

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2004-002

February 23, 2005

ALBERTA RESTRUCTURING AND
GOVERNMENT EFFICIENCY

Review Number 2717

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Summary: The Applicant requested records related to contracts between Tecskor Software Inc. and Alberta Innovation and Science. Those records are now in the custody and under the control of Alberta Restructuring and Government Efficiency (the “Public Body”). The Public Body estimated fees for service at \$433. The Applicant requested a waiver of fees on the basis that the records relate to a matter of public interest. The Applicant also questioned whether the fees were properly estimated.

The Adjudicator found that the records do not relate to a matter of public interest and confirmed the Public Body’s decision not to waive the fees. The Adjudicator also found that the fees had been properly estimated.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72, 93(4)(b); *Freedom of Information and Protection of Privacy Regulation* AR 200/95, s. 12, Schedule 2.

Authorities Cited: AB: Orders 96-002, 97-001, 99-024, 2001-017 and Adjudication Order No. 2

I. BACKGROUND

[para 1] The Applicant made an access request to Alberta Innovation and Science under the *Freedom of Information and Protection of Privacy Act* (the “Act”).

[para 2] The records requested by the Applicant relate to Tecskor Software Inc. (“Tecskor”) between January 1, 2001 and January 2, 2003. The Applicant requested the following:

- copy of departmental disbursements to Tecskor
- copy of any final contracts between Tecskor and Alberta Innovation and Science
- records demonstrating the selection or decision making process relating to any purchase or contract between Tecskor and Alberta Innovation and Science
- reports or appraisal of Tecskor services

[para 3] Alberta Innovation and Science provided an initial fee estimate of \$433 over and above the \$25 initial fee paid by the Applicant. The Applicant requested that Alberta Innovation and Science waive the fees on the basis of section 93(4)(b) of Act, that “the record relates to a matter of public interest”. Alberta Innovation and Science declined the request for a fee waiver on the basis that there was not sufficient evidence to indicate that the requested records related to a matter of public interest.

[para 4] The Applicant requested the Information and Privacy Commissioner review the decision of Alberta Innovation and Science and asked that the estimated fee of \$433 be waived. Mediation was authorized but was unsuccessful.

[para 5] The matter was set down for written inquiry. Both parties submitted initial briefs. The Applicant did not provide a rebuttal submission.

[para 6] On January 7, 2005, this Office was notified that the requested records are now in the custody and under the control of Alberta Restructuring and Government Efficiency (“the Public Body”).

II. RECORDS AT ISSUE

[para 7] The records consist of an estimated 220 pages, which include six contracts between the Public Body and Tecskor and the report of monthly payments to Tecskor by the Public Body. The Public Body sent copies of the contracts and a representative sample of other records in its *in camera* submission to this inquiry.

III. ISSUES

[para 8] There are two issues for this inquiry:

- A. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?
- B. Did the Public Body properly estimate the fees for service?

IV. DISCUSSION OF THE ISSUES

Issue A. Should the Applicant be excused from paying all or part of a fee as provided by Section 93(4) of the Act?

[para 9] The Applicant requested a fee waiver on the basis that the records relate to a matter of public interest under section 93(4)(b) of the Act, which 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,

(b) the record relates to a matter of public interest, including the environment or public health or safety.

[para 10] This office has had many occasions to consider the meaning of public interest under section 93(4)(b) and its predecessors, and how that should be applied in the context of an application for a fee waiver; see for instance Orders 96-002, 97-001, 99-024, and 2001-017. As well, Mr. Justice McMahon, sitting as an adjudicator, analyzed the meaning of public interest in Adjudication Order No. 2, May 24, 2002.

[para 11] The previous decisions considering the meaning of public interest identified an approach to be used which will be applied in each case. Any consideration for a request for waiver of fees must be made in the context of the principles of the Act in relation to fees. The first principle is that the Act is intended to foster an open, transparent, and accountable government subject to limits contained in the Act (Order 96-002, page 16; and Adjudication Order No. 2, May 24, 2002, at paragraph 26).

[para 12] The second principle is that the user should pay (Order 96-002). It is important to note that the Act does not require the Public Body to charge an Applicant but permits a Public Body to do so. Further, if the Public Body chooses to charge an Applicant, the regulations under the Act establish a method of calculating those fees.

[para 13] In addition, consideration of a fee waiver on the basis of public interest should take into account the 13 non-exhaustive criteria identified in Order 96-002. The criteria are a guideline, not a test, and offer a tool in analyzing public interest in a variety of factual contexts. The criteria are identified below with some discussion of their applicability to this case.

The Criteria

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

[para 14] Both parties agree that the Applicant is not motivated by commercial or other private interests. Therefore, this criterion weighs neither for or against a fee waiver.

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?

[para 15] I address these three questions together as they have a unifying theme of public benefit. They assist the decision-maker in trying to distinguish between what is in the public interest, and what is mere curiosity.

[para 16] The Applicant asserts a general public benefit that the records will permit the public to scrutinize the tendering process for contracts. He argues that release of the records will contribute to public understanding of how public money is spent on private companies, and how government might improve in this area. In support of his argument, the Applicant points to excerpts of the Auditor General's Annual Reports for 2001/02 and 2002/03.

[para 17] In response, the Public Body has two main contentions. First, the Public Body states that the tendering and contract award process is available on the Alberta Government internet website. I do not find this persuasive because a statement of policy does not indicate whether the processes have been followed. Second, the Public Body points to the excerpts of the Auditor General's reports relied upon by the Applicant and say they have nothing to do with the records at issue.

[para 18] One difficulty with the Applicant's position is that he argues the public interest (public benefit, public understanding, and public research) at such a general level that it is almost meaningless. If public interest were to be defined so generally then almost all records relating to private contracts that are held by public bodies could be found to be in the public interest. Clearly that was not the intention of the Act. The Act contemplates that a fee can be charged and that a fee waiver would only be appropriate in particular circumstances, the public interest being one. In order for the Act to have any meaning, and to be consistent with the approach used in previous decisions, the public interest has to be articulated in a meaningful manner.

[para 19] While the Applicant points to some specific recommendations made by the Auditor General with respect to this Public Body, those relate to the Government's financial and human resource management information system (IMAGIS), and not the records related to Tecskor.

[para 20] I have reviewed the sample records submitted, and there appears to be no connection between the records and recommendations of the Auditor General's Reports relating to IMAGIS. Further there does not appear to be a connection between the records and the public interest as articulated by the Applicant. It is important to remember that the issue in this inquiry is whether the Public Body's fee estimate for disclosing the documents should be waived. This inquiry is not addressing whether the records should be disclosed.

[para 21] There is nothing on the face of the records or in the evidence of the parties that causes me to conclude that the positive outcomes contemplated by these criteria would be realized. Therefore, these criteria do not weigh in favour of a fee waiver.

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

[para 22] The Applicant has pointed out that two other departments have provided documents related to Tecskor as a result of access requests from the Applicant at no cost. However, the Public Body submitted that this was done because the fee estimate was less than \$150 and not because of a fee waiver. I accept the Public Body's submission in this regard. This criterion does not weigh in favour of a fee waiver.

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

[para 23] The Applicant has made efforts to obtain similar records from other public bodies. The Public body stated that it has not received other requests for the records. Therefore, I consider this a neutral factor in this case.

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

[para 24] Given my analysis under the second, third, and fourth criteria, I do not see how the records would contribute to debate or resolution of events in the public interest. This criterion does not weigh in favour of a fee waiver.

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

[para 25] This criterion is not relevant in this inquiry.

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

[para 26] There is no evidence of a conflict between the parties. Therefore, I consider this a neutral factor in this case.

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

[para 27] There is nothing on the face of the records or in the arguments put forward by the Applicant that would cause me to conclude that the Public Body should have anticipated the need of the public to have the record. This criterion does not weigh in favour of a fee waiver.

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 cost?

[para 28] There is nothing in the evidence that would indicate that the Public Body has not been responsive. Therefore, I consider this a neutral factor in this case.

12. Would the waiver of the fee shift an unreasonable burden of the costs 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 29] The Public Body concedes that the fee would not significantly interfere with its operations. This criterion would not prevent the granting of a fee waiver.

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

[para 30] Both parties agree that there is a probability that the Records will be disseminated. This criterion weighs slightly in favour of a fee waiver.

[para 31] After analyzing the 13 criteria, it appears that the issue can be distilled down to a difference between the Applicant and the Public Body's understanding of public interest. The Applicant defines public interest broadly as information relating to the accountability of government for management of public funds in the context of payments to private contractors. The Public Body argues that public interest must be understood within the specific factual context of the Records.

[para 32] Based on the material before me, I do not find that the records relate to a matter of public interest either from the point of view of the records themselves or the subject matter of the records. The 13 criteria do not weigh in favour of granting a fee waiver on the basis of public interest.

Issue B: Did the Public Body properly estimate the fees for service?

[para 33] The second issue in the inquiry is whether the Public Body properly estimated the fee of \$433. The *Freedom of Information and Protection of Privacy Regulation* AR 200/95 (the "Regulation") establishes how fees are to be dealt with when a public body chooses to charge them. Section 12 of the Regulation requires that a fee estimate set out:

- The time and cost required to search locate and retrieve the record;
- The time and cost required to prepare the record for disclosure;
- The cost of copying the record;
- The cost of shipping the record.

[para 34] The Public Body provided a very detailed analysis of its fee estimate in its submissions. This included the steps the Public Body undertook prior to developing the fee estimate, including what it did to locate the records, where it looked and the time spent. The Public Body has already spent 12 hours to locate almost 200 pages of documents and believes that another hour would be required to ensure the search would be complete, for a total of 13 hours. The Public Body estimated it would take one hour to review the records prior to disclosure. An estimate was provided for copying, and it was indicated there would be no charge for shipping as an internal government courier could be used.

[para 35] In reviewing the Public Body's estimate of fees, I am limited to a determination of whether a reasonable amount of time and number of records is set out in the Public Body's estimate. A fee estimate is simply that, an estimate. It is not an exact accounting of the time taken and exact costs incurred. Once the time for search and preparation is determined to be reasonable, I must then determine if the Public Body has properly applied the fees as set out in Schedule 2 of the Regulation.

[para 36] Given that the Public Body has already expended 12 of the 13 hours estimated to search for records, the overall time estimate appears reasonable in this case. The Public Body also estimated one hour required to prepare the records, for a total of 14 hours. It then applied the rate set out in Schedule 2 of the Regulation for a total of \$378. The Public Body has already found 200 pages of records and estimates that there are likely to be 20 more. It then applied the fee of \$.25 per page for a total of \$55. The overall fee estimate is \$433, which is the total of the fees for time expended and fees for copying.

[para 37] I find that Public Body reasonably calculated the fee estimate and that it properly applied the fees as set out in Schedule 2 of the Regulation. As a result, the Public Body properly estimated the fee at \$433.

V. ORDER

[para 38] I make the following Order under section 72 of the Act:

[para 39] I find that Applicant should not to be excused from paying all or part of a fee, as provided by section 93(4) of the Act. I confirm the Public Body's decision not to waive the fees.

[para 40] I find that the Public Body properly estimated the fees for service.

Dave Bell
Adjudicator