

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-015

July 24, 2001

EXECUTIVE COUNCIL OFFICE

Review Number 1984

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Summary: A member of the Alberta Liberal Caucus applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for copies of written correspondence received by the Executive Council Office in regard to Bill 11, the *Health Care Protection Act*. The Applicant asked the Executive Council Office to waive the estimated fee of \$50,209.20 under section 87(4). The Executive Council Office refused to grant the fee waiver. The Commissioner held that, pursuant to his authority under section 68(3)(c) of the Act, that the fee should be reduced by 80% to \$10,041.84. However, the Commissioner cautioned that his finding in this inquiry was restricted to the fee waiver issue. He emphasized that he did not decide whether the Applicant is entitled to access the records under the Act or whether there are exceptions that apply to the records. These issues were not addressed in this inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, ss. 68(3)(c), 87(4).

Authorities Cited: AB: Orders 96-002, 99-012, 2000-008.

I. BACKGROUND

[para 1.] On May 9, 2000, a member of the Alberta Liberal Caucus (the “Applicant”) made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Executive Council Office (the “Public Body”) for:

“A list of the total number of letters, emails, and faxes received by the Office of the Premier in regards to Bill 11, the Health Care Protection Act, specifying the total number of letters, emails and faxes in support of the Bill and the total number of letters, emails and faxes against the Bill. If this is not available, then copies of all letters, emails and faxes received by the Office of the Premier in regards to Bill 11, the Health Care Protection Act, with all personal information of the author of the letter, email or fax omitted.”

[para 2.] On May 29, 2000, the Applicant revised the access request to limit it to the time period of September 1, 1999 to May 11, 2000.

[para 3.] On June 9, 2000, the Public Body sent the Applicant a fee estimate in the amount of \$50,209.20. The fee estimate was calculated as follows:

Review 22, 315 pieces at 5 minutes/piece = 115,575 minutes

115,575 minutes = 1859.6 hours

1859.6 hours at \$27.00 /hr. = \$50,209.20

[para 4.] On July 13, 2000, the Applicant sent a letter to the Public Body requesting a fee waiver under section 87(4). In that letter, the Applicant stated that the fees should be waived because the records relate to a matter of public interest.

[para 5.] On July 20, 2000, the Public Body wrote to the Applicant denying the fee waiver request.

[para 6.] On July 31, 2000, the Applicant requested a review of the Public Body’s decision. The matter was set down for an oral inquiry. I note that the only issue in this inquiry was whether the Applicant was entitled to a fee waiver under section 87(4). The method of calculation and the amount of the fee was not an issue for this inquiry. Whether the Applicant has a right to access the records or whether any of the exceptions listed in the Act apply to the records were also not issues for this inquiry.

II. RECORDS AT ISSUE

[para 7.] The records consist of approximately 22,315 pieces of correspondence received by the Public Body.

III. PRELIMINARY ISSUE

[para 8.] At the inquiry, the Applicant raised a preliminary issue regarding section 87(4). The Applicant requested clarification regarding whether, in this inquiry, I would review the evidence and circumstances that existed at the date the Public Body first

refused the fee waiver or whether I would review the evidence and circumstances that existed at the date of the inquiry.

[para 9.] The remedy in section 68(3)(c) allows me to review the public body's decision, consider new evidence and substitute my decision for that of the public body under section 87(4): see Order 2000-008. Therefore, in this inquiry, I have considered both the evidence and circumstances that existed at the date the Public Body refused to grant the fee waiver and at the date of the inquiry.

IV. ISSUE

[para 10.] There is one issue in this inquiry: Is the Applicant entitled to a fee waiver under section 87(4) of the Act?

V. BURDEN OF PROOF

[para 11.] The burden of proof under section 87(4) rests with the Applicant: Order 96-002.

VI. DISCUSSION: Is the Applicant entitled to a fee waiver under section 87(4)?

[para 12.] Section 87(4) grants the head of a public body the discretion to waive fees if one or more of the following circumstances exists: the applicant cannot afford to pay, it is fair to excuse payment or the record relates to a matter of public interest. This section reads:

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.

Section 87(4)(a) – Inability to Afford Payment

[para 13.] The Applicant states that the Commissioner should grant a fee waiver under section 87(4)(a) because the Applicant cannot afford to pay the fee. The Applicant states that although the Member Services Committee of the Legislative Assembly approved the budget for the Alberta Liberal Caucus, the Alberta Liberal Caucus is not allocated a specific amount for FOIP applications. In addition, the Applicant states that the budget for the Alberta Liberal Caucus will be reduced now that its Caucus is reduced to seven members. The Applicant also states that there is a huge imbalance between the resources available to the Alberta Liberal Caucus and the resources available to the Public Body.

[para 14.] The Public Body states that the Alberta Liberal Caucus is given a budget out of the General Revenue Fund of the Province. The Public Body states that this funding is to enable the Alberta Liberal Caucus to carry out its duties and responsibilities within the constraints of the budget.

[para 15.] In Orders 96-002 and 99-012, I said that if an applicant requests a fee waiver based on inability to pay, the applicant should present evidence regarding the applicant's financial situation.

[para 16.] I find that there is insufficient evidence before me that the Applicant cannot afford to pay the fee. Although the Applicant states that the Alberta Liberal Caucus is not allocated a specific amount for FOIP applications, the Applicant has not provided me with sufficient evidence that the Applicant has an inability to pay the fee out of its budget. In addition, I find that an imbalance of resources between the Alberta Liberal Caucus and the Public Body is irrelevant to the issue of whether the Applicant has the ability to pay the fee. I find that a fee waiver should not be granted under section 87(4) on the basis of the Applicant's inability to pay.

Section 87(4)(a) – Fair to Excuse Payment

[para 17.] The Applicant states that it would be fair to excuse the payment under section 87(4)(a) because the Government explicitly invited Albertans to provide input regarding Bill 11, but then failed to evaluate the information. In particular, the Applicant states that the Public Body failed to compile statistics regarding how many pieces of written correspondence were in favour of or against Bill 11.

[para 18.] After a review of the evidence and submissions of the parties, I do not find that it would be fair to excuse payment under section 87(4)(a). The evidence is that the Public Body used many different methods to gauge and evaluate public opinion. This included input from radio talk shows, meetings with various health care professionals and stakeholders, review of an Angus Reid poll, and input through elected representatives which included over 450 tablings made in the Legislative Assembly of Alberta. I do not find that it would be fair to grant a fee waiver simply because the Public Body did not generate the statistical analysis that the Applicant had hoped for.

Section 87(4)(b) – Public Interest

[para 19.] In Order 96-002, I established two general principles and a list of thirteen non-exhaustive criteria to be considered when determining whether a record relates to a matter of public interest under section 87(4)(b).

[para 20.] The two principles are:

1. The Act was intended to foster an open and transparent government, subject to the limits contained in the Act.

2. The Act contains the principle that the user should pay.

[para 21.] The thirteen 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?
3. Will the records contribute to the public understanding of an issue (that is, will it contribute to an 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 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? Were some records made available at no cost or did the Public Body help the Applicant find other less expensive sources of information or assist in narrowing 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 22.] I have reviewed the 2 public interest principles and the 13 public interest criteria.

[para 23.] I find that there are a number of the criteria that clearly weigh in favour of a fee waiver. These criteria are 1, 9, 12 and 13. I find that the Applicant is not motivated by a commercial or private interest and that the records did not relate to a conflict. In addition, I find that although generating this information could require considerable time and resources on the part of the Public Body, there is insufficient evidence before me that given the resources available to the Public Body that the fee waiver would shift an unreasonable burden of cost onto the Public Body. I am also satisfied that the Applicant would likely disseminate the contents of the records.

[para 24.] However, there were also an equal number of criteria that clearly weigh against a fee waiver. These were criteria 5, 6, 10 and 11. I find that there is insufficient evidence that access to the similar records have been given at no cost. Although I am aware of at least one other government department which, in the past, disclosed correspondence from individuals, the subject matter and the context in which these letters were written was very different. I have also reviewed the excerpts of Hansard that were supplied by the Applicant and remain unconvinced that the Applicant has made persistent efforts to access these specific records outside the Act. In addition, I do not find that the Public Body should have anticipated the need of the public to have these records. Lastly, I find that the Public Body has also been reasonably responsive to the access request.

[para 25.] Due to the equal number of criteria that weigh in favour and against the fee waiver, the determining factor lies with the remaining criteria 2, 3, 4, 7 and 8. The Applicant's primary argument under each of these criteria is that the disclosure of the records would show how the Government responded to public input regarding Bill 11. This, in turn, would benefit the public, contribute to an open and transparent Government, add to public research on the operation of Government, contribute to debate or the resolution of events of public interest and, lastly, clarify the understanding of issues where the Government has itself established the public understanding.

[para 26.] I agree that the records would reveal some of the public response to the Bill and would assist Albertans in determining how responsive the Government has been to their input regarding Bill 11 and thereby partially fulfill the remaining criteria. However, I also find that the benefit of disclosing the information will be somewhat limited. As previously mentioned, evidence in this inquiry shows that the public used many methods to make their views regarding Bill 11 known to the Government. In addition, there is evidence in this inquiry that the Government used many different methods to gauge public opinion about Bill 11. Due to the importance and notoriety of the Bill, the Public Body received input about the Bill from a variety of sources including input from radio talk shows, meetings with various health care professionals and stakeholders, review of an Angus Reid poll, and input through elected representatives which included over 450 tablings made in the Legislative Assembly of Alberta.

[para 27.] I have reviewed the submissions and have taken into account all of the evidence presented before me. I find that pursuant to my authority under section 68(3)(c), the fee should be reduced by 80% from \$50,209.20 to \$10,041.84. In coming to this decision, I took into account the fact that although the majority of criteria weigh in

favour of a fee waiver, a number of those criteria were only partially fulfilled. I also took into account the fact that although the Act was intended to foster an open and transparent government, an important principle under section 87(4) is that the user should pay. I find that an 80% fee waiver is appropriate in these circumstances.

[para 28.] I caution that my finding in this inquiry is restricted to the fee waiver issue and is not a decision regarding whether the Applicant must be given access to the records or whether there are exceptions in the Act that apply to the records. These issues were not addressed in this inquiry.

VII. ORDER

[para 29.] Pursuant to my authority under section 68(3)(c) of the Act, I reduce the Applicant's fee by 80% from \$50,209.20 to \$10,041.84.

Robert C. Clark
Information and Privacy Commissioner