

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2007-010**

August 7, 2007

**TOWN OF LAMONT**

Case File Number 3542

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

**Summary:** The Applicant made an access request to the Town of Lamont under the *Freedom of Information and Protection of Privacy Act*. The access request included a request for information regarding the Town of Lamont's contracts and tender process as well as information regarding the Town of Lamont's administration.

The Town of Lamont estimated the fees for service to be \$262.50. Upon receipt of the fee estimate, the Applicant requested a waiver of the fees pursuant to section 93. The Applicant also questioned whether the Town of Lamont properly estimated the fees for service and whether the Town of Lamont fulfilled its duty to assist.

The Adjudicator found that the fee waiver criteria under section 93 were not fulfilled and confirmed the Town of Lamont's decision not to waive fees. The Adjudicator also found that the Town of Lamont fulfilled its duty to assist.

The Adjudicator found that the Town of Lamont did not properly estimate the fees for service and ordered the Town of Lamont to provide the Applicant with a new fee estimate.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 72, 93; *Freedom of Information and Protection of Privacy Regulation* A/R 200/95, ss. 11, 12, 13(3), Schedule 2.

**Orders Cited: AB:** 96-002, 97-003, 97-011, 99-011, 2000-022, 2001-023, F2003-011, F2006-032, Adjudication Order #2.

## **I. BACKGROUND**

[para 1] On January 3, 2006, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Town of Lamont (the “Public Body”). The Applicant requested access to a wide variety of information which included the following:

- a) Information regarding the Public Body’s Councillors, or relatives of Public Body’s Councillors that have done work, either on their own or through a trade name or limited company, for the Public Body. The Applicant requested details regarding contracts, the tender process, and invoices submitted for work completed. The Applicant also specifically requested information regarding a contract with a named accounting firm;
- b) Information regarding the law firm that represents the Public Body;
- c) Information regarding the Applicant’s dealings with the Public Body including a record of phone calls or written documents that refer to the Applicant;
- d) Information regarding the Public Body’s Town Manager including his job description, application for the position, references, academic qualifications, the search committee process for the position, benefits paid to the Town Manager, use and insurance of Public Body vehicles used by the Town Manager;
- e) Information regarding the Applicant’s request to appear before the Public Body’s Town Council. The Applicant also requested information regarding the Council’s response to the Applicant’s request including the Council’s authority to respond in the manner it did;
- f) Information regarding the Public Body’s administration including information regarding the Town Council’s ability to direct the administration;
- g) Information regarding the use of the Public Body’s credit cards by the Town Manager and a Public Body employee;
- h) Information regarding the policy for addressing written requests received by the Public Body; and
- i) Information regarding e-mails from the Applicant and the Public Body’s response to those e-mails.

[para 2] The access request was for information from November 1, 2003 to and including December 31, 2005.

[para 3] On January 12, 2006, the Public Body responded to the request providing the Applicant with a fee estimate of \$262.50.

[para 4] On January 16, 2006, the Applicant requested a fee waiver pursuant to section 93 of the Act. The Public Body did not grant the fee waiver.

[para 5] On January 18, 2006 the Applicant requested a review of the Public Body's decision. The matter was set down for a written inquiry.

[para 6] The Public Body submitted an initial submission. The Applicant did not make a submission.

## **II. ISSUES**

[para 7] The issues in this inquiry are as follows:

- 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 services?
- C. Did the Public Body meet its duty to the Applicant, provided by section 10(1) of the Act?

## **III. DISCUSSION**

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

[para 8] Section 93(4) 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,*

*(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 9] 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.

**1. Should the Applicant be excused from paying all or part of a fee under section 93(4)(a) of the Act?**

[para 10] Section 93(4)(a) states that a public body may excuse an applicant from paying a fee if an applicant cannot afford the payment or if there is any other reason it is fair to excuse payment.

[para 11] In Order F2003-011, the Commissioner held that, in a fee waiver application on the basis of an inability to pay, the burden of proof lies on an applicant. The Commissioner held that an applicant is in the best position to provide proof of his or her financial circumstances.

[para 12] In this inquiry, the Applicant did not make a submission and there is no evidence before me regarding the Applicant's ability to pay. Given the foregoing, I find that the Applicant is not excused from paying the fees on the basis of an inability to pay.

[para 13] Similarly, there is no evidence before me that would lead me to conclude that it is fair to excuse payment for any other reason as set out in section 93(4)(a) of the Act.

[para 14] I find that the Applicant should not be excused from paying all or part of the fee under section 93(4)(a).

**2. Should the Applicant be excused from paying all or part of a fee under section 93(4)(b) of the Act?**

[para 15] Section 93(4)(b) states that a public body may excuse an applicant from paying a fee if the record relates to a matter of public interest.

[para 16] In Order 2001-023, the former Commissioner held that an applicant and a public body share the burden of proof under this section. In that Order the former Commissioner 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 17] The Applicant did not make a submission in this inquiry. However, given the shared burden of proof, I must still review whether the Public Body properly considered whether the records contain information that relates to a matter of public interest.

[para 18] In Order 96-002, the former Commissioner also 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 19] 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 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?<sup>1</sup>

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

[para 20] The Public Body states that there is no reason to believe that the Applicant is motivated by commercial interests. However, the Public Body states that the Applicant is motivated by a private interest to find fault with the Public Body and has requested this information as part of a “fishing trip”.

[para 21] There is no evidence before me that the Applicant is motivated by a public interest. Although the Applicant requested information regarding the Public Body’s contracts and tender processes, the Applicant has not provided any information or evidence to suggest that this information or, other information that was requested, relates to a public concern. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

**2. Will members of the public, other than the Applicant, benefit from disclosure?**

[para 22] There is no evidence before me to suggest that members of the public, other than the Applicant, would benefit from disclosure of the records. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

**3. Will the records contribute to the public understanding of an issue (that is, contribute to open and transparent government)?**

[para 23] The Public Body states that the records would not contribute to the public understanding of an issue. The Public Body states that the Applicant’s access request is a “fishing trip” to find fault with the Public Body.

[para 24] There is no evidence before me to suggest that the records will contribute to the public understanding of an issue. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

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<sup>1</sup> In Order F2006-032, dated March 2, 2007, Adjudicator Gauk stated that, in future inquiries, she would refer to a streamlined set of criteria when determining whether a fee waiver is warranted on the basis of public interest. However, given that the new criteria set out in that Order were not available on the due date for initial submissions in this inquiry, I will decide the public interest issue before me on the basis of the original 13 criteria.

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

[para 25] There is no evidence before me to suggest that disclosure of the records will add to public research on the operation of government. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

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

[para 26] The Public Body states that there have been no other access requests for similar records and it therefore has not provided access to similar records.

[para 27] I accept the Public Body's submission on this point. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

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

[para 28] Whether numerous persons have sought the information at issue is more of a significant indicator of public interest than if the applicant is the only individual to have made a request. Although an applicant may be persistent, it is possible to be persistent about a matter even when it has significance primarily to only oneself.

[para 29] In this inquiry, the Applicant has made persistent efforts to obtain the records at issue. However, there is no evidence that this persistence is related to a public interest in the information. Furthermore, there is no evidence that other persons or organizations have also requested the information.

[para 30] I do not find that this criterion is a significant indicator that the records relate to a matter of public interest.

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

[para 31] There is no evidence before me to suggest that the records would contribute to debate on or resolution of events of public interest. I find that this criterion does not weigh in favour of a finding that the records relate to a matter 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 32] There is no evidence before me to suggest that the records would be useful in clarifying the public understanding of issues where government has itself established that public understanding. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

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

[para 33] The Public Body states that the Applicant has a grievance with the Public Body. However, the Public Body states that the records do not relate to that conflict.

[para 34] I accept the Public Body's submission that the Applicant had and, continues to have, a grievance with the Public Body. However, it is unclear whether the records requested relate to, or to what extent they relate to, the conflict with the Public Body. In any event, there is no evidence before me that the grievance or conflict relates to a public interest. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

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

[para 35] The Public Body states that it should not have anticipated the public need to have the records. The Public Body states that the records cover many areas of municipal operations. In addition, the Public Body states that the Applicant is the only person who has requested access to the records.

[para 36] This criterion presumes a need of the public to have the records at issue. There is no evidence before me that the public has a need to have the records or that the Public Body should have anticipated such a need. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

**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 37] The Public Body states that it provided the Applicant with photocopies of all requested By-laws, Policies and Council Minutes at no cost. The Public Body also states that it provided photocopied legislation to the Applicant at no cost and provided the Applicant with an explanation regarding parts of the legislation.

[para 38] I find that the Public Body has been responsive to the Applicant's request for information. I accept the Public Body's submission that it provided the Applicant with information at no cost and offered to provide the Applicant with access to other records, also at no cost. In addition, I find that the Public Body attempted to assist the Applicant in reducing the fee by suggesting that the Applicant consider narrowing the access request.

[para 39] I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.



**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 40] The Public Body states that responding to this access request will place a tremendous burden on its staff. The Public Body implies that a fee waiver would significantly interfere with its operations. The Public Body did not, however, provide further evidence to substantiate its claims.

[para 41] The estimated fees for service which were calculated by the Public Body consist of \$262.50. On the basis of the information before me, I do not accept that a fee waiver would significantly interfere with the operations of the Public Body. I do not find that this criterion is fulfilled.

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

[para 42] There is no evidence before me to suggest that the Applicant will disseminate the contents of the records. There is also no evidence that the public has shown an interest in receiving the records. I find that this criterion does not weigh in favour of a finding that the records relate to a matter of public interest.

**Conclusion**

[para 43] After weighing all of the above criteria, I find that the requested records do not relate to a matter of public interest and do not fall within section 93(4)(b) of the Act. I find that the Applicant should not be excused from paying the fee pursuant to section 93(4)(b) of the Act.

**B. Did the Public Body properly estimate the fees for services?**

[para 44] The second issue in this inquiry is whether the Public Body properly estimated the fee of \$262.50. The *Freedom of Information and Protection of Privacy Regulation* AR 200/95 (the “Regulation”) establishes how fees are to be dealt with. Section 12 of the Regulation requires that a fee estimate set out a number of items including the time and cost to search, locate and retrieve a record, as well as the time and cost to prepare and handle a record for disclosure.

[para 45] In reviewing the Public Body’s estimate of fees, I must first determine whether the amount of time estimated to search, locate, retrieve, prepare and handle the records is reasonable. If this estimate is reasonable, I must then determine if the Public Body has properly applied the fees as set out in Schedule 2 of the Regulation.

[para 46] The Public Body states that its Town Manager estimated the time to search, locate, retrieve and prepare the records for disclosure by determining the time to

complete the task for one Councillor's records and then extrapolating that time by eight Councillors. The Public Body states that it then discounted the estimated time by 25% because it believed that its secretarial staff would be more familiar with the records and could, therefore, complete the task in less time. In total, the Public Body estimated that it would take 25 hours to search, locate, retrieve and prepare the records for disclosure.

[para 47] After taking into account the number of Councillors whose records need to be searched and the fact that the Public Body discounted its time by 25%, I find that the Public Body's overall time estimate is reasonable in this case. I also find that rates applied by the Public Body for time to search, locate, retrieve and prepare the records for a general access request were in accordance with the fees set out in Schedule 2.

[para 48] However, after a review of the Public Body's estimate, and by the Public Body's own admission, I find that the Public Body made an error when it provided the Applicant with the fee estimate. The Public Body erroneously reduced the fee by \$150.00.

[para 49] In addition, I find that portion of the access request should be considered a request for the Applicant's own personal information (Orders 97-003 and 97-011). Section 11 of the Regulation states that, for a request for personal information, a public body may only charge an applicant for producing a copy of a record, and only if the amount of fees is estimated to exceed \$10. There is no evidence before me that the Public Body treated a portion of the access request as a request for the applicant's own personal information.

[para 50] Given the foregoing, I intend to order the Public Body to provide the Applicant with new fee estimate.

[para 51] I note that in the Applicant's request for review, the Applicant stated that all of the records should have been readily accessible on the Public Body's computer system. The Applicant implied that there should be no need for the Public Body to search in other places and no corresponding charge for those additional searches.

[para 52] I do not agree with the Applicant's argument. The Act does not state that a public body must convert and retain all of its records in electronic form. The Act does, however, require a public body to search for all records in its custody or control, including those in paper and electronic formats. If a public body focuses its search on only one type of record, such as electronic records, and ignores other forms of records that may exist, a public body would breach its section 10 duty to assist. Although an applicant may choose to narrow an access request to request only those records in electronic form, there is no evidence before me that the Applicant in this inquiry narrowed the access request in this manner.

**C. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?**

[para 53] Section 10(1) reads:

*10(1) The head of the public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 54] There are generally four steps involved in responding to a request for access to information. The first step requires a public body to clarify with an applicant, if clarification is required, the nature of the access request. As part of this step a public body has a duty to engage in discussions with an applicant leading up to a formal fee estimate and assist an applicant in narrowing the request. The second step requires a public body to provide an applicant with a fee estimate and agree upon fees. The third step requires a public body to conduct an adequate search for records that are responsive to an applicant's request. The fourth step requires a public body to decide what, if any, exceptions under the Act apply to the responsive information.

[para 55] In this inquiry, I limited my review of the Public Body's duty to assist to the first and second step, as it was at this point that the Applicant requested a fee waiver. In addition, I did not address, under section 10(1), whether the fee estimate was appropriate nor address the Public Body's denial of a fee waiver, as these are issues that should be, and have been, addressed separately under section 93 (Orders 99-011 and 2000-022).

[para 56] In the Applicant's request for review, the Applicant implies that the Public Body did not meet its duty to assist. The Applicant states that when the Applicant gave the Public Body a letter related to the access request, the Public Body would not sign a copy of the letter as an acknowledgment of receipt. The Applicant also complains that, on at least one occasion, the Public Body told the Applicant that the Applicant was only permitted to speak with the Public Body's FOIP Coordinator and was not permitted to speak with other staff regarding the FOIP request.

[para 57] Although the Act requires a public body to respond to an applicant about whether it has custody or control of records responsive to an access request, the Act does not require a public body to sign a document acknowledging receipt or engage in any other act that may be dictated solely by an applicant. In addition, a public body's duty to assist requires that the public body identify an individual within the public body who will discuss the FOIP request with the applicant. Often a public body will assign the FOIP Coordinator to that task. The Act does not, however, give an applicant the authority to determine who that individual will be.

[para 58] After a review of the Public Body's submission and all of the information before me, I find that the Public Body fulfilled its duty to make every reasonable effort to assist and to respond to the Applicant openly, accurately and completely. I find that the Public Body engaged in a discussion with the Applicant leading up to a formal fee

estimate. I also accept the Public Body's submission that it attempted to assist the Applicant in reducing the fee by suggesting that the Applicant consider narrowing the access request.

[para 59] I find the Public Body fulfilled its duty to assist as required by section 10(1) of the Act.

#### **IV. ORDER**

[para 60] I make the following Order under section 72 of the Act.

[para 61] I find that the Applicant should not 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 fees.

[para 62] I find that the Public Body did not properly estimate the fees for service. I order the Public Body to provide the Applicant with a new fee estimate and to provide me with a copy of the new fee estimate within 50 days of receiving a copy of this Order.

[para 63] I find the Public Body fulfilled its duty to assist as required by section 10(1) of the Act.

Lisa McAmmond  
Adjudicator