ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-009

January 14, 2008

ALBERTA SOLICITOR GENERAL AND PUBLIC SECURITY

Review Number F3117

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Summary: The Applicant requested a fee waiver for a record about the Fort Saskatchewan Correctional Centre and the Edmonton Remand Centre. The fee waiver was denied by Alberta Solicitor General and Public Security ("Public Body") under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP"). The Applicant said the fee should be waived because the record is a matter of public interest under section 93(4) of FOIP. The amount of the fee at issue is $1,135.50, for a record of 992 pages. The Adjudicator ordered the Public Body to excuse the Applicant from paying 50% of the fee, pursuant to section 93(4)(b) of FOIP.

Cases Cited: *Trang v. ERC*, 2002 ABQB 1042 (AB QB) and *Trang v. ERC*, 2004 ABQB 497 (AB QB).

Orders Cited: AB: Orders H2007-024, H2007-023, OIPC External Adjudication Order #2 (May 24, 2002) Justice McMahon, 2001-017, 2000-011, 2000-008, 97-001 and 96-002.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 72(3)(c), 93(4) and 93(4)(b).

I. BACKGROUND

[para 1] In a letter dated February 17, 2004, the Applicant made the following access request to Alberta Solicitor General and Public Security ("Public Body") under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP"):

Re: Unused Beds and Space at Fort Saskatchewan Correctional Centre

I need documents relating to the following:

1. The total number of cells available for male prisoners;
2. Total number of cells available for female prisoners;
3. Total number of cells available for medical unit prisoners;
4. Total number of cells available for mental health prisoners;
5. Total number of cells available for male administrative segregation prisoners;
6. Total number of cells available for female administrative segregation prisoners;
7. Total number of cells available for female disciplinary segregation prisoners;
8. Total number of single bunk cells available for male prisoners, by unit;
9. Total number of single bunk cells available for female prisoners, by unit;
10. Documents in relation to the present use of the Fort Saskatchewan Correctional Centre for Remand prisoners;
11. Information as to any plans or proposals to use the Fort Saskatchewan Correctional Centre for Remand prisoners;
12. Information as to how many cells and beds are unoccupied at the Fort Saskatchewan Correctional Centre from September 24, 1999 to the present date;
13. Information as to which living units and/or living unit buildings have been vacant or shut down from September 24, 1999 to the present;
14. Information in relation to any plans or proposals to construct a new Remand Centre to service the Edmonton area and Northern Alberta catchment area.

[para 2] The Public Body received the Applicant's request on February 23, 2004. In a letter dated February 25, 2004, the Public Body wrote to the Applicant and requested payment of the $25.00 initial fee, advising that processing of the request would not commence until the initial fee was paid.

[para 3] In a letter dated July 8, 2004, the Public Body advised the Applicant that the request was considered to be abandoned and that it was closing the file as it had not received payment of the initial fee or any further instructions from the Applicant. The letter advised the Applicant of the right to ask the Commissioner for a review of a decision made by a public body. On July 19, 2004, the Public Body received the Applicant's payment of the initial fee of $25.00.

[para 4] In a letter dated August 11, 2004, the Public Body agreed to open a new file for the same information that was requested in the first access request. Also in the letter of August 11, 2004, the Public Body returned a $25.00 cheque to the Applicant that the Public Body received on August 6, 2004. The Applicant sent the second cheque for $25.00 to the Commissioner's Office, which the Office forwarded to the Public Body, as the cheque had been sent in error to the Office rather than to the Public Body.

[para 5] In a letter dated August 13, 2004, the Public Body wrote to the Applicant, requesting payment of the fee in the sum of $1,135.50. In that letter, the Public Body said the work was essentially complete and the record was prepared for disclosure, so the fee was the actual fee rather than a fee estimate. The Public Body provided the actual costs incurred under the fee schedule, which were searching for and locating records, retrieval

of records, preparing records for disclosure and photocopying the 992 pages in the record. The Public Body advised that the record would be provided to the Applicant upon payment of the fee of $1,135.50.

[para 6] In a letter dated October 4, 2004, the Public Body advised the Applicant a second time that the request was considered to be abandoned and the file was closed, because it had not received payment or any further instructions from the Applicant. The letter confirms a discussion that the Public Body had with the Applicant's office on August 19, 2004, that the file would be kept open until September 30, 2004. The letter of October 4, 2004, also advised the Applicant of the right to ask the Commissioner for a review of a decision made by a public body.

[para 7] In a letter dated October 8, 2004, the Applicant asked for a description of the documents that had been assembled, in order to determine if the amount of the fee was reasonable. Also in that letter the Applicant stated, "In order to preserve our right to appeal, we are appealing to the Information and Privacy Commissioner." The Public Body interpreted the October 8, 2004, letter as a request for review to the Commissioner, so took no further steps, pending mediation.

[para 8] In a letter dated October 12, 2004, addressed to the Commissioner, the Applicant said:

> Please find enclosed a copy of [name of individual] letter to me of August 13, 2004; a copy of our letter to [name of individual] of October 8, 2004, as well as a copy of the original request dated February 17, 2004.

[para 9] The Office interpreted the Applicant's October 12, 2004, letter as a request for review of whether the Public Body had properly calculated the fee. Mediation was authorized. The Public Body's submission provided a copy of a letter dated January 17, 2005, from the Office to the Applicant with the result of the mediation and asking for a response by January 31, 2005, if the Applicant did not agree. The Public Body's submission also contained a copy of a letter dated March 4, 2005, from the Office to the Applicant, saying that because no response had been received by January 31, 2005, the file was closed.

[para 10] Subsequently, a decision was made to proceed with an inquiry. A Notice of Inquiry dated August 17, 2005, was issued to the parties from the Office advising that two issues had been set down for a written inquiry. The first issue was whether the Public Body had properly estimated the fee and the second issue was whether the Applicant should be excused from paying the fee under section 93(4).

[para 11] On August 23, 2005, the Public Body contacted the Office and advised that the Applicant had never requested a fee waiver. As the Public Body had never been asked to waive the fee, the Public Body had not made a decision about a fee waiver. Therefore, there could not be jurisdiction at an inquiry to review a decision that had never been made.

[para 12] In a letter dated August 24, 2005, the Office wrote to the Applicant setting out two choices for proceeding at an inquiry. The Applicant was given the option of proceeding on the first issue only, that is, of whether the fee for services had been properly calculated. Alternatively, the Applicant was given the option of making a request to the Public Body for a fee waiver under section 93(4) of FOIP.

[para 13] The letter said that if the Applicant chose to make the request for a fee waiver, depending upon the Public Body's decision, the Applicant could choose to add the fee waiver as a second issue at the inquiry, or alternatively, abandon the first issue and proceed only on the fee waiver. Also in the letter of August 24, 2005, the Applicant was asked to respond to the Office by September 7, 2005, as the matter had been set down for inquiry.

[para 14] In a letter dated August 25, 2005, the Applicant wrote to the Public Body requesting a fee waiver. Also on August 25, 2005, the Public Body wrote back to the Applicant asking the Applicant to provide the basis for the request for the fee waiver. In that letter, the Public Body reminded the Applicant of the request to respond to the Office by September 7, 2005, regardless of the outcome of the fee waiver.

[para 15] On August 25, 2005, the Office placed the inquiry into abeyance, pending resolution of the fee waiver issue. On December 6, 2005, the Public Body wrote to the Applicant asking for the basis of the request for the fee waiver, for a second time. In a handwritten fax dated December 27, 2005, the Applicant replied to the Public Body, saying, "the answer is obvious: the records are of public interest."

[para 16] In a letter dated January 5, 2006, the Public Body advised the Applicant that the request for a fee waiver was denied. Also in that letter, the Public Body reminded the Applicant that the Office had placed the inquiry in abeyance pending the Public Body's decision and the Applicant should now indicate to the Office how he wished to proceed. The Public Body said:

> We have re-reviewed the (non-exhaustive) list of 13 criteria and two principles relevant to the issue of public interest and as first articulated by the Information and Privacy Commissioner in Order 96-002.
>
> We are of the opinion that the matter at hand does not fit within the contemplated framework for a "public interest" fee waiver. We have determined therefore that we <u>will not waive fees</u>.

[para 17] On January 26, 2006, the Office wrote to the Applicant, advising that it had received a copy of the Public Body's letter of January 5, 2006. In its letter of January 26, 2006, the Office asked the Applicant how he wished to proceed at an inquiry.

[para 18] On January 27, 2006, the Office issued an amended Notice of Inquiry that replaced the first Notice of Inquiry. The fee waiver issue under section 93(4) of FOIP was the sole issue set down for a written inquiry (the "Inquiry"). Subsequently, the Information and Privacy Commissioner, Frank Work, Q. C. (the "Commissioner"), delegated me to hear the Inquiry. At the Inquiry, both parties submitted written initial

submissions and the Applicant submitted a written rebuttal submission, all of which were exchanged between the parties.

II. RECORDS/INFORMATION

[para 19] The matter before the Inquiry is whether the fees should be waived, so there are no records at issue in the usual sense.

[para 20] For ease of reference, I have divided the record into two parts. This Order refers to the 11 items of information requested that pertain to Fort Saskatchewan Correctional Centre (i.e., items #1-9, 12 and 13), as the "Correctional Centre" part of the record. This Order refers to the other three items of information requested that pertain to Edmonton Remand Centre (i.e., items #10, 11 and 14), as the "Remand Centre" part of the record.

III. INQUIRY ISSUE

[para 21] The issue in the Notice of Inquiry is:

- ISSUE: Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4)(b) of FOIP?

IV. PRELIMINARY ISSUES

[para 22] There are a myriad of irregularities in this matter, some of which have been described above. The Public Body says, "[T]he history/chronology of this file is complex". In any event, there is no evidence before me to show that any of the irregularities go to jurisdiction or preclude me from deciding the substantive issue that is before me.

[para 23] The facts that gave rise to the issue before me began almost four years ago. In the interests of bringing resolution to this long outstanding matter, I will render a decision on the substantive fee waiver issue.

V. DISCUSSION OF INQUIRY ISSUE

ISSUE: SHOULD THE APPLICANT BE EXCUSED FROM PAYING ALL OR PART OF A FEE, AS PROVIDED BY SECTION 93(4)(b) OF FOIP?

[para 24] Section 93(4)(b) reads:

> 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 25] In this Order, references to sections of legislation are to be read as references to FOIP. References to "public interest" are to be read as, where the "record relates to a matter of public interest, including the environment or public health or safety." This Order takes the same approach to burden of proof, exercise of discretion, fresh decision, new framework, public interest and the 13 criteria as Orders H2007-023 (paras 14-29, 42-44, 48-49) and H2007-024 (para 13), so those discussions will not be repeated in this Order.

[para 26] In this case the payment of a fee in the sum of $1,135.50 is at issue. The Public Body takes the position that disclosure of the record is not a matter of public interest under the 13 criteria and section 93(4)(b) of FOIP, so the Public Body has properly refused to excuse payment. However, the Applicant says the fee should be excused because the record relates to a matter of public interest.

[para 27] There is a shared burden of proof for public interest under section 93(4)(b) of FOIP. I must consider all of the information that is available as well as the argument and evidence provided by the parties, both at the time the Public Body made its decision and at the time of the Inquiry. The Public Body did not provide a copy of the record. However, on the facts of this case I do not find it necessary to review the record itself because the subject matter of the record is a sufficient basis upon which to make my decision (Order 96-002 (page 17))).

[para 28] I accept the Public Body's submission that section 72(3)(c) of FOIP allows me to make a "fresh decision" about whether all or part of the fee should be waived (Order H2007-023 (paras 23-25)). A fee can be reduced or partly waived, as was done in OIPC External Adjudication Order #2 (May 24, 2002), where Justice McMahon reduced a fee of 59,571.00 to $500.00 for an MLA and reduced a fee of $60,696.00 to $2,500.00 for the Globe and Mail.

[para 29] The two over-riding principles for public interest are:

1. The Act was intended to foster open, transparent and accountable government, subject to the limits contained in FOIP (OIPC External Adjudication Order #2 (May 24, 2002) (para 26)); and

2. The Act contains the principle that the user seeking records should pay (Order 96-002 (page 16)).

[para 30] The 13 non-exhaustive criteria for public interest 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 to find 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 (Order 96-002 (pages 16-17))?

[para 31] The 13 criteria are essentially sub-criteria, so for clarity, this Order refers to the 13 criteria as "factors." The following discussion summarizes the arguments of the parties. My findings are provided as to whether each of the 13 factors weighs for or against, or alternatively, is a neutral factor, for excusing payment of the fees. I have considered all of the information before me when balancing the factors to determine the degree of public interest in the record.

[para 32] The list of 13 criteria is not mandatory, but rather is a guide to help determine whether a record is a matter of public interest. The 13 criteria are not an exhaustive list and some factors are not relevant to every situation. However, the 13 criteria provide a range of considerations that are indicators of the degree of public interest, to assist in determining whether a specific situation amounts to a matter of public interest in the context of a fee waiver under section 93(4)(b) of FOIP.

[para 33] The information that the Applicant provided to the Public Body at the time it made its decision about the fee waiver was:

> The answer is obvious: the records are of public interest, namely, the public health and safety of remand prisoners and correctional officers. You may have noticed media coverage on the topic.

[para 34] The information and argument that the Applicant provided at the Inquiry in his written initial submission, says:

> The information requested relates to the availability of space at the Fort Saskatchewan Correctional Centre to house prisoners in pre-trial custody to ease the overcrowding at the Edmonton Remand Centre. The overcrowding at the Edmonton Remand Centre is a matter of great public importance, of which the Commissioner may take notice, given the public notoriety of the problem.
>
> The overcrowding affects the safety, health and welfare of prisoners and staff alike and raises important justice issues. It was the applicant's information that, at the time of the application, one entire living unit at the Fort Saskatchewan Correctional Centre was empty and unused, a facility that was available to meet a significant part of the needs of pre-trial incarceration.
>
> The fee demanded by the Public Body ($1,135.50) is an obstacle which effectively denies the public access to this information which is of broad public interest and importance.

[para 35] The Applicant's written rebuttal submission says:

> The Public Body asks for evidence that the interests at play are public. Given that the Public Body here is the Solicitor General, it is suggested that it was not unreasonable to assume that this was beyond dispute, given the Solicitor General's direct participation in the issues relating to the treatment of his prisoners in Alberta which have been the subject of public criticism by many parties, including Judges. The overcrowded conditions for Alberta's prisoners and the failure of the Solicitor General to allocate sufficient resources for their proper care, is an issue of great public concern. The "public" in this case is prisoners, prison staff, friends and families of prisoners and society in general. The information requested relates directly to the issue of whether there are existing resources at the Fort Saskatchewan Correctional Centre that the Government had available to ease the problems, but chose not to use and what plans the Government has to deal with what is, obviously, a public crisis.
>
> As evidence of this public interest the Applicant attaches copies of the following:
>
> (a) various newspaper articles, being just a sampling of articles on the subject in 2004, 2005, 2006; [Tab 1]
> (b) *Trang v. ERC*, 2002 ABQB 1942 (paras 26-32); [Tab 2]
> (c) *Trang v. ERC*, 2004 ABQB 497 (paras 53, 69-74). [Tab 3]
>
> The attached materials make it absolutely clear that the "public" interests have been proven; the Applicant is acting on behalf of other concerned citizens; there will be a clear benefit to Albertans from release of the records; the records will contribute to the public understanding of the issue; the information relates to a compelling interest; the records will contribute to debate and the resolution of issues of public interest; and the records would clarify public understanding where Government has announced that monies will not be spent, based on its priorities.
>
> In answer to the question as to whether the Applicant will disseminate the contents of the records, the answer is that he will. Indeed, this would only be consistent with his past practice where information obtained on these issues has been broadly disseminated.

[para 36] I accept the Public Body's argument that an applicant must do more than make bare assertions and must provide argument or evidence about why a record is a matter of public interest. The Public Body quoted from Order 2000-011, as follows:

> I find that the Applicants did not provide the Public Body with information that the records relate to a matter of public interest. The Applicants provided a one sentence statement consisting of their opinion that the records pertain to a matter of public interest. … It is not sufficient for an Applicant to simply state that the records relate to a matter of public interest. The Applicant must provide some argument as to what the pubic interest is and how it will be served by the Public Body releasing the records to the Applicant (para 41).

13 criteria

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

[para 37] The Public Body says that the Applicant is a lawyer in private practice in Alberta and there is no evidence at the Inquiry to show that the Applicant's interest is other than a private interest. The Applicant says that he is "acting on behalf of other concerned citizens". However, the Applicant does not explain this comment further or indicate which citizens he is acting on behalf of when requesting the record. I accept the Public Body's submission that the Applicant is motivated by private interests.

- This factor weighs against excusing payment of the fee.

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?

10. Should the Public Body have anticipated the public need to have the record?

[para 38] I will consider the above four factors together as they are interrelated in this case. The Public Body says that members of the public will not benefit from disclosure of the record and disclosure of the record will not contribute to public understanding or add to public research on the issue. The Public Body also says that it should not have anticipated the need for the public to have the record itself. The Applicant takes the opposite position.

[para 39] The Public Body said there must be an identifiable group that would benefit from disclosure, not just the whole of the public. The Public Body says that it is unable to identify a "public" that would benefit from disclosure of the record. The Public Body acknowledges that disclosure of the record may contribute to the public

understanding of an issue, but only for a "narrow" public. The Public Body says that any broader public interest has already been stirred by "exhaustive media attention" for issues pertaining to the Remand Centre, so disclosure of the record could only make a marginal contribution towards greater public understanding.

[para 40] The Public Body said:

> Disclosure will not affect a broad benefit nor will it contribute further to public understanding of the issue. While the topic may generate curiosity among a broader public, no evidence has been presented to suggest the … *information in the records* … generates public interest.

[para 41] To the contrary, the Applicant says that the "public" in this case is broad and consists of prisoners, prison staff, friends and families of prisoners and society in general. The Applicant says that the overcrowding for Alberta's prisoners is an issue of "great public concern" and a "public crisis" that has been the subject of public criticism by many parties, including Judges.

[para 42] In support of the position that there is "broad" public interest in the record, the Applicant provided some newspaper articles. Some excerpts are as follows:

- It is shameful that in the wealthiest province in Canada we continue to have a facility with the dubious distinction of being "the worst place in Canada to do time" (*Edmonton Journal*, February 24, 2004, A15);
- Some offenders – over 200 – have refused to be housed (in less cramped units) because they want to go in front of the judges and get extra credit for time served for being over-crowded. "It's a scam and it works well" (*Edmonton Sun,* March 31, 2004, 3);
- One of Canada's leading experts on the treatment of inmates says conditions at the Edmonton Remand Centre don't meet international standards (*Edmonton Journal*, April 14, 2004);
- If, as Dostoevsky said, a society should be judged by the way it treats its criminals, the continuing tales of terrible conditions at the Edmonton Remand Centre reflect horribly on all of us (*Edmonton Journal*, April 15, 2004, A16);
- Alberta's Liberal leader and a prominent prisoners' rights lawyer applauded moves by the Solicitor General's Department to replace the Edmonton Remand Centre, calling the replacement of the controversial and overcrowded facility long overdue (*Edmonton Journal*, August 9, 2005, B1);
- Solicitor General spokesman [name of individual], said the population topped at 754 on Monday morning – a figure he agreed shattered the remand's previous all-time population record. "That's why getting funding to build a new remand facility is a priority for this department," he said. "But we have to go to the Treasury Board for approval, like everyone else" (*Edmonton Sun,* September 28, 2005);
- Resourceful inmates at the Edmonton Remand Centre are exploiting a bad situation, says the past president of a legal association. Triple-time sentence credit has been getting more common in recent years. That means that for every month an inmate spends in the remand waiting for trial, a judge will take three months off his eventual prison sentence (*Edmonton Sun*, September 29, 2005); and
- While Klein wouldn't say much about what's in the budget, he did confirm there won't be any money for a new $250-million remand centre in Edmonton. Albertans

> will be angry when they realize that crowded conditions at the remand centre have prompted judges to award violent offenders some of the lightest sentences in the country, he said. "It makes their promises to get tough on crime a total farce, because no one lets criminals out faster than the province of Alberta" (*Edmonton Sun,* March 21, 2006).

[para 43] In support of the position that there is "broad" public interest in the record, the Applicant provided two court decisions. In *Trang v. ERC*, 2002 ABQB 1042 (AB QB), the Applicant represented the accused in an action seeking a declaration against the Edmonton Remand Centre (ERC). The accused sought a declaration that the conditions of their previous detention and treatment at the ERC offended the *Charter*, as cruel and usual punishment.

[para 44] The ERC brought an application to strike out the proceedings on the basis of mootness because the accused were no longer prisoners. The court granted public interest standing due to ongoing questions pertaining to living conditions at the ERC. Justice Marceau said that individuals with a potentially increased risk of incarceration have a clear collateral interest in ensuring places of detention do not have conditions that breach *Charter* rights. Justice Marceau stated:

> The public has an interest in seeing that the citizens of this country are not imprisoned in a manner which offends the *Charter*. The humane treatment of its prisoners is surely one of the hallmarks of a free and democratic society. The issue is clearly one of great importance (para 32).

[para 45] In *Trang v. ERC*, 2004 ABQB 497 (AB QB), Justice Marceau again denied an application brought by the ERC to strike out proceedings on the basis of mootness for treatment received by the accused while they were in detention at the ERC. One of the allegations was that prisoners at the ERC with a reasonable defence pleaded guilty so they could be transferred to other institutions thereby depriving them of the *Charter* right to a fair trial. The Applicant did not refer to a further court decision that decided the substantive issue in these cases.

[para 46] The Public Body says that the record contains 992 pages, which is a vast amount of information to be distributed, as is, to the public. In Order H2007-023, I considered 500 pages to be a large amount of information to be disclosed to the public. I question whether the record would be meaningful to the public in its present form. Before the record could be of benefit to the public or contribute to public understanding or add to public research, in my view, the information must first be analyzed and summarized. The Applicant has not indicated his intentions or capacity in this regard.

[para 47] Order 2001-017 considered whether the disclosure of a large amount of detailed information would be in the public interest, and states:

> I understand that the Applicant is motivated by what he views as his public duty to Albertans. However, I accept Environment's key argument that disclosing the records will not benefit the public unless the Applicant can analyze the vast quantity of raw information that would rain down on him. The Applicant's agent indicated at inquiry

> that, as a member of the Opposition, only modest financial and human resources were available to analyze the records. …If the Applicant cannot properly analyze the records, then he cannot disseminate the information contained in them in a way that contributes to open and transparent government. At that point the Applicant's public interest argument breaks down and his argument for a fee waiver fails (para 29).

[para 48] I accept the Applicant's general argument that there is a "broad" public interest in overcrowding and living conditions at the Edmonton Remand Centre. However, I do not agree that there is the same level of public interest in the Fort Saskatchewan Correctional Centre. The Correctional Centre is not mentioned in any of the above reference materials, and although there may be curiosity about other facilities, I do not see that information having the same level of broad public interest as the Remand Centre.

[para 49] I said that the general issue of living conditions at the Remand Centre is a matter of broad public interest. However, the specific question before me is whether disclosure of this particular record would benefit members of the public, contribute to public understanding, add to public research and mean that the Public Body should have anticipated the public need to have the record. In my view, plans and proposals for the Remand Centre would relate to the operation of government.

[para 50] I accept the Applicant's argument that disclosure of the part of the record that pertains to the Remand Centre would benefit members of the public, contribute to public understanding and add to public research, and that the Public Body should have anticipated the public need to have the record. However, there is no evidence before me to show that disclosure of the Correctional Centre part of the record would generate the same level of public interest.

- These four factors weigh in favour of excusing payment of the fee, for the part of the record that pertains to the Remand Centre.

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

[para 51] The Public Body says that it has not granted access to similar records at no cost. The Applicant did not address this factor. There is no evidence or indication to show otherwise. Therefore, I accept the Public Body's submission.

- This factor weighs against excusing payment of the fee.

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

[para 52] The Public Body says that it has not received any other requests for the record from the Applicant or anyone else. The Applicant did not address this factor. There is no evidence or indication to show otherwise. Therefore, I accept the Public Body's submission.

- This factor weighs against excusing payment of the fee.

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?

[para 53] In regard to the above two factors, the Public Body says that disclosure of the record itself, would not contribute to debate or resolution of events of public interest. The Public Body says that the second question requires that the government has itself established public understanding of an issue and the Correctional Centre part of the record contains detailed operational information that would not contribute to either of the above two factors.

[para 54] The Applicant did not address these two factors. I accept the Public Body's submission.

- These two factors weigh against excusing payment of the fee.

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

[para 55] The Public Body says that the records themselves do not relate to a conflict between the Applicant and the Government, as it is not apparent what use the Applicant may make of the record. From the *Trang* cases, it appears that near the time of this access request the Applicant and the Government were on opposing sides in litigation that pertained to living conditions at the Remand Centre. The Applicant did not address this factor. I accept the Public Body's submission that it does not view the records themselves as relating to a conflict with the Applicant.

- This factor is neutral in regard to excusing payment of the fee.

10. Should the Public Body have anticipated the public need to have the record?

[para 56] This factor is addressed under paragraphs 41-53 in this Order.

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 to find less expensive sources of information, or assist in narrowing the request so as to reduce costs?

[para 57] The Public Body says that it responded openly, accurately and competently, and fulfilled its duty to assist under FOIP. The evidence shows that the

Public Body provided the amount of the fee and the breakdown of how the fee was calculated in a timely manner. The Public Body requested payment of the fee twice, but the Applicant did not pay the fee or provide further instructions to the Public Body.

[para 58] The evidence shows that the Public Body twice considered the request to be abandoned, due to a lack of response from the Applicant. Even without payment of the fee, the Public Body went ahead and prepared the record for disclosure to the Applicant. The Applicant did not address this factor. I accept the Public Body's submission that it was responsive to the Applicant's request.

- This factor weighs against excusing payment of the fee.

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?

[para 59] The Public Body says a waiver of the fee in this case would be an unreasonable burden of cost to shift from the Applicant to Alberta taxpayers, due to the "private" interests of the Applicant and the "narrow" public interest in the record. However, the Public Body did not address the question of whether a fee waiver would be significant interference with the operations of the Public Body. In my view a fee waiver in the sum of $1,135.50 would *not* be significant interference with the operations of the Public Body. The Applicant did not address this factor.

- This factor weighs in favour of excusing payment of the fee.

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

[para 60] The Public Body says there is no evidence to suggest that the Applicant will disseminate the contents of the record, particularly since the record has no public value other than to the Applicant. The Applicant says that he will disseminate the contents of the record, which "would only be consistent with his past practice where information obtained on these issues has been broadly disseminated". However, there is no evidence before me that addresses the probability of whether the Applicant will disseminate the contents of the record.

- This factor is neutral in excusing payment of the fee.

The two principles

1. The Act was intended to foster open, transparent and accountable government, subject to the limits contained in FOIP.

[para 61] In my view, disclosure of the part of the record that pertains to the Remand Centre may shed light on the operation of government for any plans or proposals for the Remand Centre. However, there is no evidence or argument before me that addresses how disclosure of the part of the record pertaining to the Correctional Centre would foster open, transparent and accountable government.

- This principle weighs in favour of excusing payment of the fee, for the part of the record that pertains to the Remand Centre.

2. The Act contains the principle that the user seeking records should pay.

[para 62] The Applicant says that the fee is an "obstacle" that denies the public access to the information in the record. However, the Public Body says that disclosure of the record has not been denied to the Applicant and the only thing that the Applicant has to do to obtain the record is to "simply pay the fee". In regard to the "user pay" principle in this case, the Public Body states:

> The Public Body made a conscious reflective decision that, though inadequate – the estimated fee is modest compared to what the ultimate cost of processing this request is likely to be – the processing costs must be borne by the Applicant. The Applicant must establish that conditions appropriate to a fee waiver exist. The Applicant has asserted a "public interest" in the matter however has not discharged the burden of proof that his request should be processed at the expense of Alberta taxpayers.

[para 63] In my view, waiving the fee in its entirety in this case would go against the "user pay" principle and the integrity of the fee schedule, as set out in FOIP. Order 2000-008 said:

> It is a simple fact that retrieval and copying of records costs the Public Body both human and material resources. The Public Body is funded by the taxes of Albertans. Are the records of significant importance that the cost should be passed on to all Albertans? After reviewing the records, my answer to this question is no (para 44).

para 64] In my view, the information and evidence before me weighs against setting aside the entire legislated fee schedule in the circumstances of this case. The "user pay" principle applies, in that taxpayers should not be paying for the Applicant's fee to access a record that has a "narrow" rather than a "broad" public interest, and where the record is a matter of individual or private "curiosity" rather than public "benefit".

- This principle weighs against excusing payment of the fee, for the part of the record that pertains to the Correctional Centre.

[para 65] I note the sparse amount of information the Applicant provided to the Public Body at the time it made its decision. Order 97-001 said the factors that are known at an inquiry might not be known by a public body at the time the decision is made about a fee waiver. The former Commissioner stated:

> I realize that I have the benefit of hindsight on this issue, in that the Public Body didn't know for certain, when it released the records, that the Applicant would disseminate the contents. … Inadvertently, the Applicant also touched on this issue when the Applicant said that it was difficult to demonstrate at the front end of an application what the end result will be as concerns the public interest. I would say that it is also difficult for a public body to know at the front end of an application how the record relates to a matter of public interest. I empathize with the Public Body in this regard. … The Public Body was not wrong in deciding to charge the fee. It did not have the benefit of the viewpoint I now have when making my independent decision (Order 97-001 (paras 100, 111-112)).

Conclusion

[para 66] In conclusion, after considering all of the above information, argument and evidence and after weighing the 13 criteria and the two principles, I find that the balance weighs in favour of a finding that there is a compelling case that the part of the record pertaining to the Remand Centre is a matter of public interest. Although there may be some marginal benefit or curiosity about the Correctional Centre, there is no "broad" public interest or compelling case for a finding of public interest for that part of the record.

[para 67] For all of the above reasons, I intend to order the Public Body to waive payment of part of the fee as a matter of public interest and to excuse the Applicant from paying 50% of the $1,135.50 fee, which will reduce the fee to $567.75.

VI. ORDER

[para 68] I make this Order under section 72(3)(c) of FOIP:

- I order the Public Body to excuse the Applicant from paying 50% of the fee, and to reduce the fee to $567.75; and

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

Noela Inions, Q.C.
Adjudicator