

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-001

May 18, 2006

ALBERTA SOLICITOR GENERAL AND PUBLIC SECURITY

Review Number 3264

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Summary: The Public Body refused the Applicant's request to be excused from paying the \$25.00 initial fee for access to non-personal information. The Applicant is an inmate in a provincial correctional facility. The Adjudicator excused the fee based on fairness. He found that the Public Body had not exercised its discretion properly. That, combined with the Applicant's limited ability to pay, created a reason for which it was fair to excuse the fee.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 72(3)(c), 93, 93(1), 93(4), 93(4)(a), 93(4)(b); *Freedom of Information and Protection of Privacy Regulation*, A.R. 200/95, ss. 9, 10(1), 10(2)

Orders Cited: 96-002; 2000-011; F2002-028.

I. BACKGROUND

[para 1] The Applicant is an inmate serving time in a provincial correctional facility. The Public Body responsible for that facility is Alberta Solicitor General and Public Security (the "Public Body"). The Applicant asked the Public Body to give him access to bookkeeping and accounting information from an Inmate Welfare Trust Fund established under a Regulation. He was not satisfied with verbal assurances. He wanted to see the records.

[para 2] The Applicant made a number of requests to the Public Body for access to records under the *Freedom of Information and Protection of Privacy Act* (the "Act"). His

first request of January 20, 2005, was for documents related to the finances of the Inmate Welfare Trust Fund. When the Public Body got the request, it sent the Applicant a letter advising him that he had to pay an initial fee of \$25.00. The Applicant wrote asking to be excused from paying the fee (section 93 of the Act). The Public Body refused the request. The Applicant asked the Commissioner to review the Public Body's decision.

[para 3] Mediation was authorized but was unsuccessful. The matter was set down for a written inquiry. The Applicant and the Public Body both made initial and rebuttal submissions.

II. RECORDS AT ISSUE

[para 4] The Applicant made a number of requests to the Public Body for access to records under the Act. His first request, of January 20, 2005, was for documents related to the finances of the Inmate Welfare Trust Fund. It was for that request that the Public Body asked for the \$25.00 initial fee. The Public Body's refusal to excuse the fee is the subject of this inquiry. Because of my decision on the question of public interest in this case, I do not need to see the records and have not compelled the Public Body to produce them to me.

III. ISSUE

[para 5] There is one issue set out in the notice of inquiry.

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

[para 6] In his submission the Applicant asked that the inquiry address other issues. The only issue that this inquiry will address is the Applicant's request to have the initial fee excused for his request of January 20, 2005 for access to the Inmate Welfare Trust Fund financial information. Of the information access requests he made that the record shows, the first, the trust fund records, was not denied by the Public Body but awaits the decision of this inquiry on the fee matter.

IV. DISCUSSION OF THE ISSUE

[para 7] Section 93 of the Act reads as follows:

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.

(5) If an applicant has requested the head of a public body to excuse the applicant from paying all or part of a fee and the head of a public body has refused the applicant's request, the head must notify the applicant that the applicant may ask for a review under Part 5.

(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.

[para 8] The relevant sections of the Freedom of Information and Protection of Privacy Regulation AR 200/95 (the "Regulation") read as follows:

9 Where an applicant is required to pay a fee for services, the fee is payable in accordance with sections 10, 11, 12 and 13.

10(1) This section applies to a request for access to a record that is not a record of the personal information of the applicant.

(2) An applicant is required to pay

- (a) an initial fee of \$25 when a non-continuing request is made, or
- (b) an initial fee of \$50 when a continuing request is made.

(3) Processing of a request will not commence until the initial fee has been paid.

(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.

(5) Where the amount estimated exceeds \$150, the total amount is to be charged.

(6) A fee may not be charged for the time spent in reviewing a record.

[para 9] The Public Body may charge fees for its services in responding to a request for access to a record. The records the Applicant wants are not the personal information of the Applicant (even though they may contain some small amount of his personal information such as certain of his financial transactions). The Public Body is directed by the Regulation in that circumstance to charge a \$25.00 initial fee.

[para 10] An applicant who wants the fee waived has the initial burden of showing why one of the circumstances in section 93(4)(a) or (b) of the Act should apply.

[para 11] The Applicant in this case wrote the Public Body and gave his reasons. They included that he could not afford to pay because he had little or no money, he could make no money because of his incarceration, and incarceration had its expenses (such as

purchases through the Canteen for basic personal care, food and communications expenses). He claimed that the records relate to a matter in the public interest: that the inmates and the non-inmate public should know how the government is handling money from the Inmate Welfare Trust Fund. He claimed that it was fair to excuse payment because he just wanted to review the records, not keep copies, and the fees discouraged research into issues that affected the inmates' daily lives.

[para 12] The parties made extensive submissions on the criteria set out by the Commissioner in Order 96-002 regarding what is the "public interest" as it may affect a request to waive fees. I have considered those arguments in a general way only, because, for reasons set out below, I have declined to decide the issue of whether the fee waiver should be granted on the basis that the record relates to a matter of public interest.

[para 13] The Public Body's position was that the Applicant had not shown sufficient evidence that he could not afford to pay. The Public Body says that the Applicant might be able to get information about the fund informally within the institution. That being so, the user pay principle of the Act should be upheld. The Public Body found no circumstances that met the fairness criterion. The public interest the Applicant claimed was not, in the Public Body's view, compelling.

[para 14] Public bodies have the discretion to waive the initial fee (section 93(1) of the Act and Order F2002 – 028). They must exercise that discretion according to law. The Head of the Public Body is required to turn his or her mind to the circumstances of the case, and give them individual consideration. The Public Body's submission before me includes as evidence a letter it sent to the mediator in the Commissioner's Office. It includes the following two statements.

"3. The records relate to a matter of public interest – I have no intention of examining the entire list of criteria for a "public interest" fee waiver at this stage. Suffice to say [the Applicant's] request does not meet these criteria in our estimation."

"In the 5 ½ years that I have managed this Program, I have never waived an initial fee and I am disinclined to begin doing so."

[para 15] The Public Body is entitled in law to reach an opinion without step by step examination of the Commissioner's list of criteria (Order 96-002) in deciding whether the "public interest" is met, as the first statement implies was done. The Commissioner's list is neither exhaustive nor mandatory. It is a useful guide offered by the Commissioner in that case. A public body's decision will be reviewed on a case by case basis.

[para 16] What the law does not allow, in my view, is the application of a standard policy without regard for the individual circumstances of the case. The second statement indicates to me that the Public Body's representative holds a view that is applied uniformly, without regard to individual circumstances, or without regard to those circumstances that is sufficient to meet the legal obligation. The summary opinion

revealed in the first statement does not dispel but rather contributes to my view that the Public Body did not exercise its discretion properly. I have considered the balance of the Public Body's submissions and evidence and am not dissuaded from this point of view.

[para 17] I am not satisfied that the Applicant's request to be excused from paying the initial fee was given the level of individual consideration required to meet the test for the proper exercise of discretion. The discretion was fettered. A policy approach was applied that precluded a sufficient consideration of the individual merits of the case.

[para 18] Section 72(3)(c) of the Act allows me to substitute my decision for that of the Public Body in the matter of a request to excuse payment of fees. Sending this matter back to the Public Body for reconsideration would serve no useful purpose to either party, in my view. I will not grant the Applicant the broad remedies he seeks, including a permanent fee waiver for all inmates who want to see the documents he has requested. However, I intend to order the Public Body to reduce the initial fee to zero.

[para 19] My decision is based on two considerations. I find that the Applicant has been subjected to unfair treatment by the improper exercise of discretion by the Public Body. I consider the unfair treatment as a reason to excuse payment under section 93(4)(a), but only in combination with the following decision about the Applicant's financial circumstances.

[para 20] The user pay principle of the Act must be respected, and the initial fee of \$25.00 for non-personal information set in the Regulation is modest by most standards. The onus is on an applicant to prove that they cannot afford to pay the initial fee. They must bring sufficient information to meet that onus (Order 2000-011). The Applicant's evidence of his financial circumstances was minimal. While minimal evidence hinders me in reaching a decision, I will accept the Applicant's evidence as sufficient on certain points. I do so taking into consideration that his incarceration limits his ability to marshal and manage documentary evidence. I note that the evidence presented is consistent throughout, and it is believable.

[para 21] Also, the Public Body is in control of some good evidence about the Applicant's finances. Without another access to information request by the Applicant for the institution records that show his money holdings, I am left with his evidence and assertions on the point.

[para 22] I take the Applicant's point, on the evidence before me, that his resources are extremely limited, and he has little control over that. He relies on family and friends. There is evidence before me that he receives little money.

[para 23] For this Applicant, \$25.00 is a lot of money. He has other needs to meet with what little money he has. The initial fee stands as a real barrier to him exercising his rights under the Act. Part of the reason for his request for records, he says, is to see if the inmate money spent in the Canteen is being handled according to law, which includes a trust that benefits inmates.

[para 24] The Public Body asserts that the user pay principle of the Act should prevail, particularly because, it says, the records the Applicant wants are publicly available for free. The Applicant strongly objects to that position. He says that he has asked many times, through channels that he was told were the correct ones, without success. He cannot attend at public places where the Public Body says the documents can be seen, because he is an inmate. The Public Body's comments are general and do not specifically tell me where the particular records for the Trust Fund could be accessed. The Applicant has shown me proof of a number of requests he made, not under the auspices of the Act, and the responses he got. I have considered these arguments in coming to my decision.

[para 25] I find that the Applicant's financial circumstances, in combination with the unfair circumstances related to the improper exercise of discretion, create unique circumstances in which it would be fair to excuse payment of the initial fee.

[para 26] I need not decide whether the fee waiver should be granted on the basis of the public interest.

V. ORDER

[para 27] I make the following order under section 72(3)(c) of the Act.

[para 28] I order the Public Body to reduce the initial \$25.00 fee for the Applicant's January 20, 2005, access request to zero.

[para 29] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Dave Bell
Adjudicator