

**ALBERTA**  
**OFFICE OF THE INFORMATION AND**  
**PRIVACY COMMISSIONER**

**ORDER 2001-023**

August 22, 2001

**ALBERTA ENVIRONMENT**

Review Number 2032

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**Summary:** The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for records relating to land exchanges between the provincial Crown and Three Sisters Resorts Inc. in the Canmore area. The Applicant asked Alberta Environment to waive the estimated fee of \$1855.30, as he lacked the ability to pay (section 87(4)(a) of the Act) and the records related to a matter of public interest (section 87(4)(b) of the Act). Environment refused the fee waiver on both grounds. The Commissioner held that there was a public interest in certain records and reduced the fee by 80%, to \$371.06. The Commissioner commented that when a public body is deciding whether to waive a fee under section 87(4)(b), it should consider the principles and objects of the Act, and assess all the relevant facts and circumstances, not just those presented by an applicant.

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

**Orders Cited:** **AB:** Orders 96-002, 2000-021, 2001-017.

**Cases Cited:** *Oakwood Development Ltd. v. Francois Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164.

**I. BACKGROUND**

[para. 1.] On May 8, 2000, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Environment (“Environment” or the “Public Body”) for the following records:

- November 8, 1990, “Exchange of Lands Agreement” between the Government of Alberta and Three Sisters Resorts Inc. [hereafter “Three Sisters”].
- Any records related to the exchange of lands pursuant to the November 8, 1990 or March 11, 1994 “Exchange of Lands Agreement” between the Government of Alberta and Three Sisters Resorts Inc., or subsequent agreements for the properties described as:
  1. Residential lots in south Canmore on 1<sup>st</sup> and 2<sup>nd</sup> Streets. Plan #1095 F, Block 77, Lots 15 to 20. Plan 791 1449, Block 77, Lots 1 to 6.
  2. Parcels of land on north side of highway IA also known as Bow Valley Trail. Plan #981 1928, Block 4, Lots 3, 5 & 6. Plan #971 0885, Block 1, Lots 10 & 11. Plan #981 3180, Block 1, Lots 21 & 22. Plan #971 1910, Block 1 or 4, Lots 19 & 20. Plan #981 1702, Block 3, Lots 6, 7 & 8. Plan #951 2510, Lot 6. Plan #961 1120, Lot 17. (Plan #'s have changed with change of title).
  3. Parcel of land 50 plus acres on benchlands above Alpine Club at Indian Flat, north side of highway IA at Canmore townline east. SE quarter, Sec. 34, Twp. 24, Rge. 10, W5M.
- Any assessments or valuation records for the lands exchanged pursuant to the November 8, 1990 or March 11, 1994, “Exchange of Lands Agreement” between the Government of Alberta and Three Sisters Resorts Inc., or any subsequent agreements, including assessments or valuation records for options to purchase:
- Map demonstrating the exchange of lands pursuant to the March 11, 1994, “Exchange of Lands Agreement” between the Government of Alberta and Three Sisters Resorts Inc.;
- Any agreements or maps that arose out of the \$1,500,000 credit described in clause 4.3.2 of the March 11, 1994, “Exchange of Lands Agreement” between the Government of Alberta and Three Sisters Resorts Inc. Negotiations underway. Credit used and credit remaining; and
- Thunderstone Quarry Property as described at 1.1.20 of 1994 Exchange of Lands Agreement.

[para. 2.] Environment identified approximately 4300 responsive records and presented the Applicant with a detailed fee estimate of \$1855.30.

[para. 3.] The Applicant applied for a fee waiver under section 87(4)(a) (applicant cannot afford payment) and section 87(4)(b) (record relates to a matter of public interest) of the Act. The head of Environment refused to grant the fee waiver under either provision. The head decided that the Applicant did not provide evidence that he could not afford the fee, and failed to supply sufficient evidence of a public interest in the records or information.

[para. 4.] On October 10, 2000, the Applicant asked me to review the denial of the fee waiver. Mediation failed. An oral inquiry was held in Calgary on July 12, 2001. Both parties attended and supplied additional evidence and arguments during the inquiry.

## II. RECORDS

[para. 5.] As this is a fee waiver inquiry, there are no records directly at issue. Environment supplied me with a random sample of responsive records. I note that the responsive records are now in the hands of the Department of Sustainable Resource Development.

### **III. ISSUES**

[para. 6.] I have been developing a unified approach to the issue of fee waivers, setting down a single issue for resolution at inquiry: Is the applicant entitled to a fee waiver under the Act? This inquiry was set down using the older issue pattern:

- A. Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(a) of the Act?
- B. Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(b) of the Act?
- C. Should the Applicant be excused from paying all or part of the fee pursuant to section 87(4) of the Act?

[para. 7.] Regardless of the manner in which the issue has been set down, I will consider the evidence of both the Applicant and the Public Body in deciding whether to excuse the Applicant from paying all or part of the fee.

### **IV. DISCUSSION OF THE ISSUES**

#### **ISSUE A. Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(a) of the Act?**

##### **1. The Law**

[para. 8.] Section 87(4)(a) 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,
- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment...

[para. 9.] There are two bases upon which the head of a public body can excuse payment of all or part of a fee under section 87(4)(a): an applicant's inability to pay, or any other justifying reason that is accepted by the head of the public body.

## **2. Summary of the positions of the parties**

[para. 10.] Environment argued that the Applicant failed to provide any evidence to support his argument that a fee waiver was justified because of his inability to pay the fee. Consequently, there was no basis for Environment to waive all or part of the fee and spend public money to supply the Applicant with the records.

[para. 11.] The Applicant admitted that he refused to provide personal financial information to Environment, partly because he dealt with several different persons and had no information about how his personal information would be assessed, used, kept or disclosed. The Applicant provided specific financial information about his income to me *in camera*.

## **3. Discussion**

### (a.) The Applicant's ability to pay

[para. 12.] I am sympathetic to the argument that a lack of information from Environment about how the Applicant's financial information would be handled discouraged the Applicant from disclosing his financial information. However, in Order 96-002, I noted that a public body is not in a position to know whether an applicant can afford to pay a fee. An applicant who asks for a fee waiver must provide some financial information to the public body, such as information about annual income or expenses, so that the public body can make an informed decision about whether to waive a fee. I encourage public bodies to provide information to applicants about how information supplied for a fee waiver will be assessed, used, kept and disclosed, in the hope that information will allay some fears on that score.

[para. 13.] The bottom line is that the Applicant refused to provide any personal financial information when the head of Environment was considering his application for fee waiver on the basis of an inability to pay. In those circumstances, I find that Environment properly exercised its discretion to refuse the Applicant's request for a fee waiver under section 87(4)(a).

### (b.) Other grounds for fee waiver under section 87(4)(a)

[para. 14.] The Applicant faulted Environment for failing to consider any other basis for fee waiver under section 87(4)(a). I see no other basis for fee waiver, and the Applicant offered no other basis. A public body should not ignore any obvious consideration under section 87(4)(a), but a public body is not in the best position to identify grounds for a fee waiver under section 87(4)(a). An applicant must assist the head of a public body as best he or she can to identify all possible grounds for a fee waiver under section 87(4)(a). As neither party identified any other basis for fee waiver under section 87(4)(a), and I see no other basis, my consideration is limited to the Applicant's ability to pay.

**ISSUE B. Did the Public Body exercise its discretion properly when it refused the Applicant’s request for a fee waiver under section 87(4)(b) of the Act?**

**1. The Law**

[para. 15.] The relevant provisions of section 87(4)(b) read:

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, including the environment or public health or safety

What is a matter of “public interest?”

[para. 16.] There is no statutory test for determining the extent of a public interest in records for the purposes of the Act.

[para. 17.] In Order 96-002, I said that public interest is not black and white: it is always a matter of degree. There is always a balance to be struck. Whether there is a public interest in records depends 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. 18.] Order 96-002 established two overriding principles and 13 non-exhaustive criteria to help assess whether records relate to a matter of public interest in the context of a fee waiver. These 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 seeking records should pay. The 13 criteria identified in Order 96-002 are these:

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, 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 the 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 public need 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. 19.] In Order 96-002, I agreed that the head of a public body, in exercising his discretion to waive fees, may apply such criteria as he or she sees fit. This list of 13 criteria amounts to a guideline to help assess the extent of a public interest in records. It is not a substitute for the individual head's exercise of discretion.

## **2. Discussion**

[para. 20.] The evidence shows that Environment wrote to the Applicant and invited him to make a submission on the two principles and 13 criteria. The Applicant replied with a submission, including two petitions in support of his application. By Environment's count, there were 91 signatures on the first petition, and 212 signatures on the second petition. The head of Environment considered the Applicant's submission, and the petitions, and found there was insufficient evidence that granting a fee waiver "would be in the public interest, beyond curiosity."

[para. 21.] Environment's decision to find against a public interest basis for fee waiver rested on several key points. Environment said that there was no compelling evidence of broad public interest in the records. Environment emphasized the lack of information it had from the Applicant to assess the extent of public interest in the records. It pointed out that for several of the criteria, the Applicant responded in a single, short sentence. Environment argued that the Applicant's concerns were too general. He did not identify a specific controversy or issue of public concern that would justify the use of public funds. As an internal memo submitted by Environment at inquiry put it, "[t]here is no discussion or review of the controversy or public interest that exists prior to his inquiry." There had been no other access requests for the information, and the two supporting petitions were vague. The public availability of existing policies, practices and proposals for

recreational development in the area sufficed. The public would not benefit from disclosure, as the information appealed to mere public curiosity. The Applicant had no track record under the Act to support his assertion that he would disseminate the records to others. A fee waiver would unduly burden the public purse.

[para. 22.] I take Environment's point that the Applicant's presentation of the public interest dimension was, at points, schematic and even cryptic. However, my overall impression is that Environment took a narrow and constrained approach to assessing the extent of a public interest in the records.

[para. 23.] When it refused the fee waiver, Environment disclaimed knowledge of any specific controversy or issue of public interest. I do not accept this, as given its mandate, the submissions and the evidence before me, Environment must have known of public concerns about the land exchanges and provincial involvement in facilitating developments in the area, which is regarded as an important regional wildlife area. In the inquiry submission provided by Environment, it spent a full page laying out what it considered to be the relevant background to the access request. That account reached back to the public hearing held by the Natural Resources Conservation Board in June of 1992 to assess the merits of Three Sisters' plan to build a recreational and tourism development in the Wind Valley/Canmore area. The account did not include contemporary evidence of ongoing interest in the land exchanges and its aftermath, such as the article dated August 1, 2000, from a local paper, the *Canmore Leader*, submitted by the Applicant in support of his fee waiver request. The article notes that more than 100 Canmore residents had signed a petition supporting the Applicant's fee waiver request to obtain records that would permit the Applicant to piece together a comprehensive picture of the transactions between the provincial Crown and Three Sisters. The two petitions submitted by the Applicant were treated dismissively, with Environment focusing on the fact that the petitions did not "grapple with the predominant issue of whether the free release of the information is in the public interest."

[para. 24.] Further, the Applicant's request was not so general as Environment claims. The request went in part specifically to records concerning valuation of the lands involved in the exchanges. The Applicant wanted financial information and agreements so that he could piece the transactions together and assess them. The evidence at inquiry indicated that Environment had never publicly released specific information about the valuations of the lands underlying the land exchanges. There is no evidence that the head of Environment considered its own knowledge of the ongoing public interest in the land exchanges, or the fact that it had not released specific information on the valuations, before the head of Environment denied the fee waiver.

[para. 25.] Environment's approach to exercising its discretion to deny the Applicant a fee waiver on the basis of public interest in the records is summed up at paragraph 64 of Environment's inquiry submission:

...the Applicant has not provided evidence to establish...that the records in question relate to a matter of public interest. Consequently, the head of AENV [Environment] does

not have the ability to excuse the Applicant from paying all or part of the fee.” [my emphasis]

[para. 26.] In reviewing Environment’s decision to deny the Applicant a fee waiver under section 87(4), I must look at whether Environment properly exercised its discretion to refuse a fee waiver. In Order 2000-021, I stated that legislated discretion amounts to the power to make a decision that cannot be determined to be right or wrong in an objective sense. Discretion amounts to the power to choose a particular course of action for good reasons and in good faith, after the decision-maker has considered: 1) the relevant facts and circumstances; 2) the applicable law, including the objects of the Act; and 3) the proper application of the law to the relevant facts and circumstances.

[para. 27.] The head of a public body should carefully turn his or her mind to the extent of a public interest in the records when assessing a fee waiver request, looking to the Act and all relevant facts and circumstances. As Wilson J. of the Supreme Court of Canada wrote in *Oakwood Development Ltd. v. Francois Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164 at paragraph 15 (“*Oakwood Development*”):

The question before the Court, in essence, is whether the Council exercised its discretion ‘according to law’ and in accordance with proper principles reflected in the ‘policy and objects of the [governing] Act’ .... As Rand J. said in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, any discretionary administrative decision must ‘be based upon a weighing of considerations pertinent to the object of the administration.’ .... The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, [1959] AC 663, at p. 693, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. .... The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfillment of its statutory decision-making function. [my emphasis]

[para. 28.] This passage from *Oakwood Development* emphasizes that applying the 13 criteria to an applicant’s case cannot substitute for a fully considered exercise of discretion. Nor can the head of a public body properly assess the extent of a public interest in records solely on the basis of the case made by the applicant, or on a selective consideration of the organization’s own knowledge and information. All of the relevant facts and circumstances, and the principles and objects of the Act, should be factored into the exercise of discretion to grant or to refuse a fee waiver under section 87(4)(b). Otherwise, the head of a public body cannot form a proper opinion about the extent of a public interest in the records, and cannot properly exercise the discretion granted under section 87(4)(b).

[para. 29.] This does not relieve an applicant of the burden of proving that the records relate to a matter of public interest in a fee waiver inquiry. It merely emphasizes that a public body must consider more than the facts and circumstances raised by an applicant. Section 87(4)(b) does not ask that a particular party bear the burden of proving a public interest in the record. Rather, it requires the head of a public body to form a proper



opinion about whether the record itself relates to a matter of public interest, and then decide whether to excuse the applicant from paying all or part of a fee. An applicant could fail to independently establish a public interest in the records sought, but the head of a public body could nonetheless look to all of the relevant facts and circumstances, the principles and objects of the Act, and exercise his or her discretion to find a public interest in the records under section 87(4)(b).

[para. 30.] In my view, Environment should have considered what other knowledge it had that was relevant to assessing the extent of a public interest in records. The evidence discloses that the head of Environment failed to truly consider and weigh all highly relevant facts and circumstances in light of the transparency principle before denying the fee waiver request under section 87(4)(b). In particular, the head should have considered that the government had never publicly released specific information about the valuations of the lands involved in the two land exchanges. The head should have considered Environment's own knowledge of the longstanding history of public interest and concern about the land exchanges, rather than simply taking the position that there was no controversy or public interest because the Applicant did not prove that there was one. Therefore, I find that the head of Environment did not exercise his discretion properly when he denied the Applicant a fee waiver under section 87(4)(b).

**ISSUE C: Should the Applicant be excused from paying all or part of the fee under section 87(4) of the Act?**

[para. 31.] Section 68 of the Act set out the order-making powers I have under the Act. The relevant portions of section 68 read:

68(3) ...the Commissioner may, by order...

...

(c) confirm or reduce a fee...in the appropriate circumstances...

[para. 32.] The wording "reduce a fee" in section 68(3)(c) allows me to substitute my own decision on whether to waive all or part of a fee, after looking at the evidence and the circumstances that existed when the Public Body denied a fee waiver, and at the time of inquiry. I can reduce or waive a fee whether or not the head of a public body exercised his or her discretion properly under section 87(4).

[para. 33.] I have carefully considered all of the relevant circumstances in deciding whether the records relate to a matter of public interest. In my assessment, there is a broad public interest in the records. In particular, the two petitions are compelling evidence on the extent of current public interest in the records. Environment minimized the evidentiary importance of those petitions, saying that they were vague and evidence of nothing more than public curiosity. I do not agree. Public interest is not simply a "numbers game": just amassing signatures on a petition does not by itself establish a public interest for the purposes of the Act. The number of signatures on the petitions was one element that I considered that weighed in favour of finding a public interest. I also

found the petitions more specific than Environment suggested. The preamble to the second, larger petition, stated that the Applicant was “being asked to pay an unreasonable amount of money for the release of information he has requested. CPAWS [the Canadian Parks and Wilderness Society] believes that this information should be freely available.” The petition continued:

*Petition:* We the undersigned support the application filed by [the Applicant] under the FOIPP Act...for the release of information regarding crown lands transferred between the province of Alberta and Three Sisters Resorts Inc. in their Exchange of Lands agreement. We believe the release of this information serves the public interest and fosters open and transparent government.

[para. 34.] Expressions of public interest, however imperfect, general or unsophisticated, should be taken seriously by public bodies and given their due weight. Most citizens do not know the Act well, and allowances must be made for the fact that public expressions of interest may not be tailored to the Act. Otherwise, the door to access will begin to swing shut.

[para. 35.] I also give considerable weight to the larger context in which the Applicant’s access request is made. It is common knowledge that there is a history of public interest and concern about commercial resort developments in the Canmore area, and the government’s role in facilitating development that has significant economic and ecological repercussions on the area. It is also common knowledge that land in the area is highly sought after in a commercial sense. The disposition of valuable Crown lands to a developer in that area, on an exchange basis, is bound to create concerns that can only be dispelled by bringing transparency to the transactions. There is a broad public benefit to gain from disclosing some of the records. (I note that the depth and breadth of public interest distinguishes this matter from the one I dealt with in Order 2001-017.)

[para. 36.] The Applicant has satisfied me that he has a sincere, persistent and non-commercial interest in the records, as well as the issues bound up in them. He impressed me as someone who would disseminate the information and the records as he outlined in the inquiry.

[para. 37.] Given the evidence and the relevant circumstances, I am prepared to find that the following records relate to a matter of public interest: (i) records pertaining to all assessment or valuation records for all lands exchanged pursuant to the 1990 and the 1994 Exchange of Lands Agreements, including all assessments or valuation records for options to purchase; and (ii) records pertaining to the reasons that the provincial government decided to enter into the 1990 and the 1994 Exchange of Lands Agreements. Therefore, I intend to reduce the Applicant’s fee by 80%. In coming to this decision, I took into account the fact that the transactions involved valuable public lands in an ecologically sensitive area, the transactions were on an exchange basis, and there is a longstanding public interest in the transactions.

[para. 38.] I do not intend to reduce the fee any further than 80% because I do not believe that all of the records relate to a matter of public interest (for example, records relating to property descriptions).

[para. 39.] Furthermore, I will not waive the remaining 20% of the Applicant's fee on the basis of an inability to pay. My rationale is simple. An applicant cannot refuse to provide information to a public body to justify a fee waiver under section 87(4)(a), and then expect me to waive the fee under that provision. That refusal is a relevant circumstance for me to consider in refusing to waive the fee under section 87(4)(a).

## **V. ORDER**

[para. 40.] I make the following Order under section 68 of the Act:

1. I find that the Public Body properly exercised its discretion to refuse the Applicant's request for a fee waiver under section 87(4)(a) of the Act.
2. I find that the Public Body did not properly exercise its discretion to refuse the Applicant's request for a fee waiver under section 87(4)(b) of the Act.
3. Under section 68(3)(c), I reduce the Applicant's fee by 80%, from \$1855.30 to \$371.06.

Robert C. Clark  
Information and Privacy Commissioner

*Postscript: Public bodies need to remember that this legislation is about making it possible for ordinary Albertans to access government records. A narrow and legalistic approach to the Act would undermine that larger purpose and close the door on access. A decision about the public interest dimension in records cannot be decided in a vacuum, away from what is going on in the real world. If such an approach were to prevail, much of the work that I have done as Information and Privacy Commissioner during the past six years to afford Albertans increased access to the workings of their government would be lost.*

