

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2002-003

October 30, 2002

TOWN OF PONOKA

Review Number 2229

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant requested a review of the fees charged by the Town of Ponoka for access to records. The Applicant felt that the fees should be waived because the records contained information about an issue that was of public interest. The Adjudicator determined that the records did not contain information that was of public interest and confirmed the \$25.00 fee charged to the Applicant by the Public Body.

Statutes Considered: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c-F-25, ss. 93(4) [previously section 87(4)]; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, s. 10(4).

Authorities Considered: AB: Order 96-002.

I. BACKGROUND

[para 1] On March 1, 2001, the Town of Ponoka (the Public Body) received an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) from the Applicant in which he requested records regarding a development application. The Applicant requested the following:

Please provide me with a copy of Council minutes or any other documentation showing that Council approved the exemption from road construction and the indemnification clause.

[para 2] The Applicant supplied the initial \$25.00 fee to the Public Body on March 6, 2001.

[para 3] On March 26, 2001, the Public Body wrote to the Applicant with a fee estimate of \$28.50 and requested an initial payment of \$14.25.

[para 4] On April 2, 2001, the Public Body acknowledged payment by the Applicant of \$15.00 and requested clarification of the records sought. The Applicant responded to this request on April 22, 2001.

[para 5] On May 16, 2001, the Public body responded to the Applicant's access request and informed the Applicant that time spent searching for records resulted in further fees of \$52.50. This brought the total to \$92.50. The Applicant paid the fee.

[para 6] On July 13, 2001, the Applicant wrote to the Office of the Information and Privacy Commissioner and requested a review of the Public Body's handling of his access request. Specifically, he complained that the \$92.50 fee was excessive. The Applicant did not specifically ask for a fee waiver in his letter.

[para 7] Mediation was authorized but was not successful. Somewhere in the mediation process, the issue changed from a review of excessive fees to a request for a fee waiver. The Public Body pointed out in its submission that the Applicant never made a formal request to the Public Body. I will deal with that matter as a preliminary issue in this inquiry.

[para 8] On December 4, this office sent a Notice of Inquiry to the parties. I decided to hold a written inquiry. In making my decision, I was made aware of the issues for the inquiry. I questioned how it was possible to have a fee of \$92.50 for a general request and asked the Portfolio Officer to check into the amount.

[para 9] On December 10, 2001, the Public Body refunded \$67.50 to the Applicant. The result of the refund was that the Applicant had now only paid the \$25.00 initial fee. The Applicant requested that the inquiry proceed to determine if he was entitled to a fee waiver of the initial fee.

[para 10] Both parties submitted written briefs, which were exchanged by this office. Both Parties submitted rebuttal briefs.

[para 11] The Revised Statutes of Alberta (R.S.A. 2000) came into force on January 1, 2002. Consequently, all section numbers in this Order reflect the new numbering. Where section numbers are listed, the previous number has also been included as follows:

section 10(1) [previously section 9(1)]. Unless otherwise noted, the text of each section remains the same.

II. RECORDS AT ISSUE

[para 12] This inquiry involves a request for fee waiver. The Applicant received all records responsive to his access request. Therefore, there are no specific records at issue.

III. ISSUE

[para 13] There is one issue for this inquiry:

Is the Applicant entitled to a fee waiver under section 93(4) [previously section 87(4)] of the FOIP Act?

[para 14] This fee consists of the \$25.00 initial fee, which was paid by the Applicant on March 6, 2001. The Public Body refunded all other fees to the Applicant.

IV. PRELIMINARY ISSUES

A. The Public Body

[para 15] In its initial brief, the Public Body argued that I do not have jurisdiction to hear this inquiry. They offered the following two arguments to support their position:

First, the Town has refunded the fee that is the subject of this Inquiry. The Town submits that to proceed with the Inquiry given this fact would not be in keeping with the spirit and intent of the Act.

The Town's second objection to this Inquiry proceeding is that [the Applicant] never asked the Town for a fee waiver or reduction in this case. The fee was refunded as a result of [the Applicant's] complaint to the Office that the fee was "excessive". As the Commissioner does not have original jurisdiction to make a determination with respect to a fee waiver or reduction, the Town submits that this inquiry ought not to proceed on this ground. There is no decision of the Town to review.

[para 16] In response to the Public Body's argument that the fee that is subject to this inquiry has been refunded, I would like bring to the Public Body's attention that this inquiry is now dealing with the \$25.00 initial fee which was paid to the Public Body by the Applicant and was not refunded. As this matter was being set up for inquiry, it was noted that the Public Body had charged the Applicant a total of \$92.50 for a general inquiry. The calculation of the fee appeared to be in conflict with section 10(4) of the

Freedom of Information and Protection of Privacy Regulation (FOIP Act Regulation), which states:

10(4) In addition to the initial fee, fees in accordance with Schedule 2 may be charged if the amount of the fees, as estimated by the public body to which the request has been made, exceeds \$150.

[para 17] As a result of this apparent miscalculation, I asked that the matter be referred back to the Public Body to see if this apparent miscalculation could be corrected and possibly resolve the matter without an inquiry. The Public Body decided to refund all but the initial fee. The Applicant decided to proceed to an inquiry over the \$25.00 initial fee. The Applicant is entitled to request an inquiry to determine if he is entitled to have the initial fee waived. The Public Body's refund of the overcharged fees does not constitute a loss of jurisdiction.

[para 18] On the issue of whether the Applicant ever formally asked the Public Body for a fee waiver, I would agree that the Applicant did not ask the Public Body for a fee waiver in writing. Likewise, the Public Body did not issue a written decision. However, there is nothing in the FOIP Act or the FOIP Act Regulation that requires an applicant to make a request for a fee waiver in writing. Likewise, there is nothing requiring a public body to respond to such a request in writing. While written requests and responses are the norm, they are not required.

[para 19] In the absence of written records, I must look at the particular circumstances of this case to determine if the request was made and if the Public Body responded. It is evident that both parties were conducting themselves as if the request had been made and denied. It is quite evident that the Applicant felt he was entitled to have the fees waived. Likewise, it is very evident that the Public Body had no intention of waiving the fees. Either party could have taken action to resolve this matter when the Public Body refunded the fees it had overcharged the Applicant.

[para 20] In my view, sending the matter back for the Applicant to put his request in writing would only delay the inevitable. The request would be made, the refusal would be written and the matter would be back in front of me for inquiry.

[para 21] In the absence of a requirement in legislation that a request for fee waiver or a response to such a request be in writing, I find that I have jurisdiction to hear this matter.

B. The Applicant

[para 22] In the Applicant's initial written submission, he set out an issue that was not contained in the Notice of Inquiry. The Applicant set out the following issue:

I am also asking the Information and Privacy Commission (sic) to determine if the Town of Ponoka has provided inaccurate information to both me and the Information and Privacy Commission (sic) in an attempt to suppress the truth.

[para 23] In clarification of this issue, the Applicant added the following:

The truth I am trying to establish is:

- *Senior Town of Ponoka Officials deliberately, in a concealed manner, mismanaged the affairs of the Town of Ponoka.*
- *Through this mismanagement they diverted hundreds of thousands of dollars of public funds into private pockets.*
- *There has been a cover up ever since. I believe it is reasonable to assume these town officials are benefiting from their actions.*
- *Their only defense has been to evade, deny and even lie to cover up the fraudulence. Through the Freedom of Information and Protection of Privacy Act I believe the truth is going to come out.*
- *The truth is in the Public Interest.*

[para 24] The FOIP Act does not grant the Commissioner the authority to determine whether the Senior Officials of the Town of Ponoka have mismanaged the affairs of the Town. Likewise, the FOIP Act does not give the Commissioner the authority to investigate or deal with matters that may be criminal in nature. Therefore, I will not deal with these issues in this Inquiry.

[para 25] In addition to the waiver of the \$25.00 initial fee paid to the Public Body for this access request, the Applicant stated in his written brief that he also wanted a refund of the \$391.00 paid to the Public Body on a previous request and a waiver of all future fees. There is no evidence before me that the Applicant has previously raised these matters with the Public Body. Since the Public Body has not had an opportunity to make a decision on either of these matters, there is no decision for me to review. Therefore, I will not deal with the refund of previous fees paid to the Public Body or any future fees that may be assessed by the Public Body in future access requests by the Applicant.

V. DISCUSSION OF THE ISSUE

[para 26] The only matter to be dealt with in this inquiry is whether the Applicant is entitled to a fee waiver under section 93(4) [previously section 87(4)] of the FOIP Act. Section 93(4) [previously section 87(4)] states:

93(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.

[para 27] There are three reasons for which the head of a public body may excuse fees. The first, as set out in subsection (a), is if the Applicant cannot afford to pay. The second, as set out in subsection (b), is if the record relates to a matter of public interest. Subsection (a) also grants the head of a public body the discretion to excuse fees for any other reason that is fair. The Applicant raised the issue of public interest as the reason to excuse the fees. Therefore, I will not deal with subsection (a) as it relates to inability to pay or for any other reason that is fair.

A. Do the records requested deal with a matter of public interest?

[para 28] The issue at the core of the Applicant's request to the Public Body is a development agreement reached in 1989 between the Town of Ponoka and a land developer. The Applicant appears convinced that there was some type of wrongdoing by the Town officials in relation to this development. The Applicant alleges that the wrongdoing has cost the taxpayers a large amount of money and that a continuous cover-up has followed the original wrongdoing. He argues that holding people responsible and getting to the truth is in the public interest. I must therefore, determine if the records relate to a matter of public interest.

[para 29] The Commissioner has dealt with public interest in several previous Orders in which he has stated that public interest is determined by weighing the factors of each specific situation. In Order 96-002, the Commissioner set out a list of 13 criteria that he believed are relevant in determining whether the records relate to a matter of public interest. The Public Body worked through this list in its initial submission. The Applicant dealt with the list and the Public Body's responses in his rebuttal.

[para 30] I found it helpful to work through the 13 criteria and each party's response to each criterion in reaching my decision regarding public interest. The 13 criteria are:

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

[para 31] The Public Body stated that they are unsure of the Applicant's motivation. The Public Body stated that it has repeatedly tried to work with the Applicant to address his concerns. The Public Body argues that the Applicant's repetitive requests are an indication of a private motivation, which mitigates against a fee waiver.

[para 32] The Applicant argued that the Public Body does know what motivated his requests. The Applicant took exception to the Public Body's statement that it has made attempts to try to satisfy his concerns. He then went on at great length in an attempt to prove to me that the Public Body is lying. I take all of his information on this matter to mean that he believes that there has been wrongdoing and that there have been repeated cover-ups. Therefore the Applicant would like me to conclude that his actions are in the public interest.

[para 33] There is evidence before me that the Applicant has reported the alleged wrongdoing to the RCMP and Alberta Municipal Affairs. The Applicant questioned

whether appropriate investigations have been carried out. In any event, the Applicant is obviously not satisfied with the results of his complaints to these bodies. I conclude from this that the Applicant is convinced that he is motivated by the greater public good. What is less clear is whether anyone else shares his concerns. The Applicant did not offer any evidence that this is an issue for anyone else. Therefore, I conclude that this issue has become the Applicant's personal issue. This weighs against a finding of public interest.

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

[para 34] The Public Body argued that, since there is no record remaining to be released, the matter of public interest from disclosure does not directly arise. They further argued that there is no evidence that anyone else has benefited from the Applicant's requests.

[para 35] The Applicant argued that the public would benefit if they were told the truth. The Applicant offered no evidence about the benefit to others from specific records received.

[para 36] In this case, the Applicant paid the fees and was given the records that were responsive to his request. There is no evidence before me that the records received were of interest to anyone but the Applicant. This weighs against a finding of public interest.

3. Will the records contribute to the public understanding of the issue?

[para 37] The Public Body made the same argument as it did for criterion 2. The Applicant stated that the Public Body's response to this criterion was further evidence that it is trying to mislead me in my decision. There is no evidence before me that the records released to the Applicant contributed to a greater understanding of the issue. This weighs against a finding of public interest.

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

[para 38] The Public Body answered no to this question. The Applicant offered general statements in support of this criterion. He did not relate his answer to the specific records at issue. This weighs against a finding of public interest.

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

[para 39] The Public Body pointed out that the Applicant's recent requests have resulted in the Applicant being assessed a fee which the Applicant paid. The Public body also pointed out that the Applicant has had access to files on the same topic at no charge. The Applicant complained about having been charged \$.50 a page for some records in the past. He did admit, however, to being given "a lot of information" at no charge through two town councilors. This weighs against a finding of public interest.

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

[para 40] The Public Body agrees that the Applicant has persisted in obtaining records. However, they argued that the Applicant continually asks for records that he has been told do not exist. The Public Body also submitted that it has not received requests for the same information by anyone else.

[para 41] The Applicant affirmed that he would continue to pursue the information he wants. He pointed out that the Public Body seems to contradict itself. The Applicant stated that the Public Body says that he continues to ask for information that does not exist while also stating that he has received all of the documents. The Applicant asked for clarification.

[para 42] There is a difference between information and records, or documents, as the Applicant refers to them. It is entirely possible that the Public Body has given the Applicant all of the records pertaining to his request. However, if the records do not contain all of the information that the Applicant perceives should be there, he may believe that the Public Body must have further records. In my view, that is the situation here. It really does not matter how many times you ask for records that do not exist. The Public Body cannot disclose what it does not have. One person asking for the same non-existent records does not make the issue a matter of public interest. This weighs against a finding of public interest.

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

[para 43] The Public Body sent a copy of the Editor's Note from the October 8, 2001, edition of *The Ponoka News*. Referring to an ongoing letter writing campaign between the Applicant and the Mayor, the Editor states,

In fairness to participants on both sides and for the sake of the health and well-being of all concerned, The Ponoka News is imposing a ceasefire in this public battle in the letters to the editor portion of this paper.

[para 44] The Public Body offered this passage as evidence that the community is tired of hearing about this issue.

[para 45] The Applicant argued that when the truth comes out, it would contribute to public debate. He also offered that he heard a rumor that "Town Officials" had threatened the paper.

[para 46] I find it incredible that the Applicant believes that Town Officials' threats to the paper would have caused the paper to refuse further letters from either the Applicant or the Mayor on this topic. The Editor clearly did not take sides against the Applicant. In my view, this is pretty strong evidence that the community is tired of hearing about this issue. This weighs against a finding of public interest.

8. Would the records be useful in clarifying public understanding of government issues?

[para 47] The Public Body reiterated its response to criterion 7. The Applicant stated that “the truth would blow the lid off of the public’s understanding of local issues.” There is no evidence before me that the records were of any assistance in clarifying the public’s understanding of any issue. This weighs against a finding of public interest.

9. Do the records relate to a conflict between the applicant and the public body?

[para 48] The Public Body offered that the debate between the Mayor and the Applicant could be perceived as a conflict. The Applicant points out that the Mayor is not the issue here.

[para 49] In my view, both parties missed the point of this criterion. The records at issue are not about a conflict between the Applicant and the Public Body. Generally this would indicate that there is a larger, more public focus to the issue and not a personal issue. This factor would generally weigh in favor of a finding of public interest. Given that there is little evidence to support a finding of public interest under other criteria, I do not intend to place much weight on this criterion in my decision.

10. Should the public body have anticipated the need of the public to have the record(s)?

[para 50] The Public Body stated that records related to this request have been released. The Public Body stated that it did not feel that it would be reasonable for them to anticipate this specific request. The Applicant stated that he felt that the Public Body was not being truthful. He indicated that the Public Body knew that he has been after this information since 1989.

[para 51] Again, I believe that both parties missed the point. This criterion deals with the public’s need to see the records. There is no evidence before me that anyone other than the Applicant is interested in the records. This weighs against a finding of public interest.

11. How responsive has the public body been in 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 the information or did the public body help the applicant narrow the request so as to reduce costs?

[para 52] The Public Body submitted that it met its obligations under the FOIP Act. The Applicant countered that some records had been withheld and that attempts on behalf of the Public Body to clarify his request were done to “skew my request”. No specific evidence was offered by the Applicant to support his views.

[para 53] There is insufficient evidence before me that would lead me to a conclusion either for or against a finding of public interest. Therefore, I do not intend to give much weight to this criterion.

12. Would the waiver of the fee shift an unreasonable burden of cost from the applicant to the public body?

[para 54] The Public Body conceded that the small value of the fees would not shift an unreasonable burden. The Applicant was silent on this criterion.

[para 55] The fee that the Applicant seeks to have refunded is \$25. Waiving the fee would not shift an unreasonable burden to the Public Body. The small amount of the fee is of little assistance in deciding whether the records contain information in the public interest. Therefore I do not intend to put much weight on this criterion.

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

[para 56] The Public Body argued that this criterion has little relevance because there are no records to be produced. The Applicant guaranteed that he would do his best to disseminate the contents. He went on to state, “there may be no records but that alone is very interesting”.

[para 57] Again, I believe that both parties missed the point of this criterion. The records that are the subject of this request for a fee waiver have already been given to the Applicant. There is no evidence before me that the Applicant disseminated the contents of the records that he received from this access request. This weighs against a finding of public interest.

B. Conclusion

[para 58] In working through the 13 criteria, both parties occasionally lost sight of the specific issue for this inquiry. This may be somewhat understandable when their common history is taken into account. However, the issue was whether the Applicant was entitled to a fee waiver on this specific access request. The records for this access request have been released to the Applicant.

[para 59] I have considered the arguments of both parties regarding whether the records relate to a matter of public interest. The evidence does not support a finding of public interest. I find that the Applicant is not entitled to a fee waiver under section 93(4) [previously section 87(4)] of the FOIP Act.

VI. ORDER

[para 60] I make the following order under section 72(3)(c) [previously section 68(3)(c)] of the FOIP Act.

[para 61] I confirm the \$25 initial fee charged to the Applicant by the Public Body.

Dave Bell
Adjudicator