

ALBERTA
OFFICE OF THE INFORMATION AND
PRIVACY COMMISSIONER

ORDER 2001-017

June 14, 2001

ALBERTA ENVIRONMENT

Review Number 2049

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Summary: The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for a large volume of records relating to the purchase of commercial timber and fibre permits, licenses and quotas. The Applicant asked Alberta Environment to waive the estimated fee of \$621,921.40, on the ground that the records related to a matter of public interest. Alberta Environment refused. The Commissioner agreed that the fee should not be waived.

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

Authorities Cited: AB: Order 96-002

I. BACKGROUND

[para. 1.] On August 2, 2000, the Applicant, who was then and still is a Member of the Legislative Assembly, applied to Alberta Environment (“Environment”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for:

...all records of all purchases, whether by auction or otherwise, of commercial timber and wood fibre permits, licenses and quotas from the Alberta Land and Forest Service in all regions of the province from December 1992 to the present. Records are to include full copies of licenses, permits, quotas—draft or final; all records pertaining to the auction/bidding process including bids, communications with bidders and final permit/license/quota holders; and all internal department records pertaining to this process.

[para. 2.] On August 24, 2000, Environment provided the Applicant with a fee estimate of \$624, 921.40, based on 1.7644 million responsive records.

[para. 3.] The Applicant then asked for a fee waiver. The head of Environment applied the principles and criteria set out in Order 96-002 (set out below). The head denied the fee waiver under section 87(4)(b) of the Act because there was not enough evidence that the records related to a matter of public interest.

[para. 4.] On October 30, 2000, the Applicant asked me to review the denial of the fee waiver.

[para. 5.] Mediation was authorized, but did not succeed.

[para. 6.] A Notice of Inquiry was issued and an oral inquiry was held in Edmonton on April 19, 2001. The Applicant's agent and Environment attended and made representations to me. I received final written arguments from the parties.

II. RECORDS AT ISSUE

[para. 7.] Environment identified approximately 1.7644 million responsive records, scattered throughout its offices in the province. At my request it provided two samples of the records for me to review.

III. ISSUES

[para. 8.] There is one large issue in this inquiry, which was broken down into two issues in the Notice of Inquiry:

A. Did Environment properly apply section 87(4)(b) of the Act to the Applicant's request for a fee waiver?

B. Should the Applicant be excused from paying all or part of the fee under section 68(3)(c) of the Act?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did Environment properly apply section 87(4)(b) of the Act to the Applicant's request for a fee waiver?

(1.) General

[para. 9.] The Applicant has the burden of proof to show that he is entitled to a fee waiver under the Act: Order 96-002.

[para. 10.] The relevant provision of section 87(4) of the Act 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,

...

(b) the record relates to a matter of public interest...

(2.) The application of section 87(4)(b)

[para. 11.] Order 96-002 established two general principles to help assess whether a fee waiver is appropriate under section 87(4)(b) of the Act:

1. The Act was intended to foster open and transparent government, subject to the limits contained in the Act.
2. The Act contains the principle that the user should pay.

[para. 12.] An application for fee waiver on the basis that the records relate to a matter of public interest concerns the first principle. There are many considerations that go into determining whether to waive fees on the basis of public interest. It is not enough to assert that the information relates to a matter of public interest. The Applicant must provide some persuasive evidence or argument regarding how the public interest would be served by releasing the records to the Applicant.

[para. 13.] There is no specific test under the Act for determining whether or not there is a “public interest” in records. In Order 96-002, I developed 13 non-exhaustive criteria to assess the extent of public interest in the records sought. I stated that whether there is a “public interest” will depend on balancing the weight that should be given to “curiosity” versus “benefit” when considering “interest”, and “broad” versus “narrow” when considering “public”. A request that relates to a matter of broad public benefit is more likely to be a matter of public interest. A request that arises from narrow personal curiosity is least likely to be a matter of public interest.

[para. 14.] I will summarize the arguments made by the parties under each of the 13 criteria identified in Order 96-002.

1. Is the Applicant motivated by commercial or other private interests?

[para. 15.] The Applicant says that he is motivated by his public duty as a member of the Official Opposition to ensure that Albertans are aware of “all the facts” relating to the purchase of these permits, licenses and quotas, in light of a recent conviction under the federal Competition Act for rigged timber permit bidding. Environment does not dispute that the Applicant is motivated by his public duty.

2. Will members of the public, other than the Applicant, benefit from disclosure?

[para. 16.] The Applicant says that disclosure will benefit the public by assuring that the government is accountable for its administration of public funds and resources.

Environment argues in effect that much of the information the Applicant wants is of minor public interest, or is irrelevant to the Applicant's underlying concerns about rigged bidding and the improper administration of a public resource. As well, the information in the records will not benefit the public unless it is analyzed, summarized and interpreted in a meaningful manner. Much of the information the Applicant wants is specialized and difficult to understand. The Applicant has not shown how or even if a proper analysis of such a massive volume of records would be done.

3. *Will the records contribute to the public understanding of an issue (that is, contribute to open and transparent government)?*

[para. 17.] The Applicant says that disclosure will give the public a more complete body of knowledge to assess government conduct. Environment says that a great deal of information is already in the public domain. Disclosing the records would not contribute in a meaningful way to open and transparent government.

4. *Will disclosure add to public research on the operation of government?*

[para. 18.] The Applicant says disclosure of the records will assist public research in the area of government administration of these permits, licenses and quotas. Environment says that the Applicant has not specifically requested documents relating to these government operations. There is operations information publicly available on the government's external website, as well as in a 1994 report on the timber permit program.

5. *Has access been given to similar records at no cost?*

[para. 19.] The Applicant says that access has been given to similar records at no cost, because in 1998 Alberta Labour waived \$2800.00 in fees for 2670 pages of pine shake-related records. Environment says that those records were about untreated pine shakes and disclosure was in the public interest, given consumer problems with the shakes. The only similarity between that situation and this request is that they both involve wood.

6. *Have there been persistent efforts by the Applicant or others to obtain the records?*

[para. 20.] The Applicant says that there have been persistent efforts by the applicant to obtain information. Environment says that it clarified the Applicant's position on this point. The Applicant relies on questions he asked in the Legislative Assembly that he alleged were not answered. Environment says that these questions were answered.

7. *Would the records contribute to debate on or resolution of events of public interest?*

[para. 21.] The Applicant says that the records would contribute to a more informed debate in Alberta by clarifying the government's role in the purchase of the timber permits, and allow the public to determine if the government protected the public interest.

Environment says that information relating to this is already publicly available in the 1994 report and on the department website.

8. *Would the records be useful in clarifying the public understanding of issues where government has itself established that public understanding?*

[para. 22.] The Applicant argues that the records would usefully clarify the public's understanding of how the government allocates timber resources, conducts sales and what measures were implemented to minimize future opportunities for collusion. Environment disagrees. It submits that there is a great deal of relevant information publicly available, including a 1994 report titled "A Review of the Timber Permit Program." It is unclear how the public would benefit from the disclosure of each and every document in question.

9. *Do the records relate to a conflict between the Applicant and the government?*

[para. 23.] The Applicant and Environment agree there is no known conflict between the Applicant and the government.

10. *Should the public body have anticipated the public need to have the record?*

[para. 24.] The Applicant says that Environment should have anticipated the public need for the records since they relate to the government's role in the fair market allocation of its timber resources. Environment says that there is enough information in the public domain, and relies on its arguments above.

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 assisting in narrowing the request so as to reduce costs?*

[para. 25.] The Applicant says that Environment has been "reasonably responsive." Environment says that it made repeated attempts to have the Applicant narrow the request by type of record, timeframe or region. Environment also proposed a summary computer-generated report. The Applicant has refused to narrow the request or accept the summary report.

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?*

[para. 26.] The Applicant says he does not believe that a waiver would shift an unreasonable cost burden to Environment or interfere with its operations. Environment says that the request would place a tremendous burden on it and consume the equivalent of 4083 workdays to deal with it. The request could only be processed if certain regional offices were closed down temporarily to process the request.

13. *What is the probability that the Applicant will disseminate the contents of the record?*

[para. 27.] The Applicant says that the probability is high. Environment disagrees. The Applicant does not say how the dissemination would happen, or how he could process that volume of information and distill the pertinent data.

Additional factors considered by Environment

[para. 28.] Environment presented additional arguments to justify its decision. It argued that the Applicant has taken a shotgun approach to seeking information and did not cooperate by narrowing his request, even after being advised of the operational burden it would put on Environment. Finally, it would be unfair to financially burden the Alberta taxpayers with the cost of processing the request. For all these reasons, Environment declined to grant a fee waiver on the basis of public interest.

(3.) Discussion

[para. 29.] I am substantially in agreement with the analysis Environment presented at inquiry. I understand that the Applicant is motivated by what he views as his public duty to Albertans. However, I accept Environment's key argument that disclosing the records will not benefit the public unless the Applicant can analyze the vast quantity of raw information that would rain down on him. The Applicant's agent indicated at inquiry that, as a member of the Opposition, only modest financial and human resources were available to analyse the records. As well, dealing with the records would consume a significant part of the Opposition's annual budget. Given Environment's estimate that it would take 4083 work-days, or 16.46 work-years, just to process the request, I am skeptical that the resources available to the Applicant would permit him to analyze the records in a meaningful way. If the Applicant cannot properly analyze the records, then he cannot disseminate the information contained in them in a way that contributes to open and transparent government. At that point the Applicant's public interest argument breaks down and his argument for a fee waiver fails.

[para. 30.] In addition, there is no evidence that access has been given to similar records at no cost. I find that, on the whole, the request for records is so broad that Environment should not have anticipated a public need for the records. I accept that a fee waiver would shift a significant cost burden to Environment and significantly interfere with the normal operations of Environment. This cost shifting is not justified, since disclosure would contribute little to any debate or resolution of events of public interest. In my view, the evidence shows that Environment carefully went through the established criteria and principles to assess the request for a fee waiver, and then reasonably exercised its discretion under the Act to deny the fee waiver on a public interest basis.

(4.) Conclusion under section 87(4)(b)

[para. 31.] I find that Environment properly applied section 87(4)(b) of the Act to the Applicant's request for a fee waiver.

ISSUE B: Should the Applicant be excused from paying all or part of the fee?

(1.) General

[para. 32.] Section 68(3)(c) allows me to confirm or reduce a fee under the Act "in the appropriate circumstances."

(2.) Discussion

[para. 33.] The Applicant asks to be excused from paying any part of the fee. Environment asks that I confirm its decision to deny the fee waiver.

[para. 34.] I am not persuaded that there is a cogent public interest in the records as a whole. I was impressed by the argument that it is not in the public interest to release, without cost, a massive volume of complex records to an Applicant who cannot show that he has the resources and a plan to analyze and disseminate the raw information in the records. The Applicant did not indicate in an organized and persuasive way what his resources and plans to deal with the records were.

[para. 35.] The Applicant's request amounts to a well-intentioned but unrealistic attempt at a citizen audit of government operations. Given the cooperative conduct of Environment throughout this process, I cannot understand why the Applicant refused to narrow his request for records that could have related to matters of public interest, even after I invited the parties at inquiry to re-enter mediation to narrow the request and find a mutually acceptable solution. For example, if the Applicant had been willing to narrow the scope of the request to records reasonably related to the Competition Act offences, the Applicant may have had better success in making the public interest argument.

(3.) Conclusion

[para. 36.] There is no public interest basis for excusing all or part of the fee for records. I find that the Applicant is not entitled to a fee waiver. I confirm the decision of Environment not to excuse the Applicant from paying the fee under the Act.

VI. ORDER

[para. 37.] I make the following Order under section 68 of the Act:

1. I find that Environment properly applied section 87(4)(b) of the Act to the Applicant's request for a fee waiver.

2. I confirm the decision of Environment. I do not excuse the Applicant from paying the fee under section 87(4)(b).

Robert C. Clark
Information and Privacy Commissioner