

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-031

December 21, 2004

THE CITY OF CALGARY

Review Number 2713

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

Summary: The Applicants made a request for access to information under the *Freedom of Information and Protection of Privacy Act* (the “Act”) related to decommissioning of water wells and septic systems on properties “west of 69 Street and south of Old Banff Coach Road.” The City of Calgary (the “Public Body”) conducted a search for records and estimated fees at \$555.75. The Applicants asked for a fee waiver, which was refused by the Public Body. 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. 29(1)(a.1), 93(4), 93(4)(a), 93(4)(b), and 72; *Freedom of Information and Protection of Privacy Act Regulation*, AR 200/95, Schedule 2.

Orders Cited: AB: 96-002, 2001-015, 2001-023, F2003-011, Adjudication Order #2

I. BACKGROUND

[para 1] On December 30, 2002, the Applicants (a couple) made an access request to the City of Calgary (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Applicants requested records related to the decommissioning of water wells and septic systems on properties “west of 69 Street and south of Old Banff Coach Road.” The request for general information was accompanied with the \$25.00 initial fee.

[para 2] The Public Body and the Applicants had a series of contacts over the next several months. During that time, the Public Body conducted several searches for records as the request was clarified and refined. The Applicants were given the option on two occasions to view documents in order to reduce copying costs. This option was apparently declined in both instances.

[para 3] On March 25, 2003, the Public Body advised the Applicants that records were ready to be released and that the Public Body was waiving the remainder of the fees.

[para 4] On April 30, 2003, the Applicant requested a review of the Public Body's response. The Public Body stated in their written submission that during the mediation process the Applicants refined their request to include specific documents known as Subdivision Authority Approval Forms.

[para 5] On May 5, 2004, a search for the newly specified documents revealed 117 responsive records. The records are apparently available for purchase by the public. Based on the price normally charged, the Public Body issued a fee estimate of \$1224.50, on June 8, 2004.

[para 6] On June 16, 2004, the Public Body issued a new fee estimate of \$555.75. The new estimate was based on the Fee Schedule found in Schedule 2 of the *Freedom of Information and Protection of Privacy Act Regulation*, AR 200/95 (the ("Regulations").

[para 7] The Applicants requested a waiver of fees. The Public Body refused.

[para 8] On September 13, 2004, a Notice of Inquiry was sent to the parties, setting out a waiver of fees as the only issue for a written inquiry. The Public Body made a written submission. The Applicants failed to make any representations in this inquiry.

II. RECORDS AT ISSUE

[para 9] 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 a sample copy of a Subdivision Authority Approval. All of the responsive records are in this form.

III. ISSUE

[para 10] There is one issue for this inquiry:

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

IV. DISCUSSION OF THE ISSUE

[para 11] 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 12] 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 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, and 2001-023.

[para 14] In this inquiry, the Applicants have failed to make a submission. The Public Body has also stated in its submission that the Applicants offered no information about their ability to pay when the waiver was first requested. In the absence of any evidence to support a waiver of fees on the basis that the Applicants are not able to pay, I must find that the Applicants are not excused from paying the fees under this category of section 93(4)(a) of the Act.

[para 15] Likewise, there is no evidence before me that would lead me to conclude that the Applicants should be excused from paying fees "for any other reason it is fair to excuse payment", as set out in section 93(4)(a) of the Act.

[para 16] I find that the Applicants should not be excused from paying all or part of a fee under 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 17] With respect to the burden of proving a public interest in the records, in Order 2001-23, the 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 18] Consequently, even though the Applicant has not made a submission on this issue, I must still review whether the Public Body has properly considered whether the records contain information that relates to an issue of public interest.

[para 19] In Order 96-002, the 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] Also in Order 96-002, the 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 McMahon added "accountable" to the first principle, revising it to read "to foster open, transparent, and accountable government."

[para 21] 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 22] What follows is discussion of the criteria that have some application in this inquiry:

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

[para 23] In the absence of information from the Applicants, I have no information regarding their interest in the records. Therefore, 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 24] The Public Body has stated that the records are available for purchase from the Public Body. There is no evidence on the face of the records to suggest that disclosure to the Applicants under the Act will have any benefit to anyone but the Applicants.

[para 205] This factor weighs against 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 26] There is nothing on the face of the records that would cause me to conclude that the information would contribute to public understanding of an issue.

[para 27] This factor weighs against a fee waiver.

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

[para 28] The Public Body says that disclosure would not add to any public research. This position is evidenced by the records themselves.

[para 29] This factor weighs against a fee waiver.

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

[para 30] No. The records are available for purchase by the public from the Public Body. However, the Public Body points out that they have reduced the cost normally charged members of the public from \$1224.50 to \$555.75 as a result of offering the records to the Applicants for the fees in the amounts set out in the Regulations.

[para 31] I note that the Public Body had the discretion to refuse disclosure of the records by applying section 29(1)(a.1) of the Act, which states:

29(1) The head of a public body may refuse to disclose to an applicant information
(a.1) that is available for purchase by the public,

[para 32] The net effect of this decision by the Public Body is that the Applicants will be required to pay less than half the fees normally charged anyone else.

[para 33] This factor weighs against a fee waiver.

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

[para 34] The only evidence before me related to this criterion is that the Applicants' request has taken a long time to complete. On the face of it, this constitutes some evidence that the Applicants have been persistent. However, it is apparent from the Public Body's submission and the Applicants' letters included with that submission that the reason for the lengthy time involved was primarily as a result of the time it took to finally settle on the records at issue as the records specifically wanted by the Applicants.

[para 35] This factor weighs against a fee waiver.

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

[para 36] The Public Body argues that there is nothing in the records that would contribute to any debate or resolve any events of public interest. Having reviewed the records, I agree with the Public Body's position.

[para 37] This factor weighs against a fee waiver.

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

[para 38] There is nothing on the face of the records that would allow me to conclude that this criterion could be met.

[para 39] This factor weighs against a fee waiver.

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

[para 40] There is no evidence of any conflict.

[para 41] This factor weighs neither in favour of nor against a fee waiver.

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

[para 42] The Public Body has made these records readily available to the public at a fee.

[para 43] This factor weighs against a fee waiver.

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

[para 44] It is evident that this access request has been ongoing for a long time. However as I have said previously, it is apparent that is primarily as a result of the time it took to finally settle on the records wanted by the Applicants. There is no evidence before me that the Public Body has not been responsive.

[para 45] This factor weighs against a fee waiver.

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

[para 41] The Public Body stated that it is capable of bearing all of the costs related to this request. However, the Public body contends that it has already borne much of the actual costs associated with the Applicants' request.

[para 42] This factor weighs against a fee waiver.

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

[para 43] There is no evidence that would lead me to believe that the Applicants will disseminate the information. The information is publicly available.

[para 44] This factor weighs against a fee waiver.

Conclusion

[para 45] Having weighed the criteria that assist in determining whether the information requested by the Applicants 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 Applicants 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 Applicants' access request.

V. ORDER

[para 46] I make the following Order under section 72 of the Act.

[para 47] I find that the Applicants should not be excused from paying the fee under section 93(4)(a) of the Act (inability to pay and for any other reason it is fair to excuse payment).

[para 48] I find that the Applicants should not be excused from paying the fee under section 93(4)(b) of the Act (public interest).

[para 49] I confirm the Public Body's decision not to waive fees.

Dave Bell
Adjudicator