

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2005-022

October 28, 2005

ALBERTA SOLICITOR GENERAL
AND PUBLIC SECURITY

Review Number 3043

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

Summary: The Applicant is a print media reporter. He asked for information held by Alberta Solicitor General and Public Security pertaining to the death of a young person while in custody in January 2004. The Public Body refused to waive the estimated fee of \$496.00 on the basis of public interest. The Adjudicator found that the facts showed a clear public interest and ordered the fees reduced to zero.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, s. 72(2)(c), 93, 93(4), 93(4)(b),

Orders Cited: **AB:** 96-002, 97-001, F2003-011, 2000-008, Adjudication Order #2.

I. BACKGROUND

[para 1] The Applicant is a print media reporter. In March of 2004 he asked for any and all information held by Alberta Solicitor General and Public Security (“the Public Body”) pertaining to the death of a young person in January 2004. The young person fell down an elevator shaft in a courthouse while in the custody of the Public Body.

[para 2] The Applicant paid the initial fee of \$25.00. The Public Body extended its time to respond to the Applicant’s request and involved another public body prior to

responding to the Applicant. The Public Body advised the Applicant that it had searched its records, found 133 pages of records that were responsive to his request, and that it had decided that 40 pages could be disclosed. It calculated a fee of \$496.00. After some time had elapsed, the Applicant asked that the Public Body waive the fees, citing public interest. The Public Body denied the request for a fee waiver.

[para 3] Mediation was authorized but was not successful. The matter was scheduled as a written inquiry.

[para 4] The Applicant did not provide a formal submission. However, the Applicant had written the Public Body and this office several letters prior to scheduling the inquiry. Those letters raise the relevant issue and provide the Applicant's essential argument, albeit briefly. As in other cases where no formal submission is made, I will consider the contents of correspondence from the Applicant in coming to my decision. The Public Body made considerably more effort and provided a thorough submission.

II. RECORDS

[para 5] As this inquiry relates only to the waiver of fees, the records are not directly at issue.

III. ISSUE

[para 6] There is one issue in 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 ISSUE

[para 7] The Public Body relied on its discretionary ability to require a fee as set out in section 93(1) of the Act. The Applicant relied solely on the public interest criteria for a fee waiver in section 93(4)(b) of the Act. Section 93 reads:

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.

(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

(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 8] My role in adjudication of this issue was described in Order 2000-008. The application of sections 93 and 72(3)(c) of the Act allow the Commissioner to consider a decision about fees afresh. The Commissioner can substitute a different decision for the one made by the head of the public body.

[para 9] The burden of proof to establish the reason for the waiver lies first with the applicant, who will most often be the one with the information to show why it should be granted (Order 96-002). In cases where the question is whether the public interest is engaged, the Public Body will share that burden (Order F2003-011).

[para 10] The Applicant asked for any and all information held by the Public Body pertaining to the death of a young person in January 2004. The young person died while in the custody of the Public Body. He fell down an elevator shaft in a courthouse. The Applicant says the known facts around the event reveal the public interest. He says:

...I believed information on the death of a shackled 16-year-old in the custody of courtroom guards was most certainly in the public interest.

[para 11] The Applicant claimed the government had released very little information and what had been released was contradictory and incomplete. He expressed concern with the amount of time passing before the issue was reviewed and any possible changes are made. The Applicant noted that the public may perceive problems with the courthouse security system. He complained that the Public Body gave him no reasons for its decision to refuse the waiver.

[para 12] The Applicant's burden of proof in this case is assisted by the fact that the event received considerable publicity. A public fatality inquiry was held and reported on. The Public Body noted in its submission that it received similar information requests from other applicants. At least one applicant paid the fee to get the information.

[para 13] The Public Body drew to my attention two previous Orders of the Commissioner on the issue of fee waivers. Order 96-002 set out two principles and a non-exhaustive list of 13 criteria to assist in considering public interest. Order 97-001 applied those criteria in a case where an applicant from the media requested a fee waiver for information about escalators.

[para 14] In Order 96-002, the Commissioner set out the following two principles:

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 should pay.

[para 15] In Adjudication Order #2, Justice T.F. McMahon added the word “accountable” to the Commissioner’s first principle. I agree with this addition.

[para 16] The criteria from Order 96-002 are as follows:

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, will they 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 public understanding of issues where Government has itself established that public understanding?
9. Do the records relate to a conflict between the applicant and Government?
10. Should the public body have anticipated the need of the public to have the record?
11. How responsive has the public body been to 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?
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 17] The Public Body addressed individually each of the two principles and 13 criteria set out in Order 96-002.

[para 18] In this case, the Public Body takes the position that this Applicant’s interest as a member of the media is commercially motivated. The Public Body went no further in assessing the facts against that criterion.

[para 19] When confronted with a similar assertion about the commercial interests of a print media applicant in Adjudication Order#2, Justice T.F. McMahon made the following comments:

[52] Alberta Justice also argues that this request is about selling advertising and "whether the applicant can turn a profit". That argument characterizes a free and

independent press at its basest level. The media, in my view, has a higher role to play. Absent proof of overriding self-interest, I decline to reduce respected print media to this level, or to dismiss its attempts to bring accountability to government management of public funds, as merely an effort to sell advertising.

[para 20] I agree with the comments made by Justice McMahon. Members of the media have and fulfill professional responsibilities for the public good. It is not fair to say that the commercial value of newsworthy information is the only motivator of the working reporter. The extent to which putting the information into the hands of the media would be in the public interest, and at what price, must be assessed on the facts of the case.

[para 21] In Order 97-001, the applicant, a member of the media, sought records about accident reports concerning escalators in Alberta from the public body that regulated those devices. The applicant requested a fee waiver on the basis of public interest. The Commissioner warned the media that public interest, not public curiosity, is the standard with which the media should approach fee waiver requests. The Commissioner found that government regulation of escalators was an indication of public interest. He found, on an assessment of the principles and criteria, that the fee should be waived in that case.

[para 22] I have considered the important role the media plays in obtaining information and making it available to the public in pursuit of government accountability. In this case, I note the minor age of the person about whom the information was sought. That minor was a prisoner, in custody in a major courthouse. He died tragically, in circumstances that raise many serious questions. Without giving it priority, one issue is the safety of an elevator in a public facility. The issues clearly involve public safety, one of the anticipated areas of public interest for a fee waiver under section 93(4)(b).

[para 23] I have reviewed in detail the Public Body's arguments on each of the principles and criteria in relation to the facts of this case. The lack of submissions by the Applicant was not helpful. I have reviewed other cases where the principles and criteria were considered. I note the criteria are not an exhaustive list, nor a test.

[para 24] I have also considered the Commissioner's discussion in Order 96-002 about whether it is necessary to consider the contents of the particular records to measure public interest. Neither party in this inquiry raised the issue. Given my assessment of the balance of the facts of the case in measuring the public interest, I do not consider it necessary for me to review the records to make my decision.

[para 25] The facts before me raise the issue of the proper care, safety and security of a minor person involuntarily in the custody of the state who, at the time of his death, was physically restrained and attended by government employees who allegedly used force. Those circumstances, assessed against the criteria individually and considering the result globally, in my view, justify finding that access to the requested records by the

Applicant, a reporter, would be of benefit to the public. In addition, there is an issue about the safety of elevators, generally.

[para 26] I find that the facts as set out by both the Applicant and the Public Body, many of which were notorious because of media reporting, clearly establish that the records relate to a matter of public interest for the purposes of section 93(4)(b).

[para 27] I have considered the extent to which the fee should be reduced. In the circumstances I find that the fee should be reduced from \$496.00 to zero. The public interest and the total sum justify the financial responsibility for the access request being borne by the taxpayer. I do not intend to order the refund of the \$25.00 initial fee paid by the Applicant to the Public Body.

V. ORDER

[para 28] I make this Order under section 72(2)(c) of the Act.

[para 29] I order the Public Body to reduce the fee for responding to the Applicant's request from \$496.00 to zero.

[para 30] I order the Public Body to notify me within 50 days of receiving a copy of this Order that it has complied with its terms.

Dave Bell
Adjudicator