

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2003-024

December 14, 2004

ALBERTA EXECUTIVE COUNCIL

Review Numbers 2749

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

Summary: The Applicant made a request for access to information under the *Freedom of Information and Protection of Privacy Act* (the “Act”) related to comments attributed to the Premier on the topic of abortion. Alberta Executive Council (the “Public Body”) conducted an initial search for records and estimated fees at \$837.00. The Applicant asked for a fee waiver on the ground that the records relate to a matter of public interest. The Public Body refused the request. The Adjudicator found that the records do not contain information that relates to a matter of public interest and the Applicant should not be excused from paying the fee under section 93(4)(b) of the Act.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 93(4), 93(4)(a), 93(4)(b), and 72.

Orders Cited: AB: 96-002, 2001-015, 2002-023, F2003-011 ON: M-403

I. BACKGROUND

[para 1] By letter of April 15, 2003, the Applicant made an access request to the Office of the Premier for information under the *Freedom of Information and Protection of Privacy Act* (the “Act”) related to nine questions set out in the Applicant’s previous letter to the Premier, dated December 16, 2002. The Applicant enclosed a \$25.00 fee. The original request was revised as a result of a telephone conversation between the Applicant and Alberta Executive Council (the “Public Body”). This was confirmed in a

letter from the Public Body to the Applicant on April 28, 2003. The revised request was as follows:

Copies of all records that evidence (1) Premier Klein being 'officially informed in or about 1995 that all abortions are medically required', (2) communications from the federal government over the issue of facility fees, and specifically, whether eye centers or abortion clinics were referenced, and (3) legal opinion on the manner of de-insuring abortions. The time period of this request is October 1, 1994 to December 31, 1998.

[para 2] In the April 28, 2003 letter, the Applicant was advised that the total estimate of fees for processing his request was \$837. The Applicant requested a waiver of the fee, which was denied by the Public Body by letter on June 3, 2003.

[para 3] The Applicant asked the Commissioner to review the refusal of a fee waiver by letter dated June 5, 2003. Mediation was authorized, but was unsuccessful.

II. RECORDS AT ISSUE

[para 4] As this is a fee waiver inquiry, the records are at issue only to the extent that I must consider whether they relate to a matter of public interest. The Public Body supplied me with what it stated was a representative sample of records obtained through a preliminary search.

III. ISSUE

[para 5] There is one issue in this inquiry:

Should the Applicant be excused from paying all or part of a fee under section 93(4) of the Act?

IV. DISCUSSION OF THE ISSUE

[para 6] The relevant provisions of section 93 of the Act state:

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 7] Section 93(4) provides for three categories under which a fee may be waived by the head of a public body: where an applicant cannot afford to pay, where the record relates to a matter of public interest, and for any other reason it is fair to excuse payment. The evidence required to support each of these categories is different. Therefore, in reaching a decision about a fee waiver, the head of a public body must consider the criteria required for an applicant's specific request.

A. Should the Applicant be excused from paying all or part of a fee under section 93(4)(a) of the Act?

[para 8] I note that in the Applicant's letter of May 29, 2003, the Applicant specifically made his request for a fee waiver citing public interest. The Public Body's response on June 3, 2003, specifically addressed the public interest issue when declining to grant a waiver. Since the Applicant did not specifically address the issue of ability to pay, the Public Body made no decision related to that issue.

[para 9] In the Applicant's request for review to this office, he focused on the public interest issue and set out his responses to the 13 questions set out in Order 96-002. In his letter requesting a review, the Applicant stated, "While I could afford to pay this amount if I choose to, I feel it is information that should be available without cost..." Consequently, ability to pay was not an issue for the Applicant prior to the inquiry.

[para 10] In his rebuttal submission, the Applicant commented on his ability to pay. He pointed out that he is only one person in contrast to being a group or organization. He asked how the Public Body decided whether he could afford payment, since he was not asked. He indicated that he "could suggest that as a senior on fixed income paying for this fee would mean that I might need to go without something else". He said the Public Body had "taken liberties" in suggesting that he could pay the fee, and that "This was not a definitive statement that ... [he] could pay them and if so how much and whether or not it would be some kind of sacrifice."

[para 11] The Applicant's suggestion that the Public Body had "taken liberties" in stating that he could afford to pay appears to raise the issue of whether a public body has a duty to ask an applicant about his or her ability to pay.

[para 12] In many cases, an applicant will simply ask for a waiver of fees without specifying one of the categories set out in section 93(4) of the Act. In my view, when no specific category is stated, it is reasonable to expect a public body to ask an applicant under which category their request is made and, if necessary, to explain the categories to an applicant. However, when an applicant is specific about his or her reason for a request to waive fees, it is reasonable for a public body to make a decision only for the specific request made. When burden of proof is taken into account, this conclusion is strengthened.

[para 13] In Order F2003-011 the Commissioner said:

In a fee waiver application, the burden of proof lies on the Applicant to establish an inability to pay, because the Applicant is in a better position to provide proof of his financial circumstances: Orders 96-002, 2001-015, 2001-023.

[para 14] To discharge his or her burden, an applicant must provide personal financial information for the public body to properly decide whether an applicant can afford to pay the fees. This process can be very intrusive and is often viewed by applicants as a breach of their privacy. Therefore, it would be inappropriate for a public body to inquire about an applicant's ability to pay unless the issue is raised by the applicant.

[para 15] In this case, the Applicant was clear that he was making the request for a fee waiver because, in his opinion, it was in the public interest to waive fees. The Public Body was correct to proceed on that basis.

[para 16] The Applicant has not offered any evidence to support his suggestion that he should be excused from paying a fee because he cannot afford to pay. His late suggestion is also in direct contradiction with the statement he made in his request for review which stated:

“While I could afford to pay this amount if I choose to, I feel it is information that should be available without cost...”

[para 17] I find that the Applicant should not be excused from paying the fee under the provisions of section 93(4)(a) of the Act.

B. Should the Applicant be excused from paying all or part of a fee under section 93(4)(b) of the Act?

[para 18] In his letters and submissions, the Applicant has put forward a number of issues of concern to him that he says are matters of public interest. However, the question for this inquiry is not whether matters in which the Applicant has an interest are important or are of public interest. Rather it is whether the *records are related to* a matter of public interest.

[para 19] In Order 96-002 the former Commissioner stated:

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 20] As I understand it, the Applicant's primary concern is with the "legal recognition of the unborn" and "rights of the unborn." He is also concerned with whether abortions should be "insured", that is, funded through public health insurance. As well, he raises the matter of provincial funding of facility fees for abortions performed in private clinics.

[para 21] The Applicant says his purpose in seeking the requested 'official information' is to enable him to place under scrutiny the contention that 'all abortions are medically necessary', and any scientific or other rationale the 'official information' contains. It appears that the Applicant hopes to refute the contention in the 'official information'. Presumably he believes this exercise could help support a legal or political argument in favour of granting rights to the unborn, and/or of de-insuring those abortions that are not 'truly' medically necessary. This idea is expressed in the Applicant's rebuttal submission where he says: "The fact there is not evidence to support the statement attributed to the Premier, will be a benefit to the public, as it will allow for pressures to redirect these health care dollars."

[para 22] The Public Body argues that the Applicant's beliefs about provincial policy are not well-grounded. As the February 7, 2003, letter to the Applicant from the Deputy Chief of Staff explains, in Alberta, only medically necessary abortions are funded, and the determination of medical necessity is made by medical professionals according to guidelines issued by the College of Physicians and Surgeons.

[para 23] The Public Body contends that Alberta's policy respecting inclusion of abortions under the health care scheme is based on considerations, pointed out by the provincial health Minister in his letter to the Applicant of October 15, 2002, that are quite unrelated to ideas held by officials about the medical necessity of abortions. The Minister's letter refers to Charter and jurisdictional considerations. Court decisions striking down prohibitions on abortion under the Criminal Code by reference to the *Charter of Rights*, and denying the jurisdictional capacity of a province to prohibit and de-insure abortions, have placed serious constraints on provincial decision-making in this regard. As the Minister indicates in his letter, the province has been governed by these constraints.

[para 24] Therefore, it appears that even if the 'official information' sought by the Applicant could be found and scrutinized, it would be largely irrelevant to the discussion or resolution of Alberta policy on the abortion issue.

[para 25] In Order 96-002, the former Commissioner 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. 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 seeking records should pay. In Adjudication Order #2, Justice McMahan added "accountable" to the first principle, revising it to read "to foster open, transparent, and accountable government."

[para 26] The 13 criteria identified in Order 96-002 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, 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 27] With respect to the burden of proving a public interest in the records, in Order 2001-23 the former Commissioner held that this burden does not lie exclusively upon an applicant. He said:

... Section 87(4)(b) [now section 93(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) [now section 93(4)(b)].

[para 28] Both the Applicant and Public Body worked through the 13 criteria set out by the former Commissioner in Order 96-002. What follows is a summary of the positions expressed by both parties related to the criteria, followed by my comments and conclusions:

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

[para 29] The Applicant says he is acting on behalf of the unborn, who can not speak for themselves, and who are part of the 'public'. His ultimate goal is to obtain legal recognition and status for the unborn. He says his only gain will be his joy at seeing the eventual declaration that the unborn are persons.

[para 30] In his rebuttal submission the Applicant also mentions that his issues are of ongoing concern to groups like Friends of Medicare and others.

[para 31] The Public Body submits that the Applicant's interest in this matter is of a private nature.

[para 32] On the face of it, the Applicant's motivation is not selfish or purely private. However, the interest he seeks to advance is peculiar to a group of people who believe in a particular cause and wish to advance it. Given the widely differing views on the topic of abortion held by the public, the Applicant's interests relative to these issues he raises do not coincide with the general public's interests.

[para 33] This factor weighs neither in favour of nor against a fee waiver.

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

[para 34] The Applicant says it is the unborn, which he states numbered 10,417 in 2000, who will benefit from disclosure. He also says many adult citizens of Alberta would be interested and supportive of the request. In his rebuttal submission, the Applicant mentions a benefit to others seeking backlogged medical procedures if medically-unnecessary abortions were not funded. He also reiterates his idea that showing there is no evidence to support the statement attributed to the Premier will be a benefit to the public as it will allow for pressures to redirect health care dollars.

[para 35] The Public Body argues that documents related to medically necessary abortions, facility fees, and de-insuring abortions will have little or no effect on the status of the rights of the unborn. It says the Applicant has not provided evidence that the public will benefit from the disclosure.

[para 36] The benefits expressed by the Applicant cannot be attributed directly to the disclosure of records. It appears the Applicant is hoping that disclosure will result in a change to policy by the government which will then result in the benefits that he put forward. In my view, it is highly unlikely any responsive records held by the Public Body would contain information, even if refuted, that could cause the type of radical policy change envisioned by the Applicant. Therefore, I conclude that disclosure would not bring about the potential benefits expressed by the Applicant.

[para 37] This factor does not weigh in favour of a fee waiver.

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

[para 38] The Applicant believes the documents will provide specific information about issues on which both provincial and federal politicians have been vague and “buck passing”.

[para 39] The Public Body says the Applicant has not provided evidence that the records will contribute to a public understanding of an issue. It says the Minister of Health has been clear in his correspondence to the Applicant about the Province’s policy on “this matter”, specifically, that legal reviews have opposed de-insuring abortions due to potential jurisdictional and Charter implications, and that facility fees for abortions in private facilities were judged by the federal government to be in violation of the *Canada Health Act*.

[para 40] This criterion relates to “open, transparent, and accountable government” as it relates to the specific information requested. The Applicant has offered no evidence to support his apparent views that the Public Body is not being open, transparent, and accountable about his topics of interest. Likewise, he has not been clear about any public understanding that would result from the disclosure of these specific records.

[para 41] This factor does not weigh in favour of a fee waiver.

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

[para 42] The Applicant says the information he seeks “might cause others to question the answers government gives us and to have more accountable answers in the first place”.

[para 43] The Public Body says the Applicant has provided no evidence the documents have any particular potential to do what he contends.

[para 44] The Applicant's argument on this point is obscure. In the absence of specifics, it is difficult for me to conclude that disclosure of the specific information requested could result in any research or improved public understanding of the operations of government.

[para 45] This factor does not weigh in favor of a fee waiver.

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

[para 46] The Applicant said he is unaware of any access having been given at no cost.

[para 47] The Public Body said it has not given access, at no cost, to the kinds of documents in question. It also indicated that this is because there have been no other requests.

[para 48] There does not appear to have been any other requests for the information specifically requested by the Applicant. Therefore, this factor weighs neither in favour nor against a fee waiver in this case.

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

[para 49] The Applicant says that the material he provided shows that he has been persistent. He suggested, but did not demonstrate, that similar requests have been made by others, such as Friends of Medicare.

[para 50] The Public Body has no record of any earlier requests or any other attempts to obtain the requested documents through investigative or other means.

[para 51] In its rebuttal, the Public Body submitted that the Applicant's submission regarding his unsuccessful efforts to generate interest by other groups reveals an apparent lack of interest in the information requested. The Public Body also challenges the validity of statistics cited by the Applicant regarding the level of interest in the issues about which he is concerned.

[para 52] The reference made by the Public Body to the Applicant's inability to generate interest came in a statement in the Applicant's initial submission, which reads:

For example I have called the Friends of Medicare for information about their polls or back up their statements on the level of interest of the public in the Government's statements that all abortions are medically required and therefore should be paid for from health care funds, but they have not got back to me.

[para 53] The statistics presented by the Applicant were from the Alberta Pro-Life website and relate to the number of Albertans who believe that life should be protected at conception and the number who were interested in the unborn. However, the Applicant failed to demonstrate that the records requested relate directly to these specific interests.

[para 54] The absence of requests for these documents by persons other than the Applicant suggests there is not a wide public interest in the specific information requested.

[para 55] This factor does not weigh in favor of a fee waiver.

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

[para 56] The Applicant says: "When the courts struck down sections of the criminal code [sic] dealing with the unborn, they charged governments to put forth replacements. The government has not done this. The request would further that debate and action would be a material resolution to at least one side of the issue."

[para 57] The Public Body acknowledged that debate over funding abortions may recur, but denied that the disclosure of the documents sought would contribute to the public dialogue on the matter. It also reiterated the reasons, already communicated to the Applicant, behind the existing provincial policy on the matter of insuring or de-insuring abortions, and on the matter of funding facility fees in private clinics.

[para 58] The Applicant's argument is again somewhat obscure. The Applicant gives no indication of how the documents he requested would further the debate on or offer resolution of the issues dealt with by the courts in the court case to which he refers. I do not see how any of the specific records would be useful in developing "replacements" for constitutionally invalidated federal criminal legislation.

[para 59] This factor does not weigh in favor of a fee waiver.

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

[para 60] The Applicant says that "Many people do not understand how the government can continue to put forth an understanding that is not specific or supported by modern science and historical understanding".

[para 61] The Public Body says that the government has clearly stated its policy on this matter. Citing Ontario Order M-403, it adds that the Applicant has not demonstrated how disclosure of the records would result in a public benefit by disclosing a public health or safety concern or contributing meaningfully to the development of understanding of an important public health or safety issue.

[para 62] By adopting policy to fund facility fees for abortions in private clinics, and to include medically necessary abortions under the health care insurance scheme, the government can be said to have established the public understanding relative to these issues. However, the Public Body's position is that funding of facility fees for abortions is based on factors other than the 'medical necessity' principle allegedly expressed in the records requested by the Applicant. As the Public Body has pointed out to the Applicant, the policy is based primarily on the fact that continued transfer payments from the federal government to the province were conditional on payment of these fees. It is therefore unlikely that the records requested would be useful in clarifying public understanding of the issues set out by the Applicant.

[para 63] This factor does not weigh in favor of a fee waiver.

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

[para 64] The Applicant says there is no personal conflict.

[para 65] The Public Body denies any conflict.

[para 66] At most the documents relate to a difference of opinion between the applicant and the government as to the propriety of funding abortions under provincial health insurance. This factor weighs neither in favour nor against a fee waiver in this case.

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

[para 67] The Applicant says the Public Body should have anticipated the need, commenting that a large segment of the public does not feel they receive full disclosure on these issues. He takes issue with the Public Body's submission that a "public health and safety" concern has not been shown, pointing out the Act does not require this. He also points to Bill 11 as an indicator of public interest relative to the 'basic issue'.

[para 68] The Public Body denies this need on the basis that the documents do not relate to matters of public health or safety or any matter of urgent public interest. The

Public Body also notes the absence of requests for the documents by anyone other than the Applicant.

[para 69] The abortion issue has many facets. On the face of the limited evidence before me, it is difficult for me to conclude that the Public Body could anticipate that anyone would have a need for the specific information requested by the Applicant. I agree with the Applicant the absence of a public health and safety issue does not preclude a finding of public interest. However, it is insufficient for the Applicant to argue for a finding of public interest based on broad statements about a large number of people being interested in the general issue of health care funding without drawing at least a reasonable link between the records sought and the issues ascribed to them.

[para 70] This factor does not weigh in favor of a fee waiver.

11. How responsive has the public body been to the applicant's request?

[para 71] The Applicant says the Public Body was not responsive initially, but became so eventually, helping to narrow the request. He adds in his rebuttal that the Premier's office staff, other than the FOIP officer, was less understanding and made unacceptable remarks. He also argues that it is wrong to argue reduction of the original request or estimate as a point against fee waiver.

[para 72] The Public Body says it helped the Applicant narrow the request so as to reduce costs and the subsequent fees that would be charged to the Applicant.

[para 73] It is evident that the Applicant's first letter was not processed as a request for specific records but rather as a request for general information. Initially, the Applicant's correspondence was sent to Alberta Health and Wellness. The Applicant was sent a letter from the Minister which explained the government's policy decisions regarding the funding of abortions. After additional correspondence, the Applicant made a formal request under the Act for general information from the Public Body. This was accompanied by a cheque for the initial fee for general information. From that point on, it appears that the Applicant is reasonably satisfied with the Public Body's response.

[para 74] There is no evidence before me that the referral of the Applicant's correspondence by the Office of the Premier to Alberta Health and Wellness was done for any other reason than to best address his concerns. It would be impossible for the Office of the Premier to address every request from a citizen as a formal FOIP request. Most concerns can be addressed in a less formal fashion. I can understand that the Applicant may not have found this to be a particularly helpful process when he did not want the information offered. However, there is nothing before me that would cause me to conclude that a fee waiver should be granted on the basis of his treatment by the Public Body.

[para 75] This factor weighs neither in favour nor against a fee waiver in this case.

12. Would the waiver of the fee shift an unreasonable burden on the cost from the applicant to the public body, including other programs of the public body?

[para 76] The Applicant stated that the fee was not an unreasonable amount for government to pay in the interest of fairness, open government and reasonable access to an individual citizen.

[para 77] The Public Body concedes that a fee waiver would not shift an unreasonable burden of cost.

[para 78] This factor weighs in favour of a fee waiver.

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

[para 79] The Applicant provides assurance that he will share the information with others as he comes into contact with them while pursuing common interests, and that he will try to get rights for the unborn. He also says he will continue to try to get the press interested, though commenting that the press may not be interested in issues that are “not politically correct”.

[para 80] The Public Body says the press is not interested in the issue.

[para 81] I accept that the Applicant intends to share the information that would be disclosed to him in response to his request. I also respect his motivation. However, it is clear from his comments that the Applicant has doubts about his own ability to provoke sufficient interest in this specific issue. It does not appear likely that the records will be widely disseminated.

[para 82] This factor weighs only slightly in favour of a fee waiver.

Conclusion

[para 83] I do not dispute the Applicant’s belief that abortion and the rights of the unborn are important issues. However, in order to be entitled to a waiver of fees under this provision of the Act, there must be more than a passing connection between the information sought and the larger issue of public interest. It is reasonable for taxpayers in general to pay for disclosure costs when it is clear that the information to be disclosed would be of interest to the public at large. However when the information is only of

special interest, or of interest to a small segment of the population, it is reasonable for the requester to pay the fees related to disclosure.

[para 84] Having weighed the criteria that assist in determining whether the information requested by the Applicant relates to a matter of public interest, I find that the requested information does not fall within section 93(4)(b) of the Act. Therefore, I find that the Applicant should not be excused from paying the fee under section 93(4)(b) of the Act. I am also satisfied that the Public Body properly came to the conclusion not to waive fees for the Applicant's access request.

V. ORDER

[para 85] I make the following Order under section 72 of the Act.

[para 86] I find that the Applicant should not be excused from paying the fee under section 93(4)(a) of the Act (inability to pay).

[para 87] I find that the Applicant should not be excused from paying the fee under section 93(4)(b) of the Act (public interest).

[para 88] I confirm the Public Body's decision not to waive fees.

Dave Bell
Adjudicator