16.] Written representations for the inquiry were submitted by the Applicants and the Public Body.

II. PRELIMINARY MATTERS

[para 17.] The access request was made after the amendments to the Act came into force on May 19, 1999.

[para 18.] In Order 2000-08, the Inquiry Officer addressed the effect of the amendments. Specifically, the Inquiry Officer considered whether an Applicant could by-pass the public body and go directly to the Commissioner for a decision on a fee waiver. As well, the Inquiry Officer considered whether the Commissioner was limited to reviewing the decision of the public body or could render a new decision.

[para 19.] The relevant sections of the Act are sections 87(4) and 87(4.1):

***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 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.

***87(4.1)** If an applicant has requested the head of a 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 20.] In Order 2000-08, the Inquiry Officer determined that an Applicant must first obtain a decision from the head of a public body regarding waiver of fees. In this case, the Applicants obtained a decision from the Public Body before requesting an inquiry by the Commissioner.

[para 21.] The Inquiry Officer also considered whether the Commissioner was limited to reviewing the decision of the head of the Public Body or can render a new decision. The Inquiry Officer ruled that under section 68(3) of the Act, the Commissioner may render a new decision.

[para 22.] It was further ruled that the Commissioner can consider new evidence presented at inquiry when making a decision regarding a request for a fee waiver.

[para 23.] In this inquiry, the decision of the Public Body will be reviewed to determine whether it exercised its discretion properly in declining the Applicants' request for a fee waiver. As well, the inquiry will consider all available evidence and decide whether the Applicants should be granted a fee waiver.

III. ISSUES

[para 24.] There are three issues in this inquiry:

1. Should all or part of the fees be waived because the Applicants cannot afford to pay, as provided by Section 87(4)(a) of the Act?
2. Should all or part of the fees be waived because of any other reason it is fair to excuse payment, as provided by Section 87(4)(a) of the Act?
3. Do the records relate to a matter of public interest? If so, should all or part of the fees be waived as provided by 87(4)(b)?

IV. DISCUSSION

Issue 1 Should all or part of the fees be waived because the Applicants cannot afford to pay, as provided by Section 87(4)(a) of the Act?

[para 25.] The Act is premised on the principle that the user should pay. However, Section 87(4) grants the head of a public body discretion to waive fees if one or more of the following circumstances exists:

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

[para 26.] In this case, the Applicants requested a fee waiver for two reasons. One, the Applicants stated they could not afford to pay the fees and secondly, that the records relate to a matter of public interest.

[para 27.] In Order 96-002, the Commissioner ruled that the person requesting a fee waiver bears the burden of proving that a fee waiver is justified. The Commissioner noted that the public body is not in a position to know whether an Applicant can afford to pay or if it is fair to excuse payment of fees for some other reason. Similarly, the public body is not in a position to know whether the records relate to a matter of public interest. The Commissioner determined the Applicant is in the best position to argue why a fee waiver is justified. Therefore, the Applicant must provide sufficient information to allow the head of the Public Body to make an informed and objective decision.

[para 28.] In reviewing the decision of the Public Body, the test applied is whether the Public Body exercised its discretion reasonably, in good faith and without regard to extraneous considerations.

[para 29.] I have reviewed the information available to the Public Body at the time of the decision. I find the Applicants gave the Public Body very little information in support of their request for a fee waiver.

[para 30.] With respect to inability to pay, the Applicants provided only general information. No specific information showing actual income or expenses was provided. Nor was any supporting documentation provided. The only information available to the Public Body was that one Applicant was a single parent of dependent children living on a modest income. The other Applicant was described as employed part-time and having personal debts as a result of an unresolved disability claim.

[para 31.] Access requests involve use of public resources that are paid for by taxpayers. Public Bodies are accountable for the use of public resources. In fairness to all, it is reasonable that decisions to waive fees be based on sufficient information that clearly shows that an inability to pay exists.

[para 32.] It is not sufficient for the Applicants to simply state that they are unable to pay fees because they are a single parent of dependent children on a modest income or that they are employed part-time because of a disability. The mere statement that one is a single parent or a person employed part-time because of a disability does not provide sufficient information to determine whether an inability to pay exists. Similarly, the mere statement that an Applicant is on a modest income is not sufficient. What constitutes a modest income is subjective. Therefore, the Applicant must provide sufficient information regarding actual income and expenses so that an objective decision regarding inability to pay can be made.

[para 33.] In my view, there was insufficient information that would permit the Public Body to determine that an inability to pay existed. I find the Public Body reasonably concluded that a fee waiver could not be granted on the basis of the Applicants' inability to pay. There is no evidence that the Public Body failed to act in good faith or based its decision on extraneous considerations. Accordingly, I find that the Public Body exercised its discretion properly.

[para 34.] At inquiry, the Applicants did not provide any information in their initial submission relating to inability to pay fees. In subsequent correspondence, the Applicants argued that charging fees over \$150.00 is contrary to the Act as only those who can pay have access to records.

[para 35.] In this case, I find that the Applicants failed to establish they are unable to pay the fees.

[para 36.] Therefore, I find that fees cannot be excused on the grounds that the Applicants cannot afford to pay.

Issue 2 Should all or part of the fees be waived because of any other reason it is fair to excuse payment, as provided by Section 87(4)(a) of the Act?

[para 37.] The Applicants have not requested a fee waiver under this sub-section. Therefore, it is not necessary to address this issue.

Issue 3 Do the records relate to a matter of public interest. If so, should all or part of the fees be waived as provided by 87(4)(b)?

[para 38.] 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 39.] 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 40.] 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 41.] With respect to public interest, I find that the Applicants did not provide the Public Body with information that the records relate to a matter of a public interest. The Applicants provided a one sentence statement consisting of their opinion that the records pertain to a matter of public interest.

[para 42.] I recognize the matter of the bridge is of significant interest to the Applicants. However, the duty of the Applicants is to show that the records relate to a matter of public interest.

[para 43.] There are many factors and considerations that go into making a decision to excuse fees. Therefore, it is not sufficient for an Applicant to simply state that the records relate to a matter of public interest. The Applicant must provide some argument as to what the public interest is and how it will be served by the Public Body releasing the records to the Applicant.

[para 44.] It is evident from their submission that the Applicants take issue with the Public Body with respect to the Centre Street Bridge. The Applicants allege the Public Body contravened its own by-laws as well as the *Municipal Government Act*. It is the opinion of the Applicants that the Public Body failed to act in good faith in matters relating to the bridge. It appears that the specific issues of concern to the Applicants are decisions relating to the lion statues.

[para 45.] The Public Body submitted the following:

“Council for the Public Body, through its Committee on Operations & Environment, on January 24, 2000 approved a number of recommendations regarding the lions on the Centre Street Bridge. The fate of the lions has been decided. The process involved the Public Body’s Heritage Advisory Board which provides an open public forum. The minutes and supporting material for the Heritage Advisory Board, the Committee on Operations and Environment and Council are available for viewing free of charge.”

[para 46.] The Public Body applied the criteria set out in Order 96-002 in their written submission. In particular, the Public Body submitted there is no indication the Applicants are acting on behalf of a group of concerned citizens. Rather, the Public Body is of the view that the Applicants are concerned citizens who are pursuing a private interest.

[para 47.] The Public Body also submitted that there is no indication the records will be disseminated broadly or that members of the public other than the Applicants will benefit by the Public Body providing the records at no cost. The Public Body also noted that the issue of the lions has been before the public and there has been ample opportunity for debate. Furthermore, the Public Body submitted that decisions regarding the bridge and the lions have already been made. Therefore, the records at issue will not make any additional contribution to resolution of this matter.

[para 48.] There is no evidence that the Public Body failed to act in good faith or based its decision on extraneous considerations. I find the Public Body exercised its discretion properly and reasonably concluded that a fee waiver could not be granted on the basis of public interest.

[para 49.] I have reviewed the records at issue.

[para 50.] I am of the view the records are of primary interest only to the Applicants. There was no evidence presented that there are numbers of individuals interested in the information contained in the records or that there have been efforts by others to obtain the records. There is no information showing that the Applicants are acting on behalf of other concerned citizens.

[para 51.] The Applicants have not clearly identified how they intend to use the records. Nor have they provided information indicating what foreseeable benefit there may be to Albertans from release of the records. Based on the information available, I am doubtful the records would serve any function other than being reviewed by the Applicants.

[para 52.] It follows from the above that I am not convinced a sufficiently broad group of people will benefit from the information in the records or that release of the records will contribute to public understanding. Also, having reviewed the content of the records, I am not satisfied that the records are of significant importance that the cost of the Applicants’ access request should be passed on to taxpayers.

[para 53.] After considering all the available information and the 13 criteria, I find the records do not relate to a matter of public interest. I do not excuse the Applicants from paying fees.

V. ORDER

[para 54.] For the reasons stated in the Order, I find the Public Body exercised its discretion properly when it denied the Applicants' fee waiver request under section 87(4)(a) and (b). I do not excuse the Applicants from paying fees under section 87(4)(a) or 87(4)(b).

Valerie Kupsch
Inquiry Officer