

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-016

November 15, 2007

ALBERTA EMPLOYMENT, IMMIGRATION AND INDUSTRY
(formerly Alberta Human Resources and Employment)

Case File Number 3673

Office URL: www.oipc.ab.ca

Summary: The Applicant requested copies of all of her personal information from all of the Public Body's offices, with the exception of documents that she provided to the Public Body or that it already provided to her. The Public Body estimated the number of records involved to consist of at least 1,828 pages and the accompanying fee to be \$457. The Applicant requested a fee waiver under section 93(4)(a) of the *Freedom of Information and Protection of Privacy Act* on the basis that she could not afford payment.

The Public Body acknowledged the Applicant's inability to pay the entire fee but exercised its discretion not to excuse payment. Its reasons were that the Applicant refused to narrow her request, the cost of complying with the request would be burdensome to the Public Body, the Applicant refused to use other processes such as routine disclosure from the district office, and the Applicant had already received some of the requested information indirectly or the information was otherwise known to her.

The Adjudicator found that because the request for a fee waiver was based on inability to pay, and the Applicant had requested her personal information rather than general government records, the scope of the request and cost to the Public Body were less relevant than in matters involving fee waivers based on public interest or fairness. The Applicant could not control the amount of her personal information held by the Public Body or the possibility that it may be located across several offices. The Adjudicator also found that the Applicant had already attempted to access her information through other

processes without complete success, and was entitled to all records containing her personal information even if she had already received the information indirectly.

The Applicant had already narrowed her request to exclude records previously provided to her or by her. In respect of records containing the Applicant's personal information that the Applicant had not provided to the Public Body or had not previously received, the Adjudicator reduced the fee that the Public Body may charge to zero.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 3(a), 6(1), 7(2), 9, 10(1), 14(1)(b), 29(1), 55(1)(a), 72, 72(3)(c), 93, 93(2), 93(4), 93(4)(a) and 93(4)(b).

Authorities Cited: AB: Orders 96-002, 96-009, 97-003, 97-020, 98-002, 99-016, 2000-020, 2000-033, 2001-009, 2001-017, F2002-023, F2003-011, F2003-025, F2004-008, F2005-006, F2006-028 and F2006-032, decision dated February 5, 2003. **BC:** Orders 79-1996 and 01-15. **ON:** Order P-233.

I. BACKGROUND

[para 1] By letter dated February 21, 2006, the Applicant made an access to information request to Alberta Human Resources and Employment, which is now called Alberta Employment, Immigration and Industry (the "Public Body"). She requested copies of her personal information from all of the Public Body's offices, including without limitation the district west office, appeals office, Minister's office and all corporate offices. She wanted her information for the period from May 31, 2005 to the date that her information is copied, but excluded copies of documents that she provided to the Public Body or that it already provided to her. The Applicant requested a fee waiver on the basis that she was receiving income support.

[para 2] By letter dated March 23, 2006, the Public Body advised the Applicant, through her authorized agent, that it understood the request to be for her personal information contained in the Public Body's income support files and in the office of the Minister for the period from May 31, 2005 to February 21, 2006, the date her request was received. The Public Body denied the Applicant's request for a fee waiver, saying that the Applicant could obtain much of the information through the Public Body's district offices in the form of routine disclosure, rather than through a formal request under the *Freedom of Information and Protection of Privacy Act* (the "Act" or "FOIP"). The Public Body estimated the fee for providing copies of the requested records to be \$315.00 for 1,260 pages.

[para 3] By letter dated March 29, 2006, the Applicant's agent clarified to the Public Body that the Applicant's request was for her personal information in all of the Public Body's offices, not just in income support files and the office of the Minister, and that the start date for the request should be amended to January 1, 2005. The Public Body was again told that the Applicant wanted her information up to the date that it is

copied. The Applicant's agent repeated her request for a fee waiver, saying that previous attempts to obtain information from the district office were unsuccessful.

[para 4] Telephone conversations took place between the Applicant's agent and the coordinator of the Information and Privacy Office of the Public Body in an effort to clarify and narrow the request for information. However, an agreement was not reached.

[para 5] By letters dated April 20 and May 2, 2006, the Public Body advised that, unless the Applicant could narrow her request to indicate which program areas other than income support should be searched, it would only be in a position to provide information contained in income support records and the offices of the Minister and Deputy Minister. The Public Body again denied a fee waiver. As a result of the amended start date of January 1, 2005, it revised the fee estimate to \$457.00 for 1,828 pages.

[para 6] By letter dated May 8, 2006, the Applicant asked this Office to review the decision of the Public Body to deny a fee waiver. Mediation was authorized but was unsuccessful. The matter was therefore set down for a written inquiry.

II. RECORDS AT ISSUE

[para 7] As the issue in this inquiry is whether or not the Applicant should be granted a fee waiver, there are no records directly at issue. For context, the Applicant has requested her personal information in all of the Public Body's records from the date of January 1, 2005. Part of these records consist of an estimated 1,828 pages held in the Public Body's income support files and the offices of the Minister and Deputy Minister.

III. ISSUE

[para 8] The issue in this inquiry is whether the Applicant should be excused from paying all or part of a fee under section 93(4)(a) of the Act, on the basis that she cannot afford payment.

IV. DISCUSSION OF ISSUE

[para 9] On a preliminary point, the Applicant and Public Body disagree on the end date of the period covered by the access request. The Public Body understands it to be February 21, 2006, which is the date that the initial request was received. The Applicant states that it is the date that her information is copied.

[para 10] Unless there are future response dates set as a result of a continuing request under section 9 of the Act, which type of request was not made here, the practice appears to be for a public body to use the date of an access request as the date up to which records will be provided. I note that an applicant cannot unilaterally require that a public body search for records beyond the date of an access request, as he or she should normally make a new access request (Order 2001-009 at para. 12). I further note that an open-ended timeframe has been found to be unworkable (Order 2000-020 at para. 13).

[para 11] Here, the Applicant made her initial access to information request to the Public Body in a letter dated February 21, 2006. Although she clarified her request in a subsequent letter, that was not a new or separate request. In order for there to be a workable timeframe, the Public Body was entitled to treat the date of the initial letter as the date up to which records would be provided and the estimated fee would apply.

A. Fee Waivers where an Applicant Cannot Afford Payment

[para 12] Section 93(4)(a) of the Act reads as follows:

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...

[para 13] An applicant has the burden of proving that he or she cannot afford payment and that section 93(4)(a) therefore applies (Order F2003-011 at para. 17). Here, I am satisfied that the Applicant has discharged the burden, given that she receives income support. The Public Body acknowledges that the Applicant does not have the financial resources to pay for all of the requested records.

[para 14] If an applicant cannot afford payment, section 93(4) of the Act gives a public body the discretion to grant a fee waiver, as it *may* excuse an applicant from paying all or part of a fee. A finding of financial hardship by itself does not mean that the public body must waive the fee, as it must still consider all of the circumstances and exercise its discretion (Order F2005-006 at para. 18). However, if the decision to refuse a fee waiver becomes the subject of an inquiry, the Commissioner or his designate may, under section 72(3)(c) of the Act, confirm or reduce a fee. This means that the Commissioner or his designate may not only determine whether a public body properly exercised its discretion, but may also render a new decision (Order 2000-033 at para. 19).

[para 15] The Public Body submits that it refused a fee waiver after considering a number of factors. I intend to summarize and review those factors, along with the Applicant's submissions relative to the same points.

1. Refusal to narrow the request

[para 16] The Public Body submits that the Applicant should not be entitled to a fee waiver because she has refused to clarify or narrow her request, or provide further information to enable the Public Body to identify additional responsive records (i.e., those outside income support files or the office of the Minister or Deputy Minister). The Public Body cites section 7(2) of the Act, which requires an applicant to provide enough detail to enable the public body to identify the record.

[para 17] The Applicant points out that she has already narrowed her request to exclude documents previously provided to her or that she provided to the Public Body. She submits that she has provided enough detail to enable the public body to identify the requested records, in that she has asked for all of her information in all of the public body's offices. She says that she cannot provide more specific locations because the Public Body has refused to provide a list of offices where her information exists.

[para 18] Applicants must make some effort to define for the public body what it is they want and the public body must assist them in doing this (Order 96-009 at p. 2 or para. 8). The applicant's initial duty is to provide sufficient clarification of the request for access to enable the public body to respond appropriately to the request (Order F2004-008 at para. 9). Here, I find that the request is sufficiently clear – it is for all records containing the Applicant's personal information, which I believe the Public Body has a capacity to identify.

[para 19] Although the Applicant has not indicated which other files or offices of the Public Body she wants searched, the Public Body is in a better position than she to ascertain where her personal information is located. It should assist the Applicant by indicating where her personal information is additionally located, so that she may then confirm whether she would like to have those additional records. It is typical for an access request to apply to a portion of all of the records in the custody or under the control of a public body, and applicants cannot control the fact that a public body may be large with several program areas.

[para 20] The Public Body cites orders stating that an applicant should be prepared to narrow his or her request when requesting a fee waiver (Orders 99-016 and 2001-017). However, these orders dealt with fee waivers on the basis of public interest rather than inability to pay. I discuss this distinction, as it relates to a number of factors when considering a fee waiver, in greater detail below.

[para 21] The Public Body also cites a British Columbia order (B.C. Order 79-1996 at p. 4 or para. 13), which states that individuals who cannot afford payment do not have an unlimited right of access to government records, and that their access request should therefore be reasonable in scope. However, the B.C. Order dealt with a request for general, not personal, information. In my view, an access request is reasonable, regardless of its scope or the number of records involved, if an individual is requesting his or her personal information. Orders in other jurisdictions have noted that an applicant has a right akin to ownership in personal information about him or herself, which cannot be asserted in respect of general information (B.C. Order 01-15 at paras. 31 and 32), and that a person should have a higher right of access to his or her own personal information than to general information (Ontario Order P-233 at p. 12).

[para 22] While applicants should be encouraged by public bodies to narrow their request or exclude more than just those records previously received, it remains the right of applicants to obtain their personal information, subject only to limits and exceptions

set out in the Act. Here, I find that the Applicant's decision to request all of her personal information not previously obtained does not justify the denial of a fee waiver.

2. *Reason for the request*

[para 23] Although the Public Body recognizes that it cannot require the Applicant to reveal the purpose for which she has made the information request, it argues that the Applicant would be able to reduce the fee if she were to ask for only those records she requires for her particular purpose. It says that the Applicant has not demonstrated that all of the requested records are critical to a fair determination of her financial benefits.

[para 24] The Applicant submits that she should be the one to decide the use to which she will put the information once she receives it, rather than provide a purpose to the Public Body and allow it to decide which records fall under it. She questions whether the Public Body actually understands that it cannot require a reason for her request when it uses the lack of a reason to justify its refusal to waive the fee.

[para 25] Whether an applicant can give a sufficient reason to justify why he or she wants particular records is an irrelevant consideration for the public body when considering a fee waiver (Order F2003-025 at para. 13). Accordingly, a fee waiver should not be denied in the present inquiry because the Applicant will not disclose the purpose for her request and allow the Public Body to provide only those records that it believes meet that purpose.

3. *Cost of complying with the request*

[para 26] The Public Body submits that the Applicant should not be entitled to a fee waiver because the request will involve a large volume of records, extensive searches and time-consuming preparation procedures. It argues that it will face an unreasonable burden due to the number of hours required to copy, review, sever and prepare the records, as well as consult and coordinate between the Public Body's Information and Privacy Office and the district office.

[para 27] The Applicant submits that she is entitled to her personal information, regardless of the cost to the Public Body. She also questions how the cost would be reduced, for instance, if she approached the district office instead, given that her records would still have to be reviewed and copied.

[para 28] In my view, the cost incurred by a Public Body in responding to a request for an individual's personal information is not an important factor when considering a fee waiver on the basis of inability to pay. I distinguish this from matters involving general government records and fee waivers based on public interest or fairness, as discussed further below. In respect of records containing personal information, section 93(2) of the Act states that fees for services, as provided for in the regulations, do not apply except for the cost of producing the copy. The necessary implication is that costs related to time spent reviewing, severing and preparing the records are to be borne by the public body.

[para 29] The Public Body argues that the Act contains the principle that the user should pay (Order 96-002 at p. 16 or para. 50). However, that principle was considered in an inquiry involving a fee waiver on the basis of public interest. A fee waiver on the basis of inability to pay is precisely meant to be an *exception* to the normal rules requiring payment for services performed under the Act.

[para 30] The Public Body argues that if all Albertans receiving income support requested all of their personal information expecting full fee waivers, the cost to taxpayers would be exorbitant and complying with the requests would interfere with the operations of the Public Body. This particular fact situation is not before me. However, I note that if a public body believes that responding to an access request will unreasonably interfere with its operations, it may request an extension of the time limit for responding under section 14(1)(b) of the Act, or ask the Commissioner for authorization to disregard the request, on the basis that requests have become repetitious or systematic in nature, under section 55(1)(a). Neither of these remedies was sought here.

4. *Refusal to use other processes*

[para 31] The Public Body submits that the Applicant should not be entitled to a fee waiver because she is unwilling to obtain some of her information informally through the district office rather than a FOIP request. The Public Body estimates that 30% of the requested information may be available outside the FOIP process and has been advised that district office staff would be willing to provide it. The Public Body says that the Applicant has received routine documents from the district office in the past.

[para 32] In support of its position, the Public Body cites section 3(a) of the Act, which states that the Act is in addition to and does not replace existing procedures for access to information or records. It also cites the provincial *FOIP Guidelines and Practices (2005)*, which encourage public bodies to provide information through routine disclosure and to advise individuals of that alternative. The Public Body further submits that if the Applicant is dissatisfied with information that she has received in the course of appeals that she has initiated, there are remedies available to her within that process as well.

[para 33] The Applicant submits that she has not been successful in obtaining all desired records directly from the district office or in the course of the appeal process. In short, she says that alternate processes have not worked in the past and that it is for this reason that she has made a request under the Act. She submits that the very purpose of the Act, and the Public Body's own Information and Privacy Office, is to enable applicants to obtain a coordinated response rather than obtain records in a piecemeal fashion from various offices.

[para 34] Section 3(a) of the Act does not preclude recourse under the Act where other means of access to a record are available. Its intent is quite the opposite. The Act provides for a dual process and does not limit one's right of access if another access

process exists outside the Act (Order F2006-028 at para. 11). Further, it grants individuals a legislated right to access information that is otherwise not available to them through informal avenues (Decision on request for authorization to disregard an access request under s. 55 of the Act, February 5, 2003, at para. 24). While informal disclosure should be encouraged, the purpose of the Act is to allow applicants to make formal access requests if they so choose.

[para 35] I do note at least one order suggesting that the availability of records at no cost through other processes outside the Act is a factor in considering a fee waiver on the basis of inability to pay (Order F2005-006 at para. 30). I also recognize that alerting an applicant to other processes may mean that a public body has met its duty to assist under section 10(1) of the Act (Order 98-002 at para. 47).

[para 36] However, the important point in the present inquiry is that the Applicant has already attempted to use other disclosure processes with limited success. She indicates that she made an information request to the district office in the summer of 2005 but was denied, and that the district office provided some, but not all, information when asked to do so in advance of an appeal hearing in February 2006. She has found that routine disclosure through the district office and disclosure through the appeal process have not resulted in obtaining all of her personal information. I therefore do not find that her current refusal to seek her personal information through alternate means is a factor suggesting that she should be denied a fee waiver.

5. *Information already received indirectly*

[para 37] The Public Body also denies a fee waiver on the basis that many of the requested records contain information that has already been indirectly provided to the Applicant, either because she has received other records with essentially the same information or is already aware of the information. It cites, for example, printouts of the Applicant's monthly financial benefit, which she already knows given that it is deposited into her bank account. The Public Body also cites information relating to the Applicant's requests for additional items or services that have been approved – if the Applicant received funds for the item or service, she already knows that it was approved. The Public Body argues that the Applicant should narrow her request to exclude information that has already been provided to her in a different form, or that she already knows through other means.

[para 38] The Applicant states that she wants a complete copy of her personal information in the possession of the Public Body, not just highlights or summaries. Referring to the example of additional items and services, she submits that she not only wants to know that they were approved, but who approved them and why, among other things. The Applicant argues that she is entitled to “records” not previously received, as opposed to “information”.

[para 39] The Public Body cites certain orders in which the difference between a “record” and “information” was discussed in the context of the specific inquiry (Orders

97-003 and 97-020). I do not believe that it is necessary to debate the difference in this case. Section 6(1) of the Act states: “An applicant has a right of access to any *record* in the custody or under the control of a public body, including a *record* containing personal information about the applicant.” Even if one’s personal information is found elsewhere in a different form, or one already knows the information through other means, one still has a right of access to the record. I therefore find that the Applicant should not be denied a fee waiver as a result of her desire to obtain all records containing her personal information.

B. Clarification regarding Certain Criteria

[para 40] Section 93(4) provides for three categories under which a fee may be waived: where an applicant cannot afford payment [first part of section 93(4)(a)], where it is fair to excuse payment for any other reason [second part of section 93(4)(a)], and where the record relates to a matter of public interest [section 93(4)(b)]. There was disagreement between the parties to this inquiry regarding the extent to which five criteria – which have been considered in matters involving fairness, public interest and/or requests for general government records – may be considered in matters involving inability to pay and requests for an individual’s personal information.

[para 41] These five criteria, from among those first enumerated in Order 96-002 and later reformulated in Order F2006-032, are whether access has been given to similar records at no cost, the fee waiver would interfere with the operations of the public body, there are other less expensive sources of the information, the request is as narrow as possible, and the public body has helped the applicant to define the request. Here, the Public Body relied on all of these criteria as reasons for denying the Applicant’s request for a fee waiver. In response, the Applicant submitted that factors such as the scope of the request and cost to the public body are not relevant in matters involving inability to pay, as they have arisen in matters involving fee waivers based on public interest or fairness.

[para 42] In my view, when determining whether a fee waiver should be granted to an applicant who cannot afford payment and who has requested his or her personal information, there are limits to the relevance of the five aforementioned factors (similar records at no cost, burden on the public body, less expensive sources, narrowing of the request and the public body’s efforts to help).

[para 43] Previous orders have indicated that where an applicant cannot afford to pay to obtain his or her personal information, he or she is entitled to a fee waiver at least in respect of records not previously received from the public body or not provided to the public body by the applicant him or herself (Orders F2002-023, F2003-025 and F2005-006, discussed in greater detail below). Apart from possibly excluding records received or provided, this means that the scope and size of the request, whether it has been narrowed in other ways and the cost and burden to the public body do not generally justify the denial of a fee waiver. Likewise, the past provision of similar records at no cost, or the presence of less expensive sources of the information, do not justify the

denial of a fee waiver unless the *same* records have been provided before or the applicant can *successfully* obtain the information elsewhere.

[para 44] Despite the limited application of the five criteria in situations where there is an established inability to pay, as opposed to cases where a fee waiver is requested on grounds of fairness or public interest, I emphasize that the criteria are less important only with respect to records containing an applicant's personal information. An applicant may be expected to obtain general information (e.g., copies of legislation, policies, manuals, published decisions) from other sources or else pay for copies of that information (Orders F2002-023 at para. 31 and F2005-006 at para. 30). This is so even if the general information is contained in the applicant's personal file or the overall request is characterized as a request for access to personal information (Order 97-003 at para. 262).

[para 45] Certain provisions of the Act reinforce the distinction between general and personal information when it comes to responding to access requests and charging fees. For example, section 29(1) allows a public body that has received a request under the Act to refuse to disclose information that is readily available to the public, which would usually be general rather than personal information. Section 93 of the Act distinguishes between a request for general information, for which all fees under the regulations may apply, and a request for personal information, for which only costs for producing the copy may be charged.

[para 46] As set out in previous orders, the principles with respect to fee waivers on the basis that an applicant cannot afford payment are as follows: An applicant who has established an inability to pay should not ask for the same records on numerous occasions and not expect to pay fees (Order F2002-023 at para. 42). Conversely, an applicant who has established an inability to pay is entitled to a fee waiver with respect to those records that he or she has not already received (Order F2003-025 at para. 15). The public body is in the better position to give evidence of what records have already been provided on previous occasions (Order F2002-023 at para. 43), although the applicant may give evidence to deny that he or she has received them (Order F2005-006 at para. 28).

[para 47] Earlier orders indicate that an applicant will be considered to have already received a particular record, and therefore not be entitled to a fee waiver for that record, if he or she obtained it through a previous request (Order F2003-025 at para. 12), which includes a request outside the Act (Order F2005-006 at paras. 24 and 29). An applicant will also be considered to have already received correspondence between the applicant and public body (Order F2002-023 at para. 44). I take this to mean correspondence both to and from the applicant, although it remains open to an applicant to argue that he or she did not receive, did not retain, or no longer has a particular record so that a fee waiver should also apply to that record.

[para 48] Here, the Applicant already excluded, in her initial request, documents that she provided to the Public Body or that it provided to her. She has established that she cannot afford payment of a fee. She cannot control the amount of her personal information that is in the possession of the Public Body, and she cannot control the fact

that it may be located across various offices or programs. She has already attempted to obtain her personal information through other processes without complete success. I conclude that she is entitled to a fee waiver in respect of those records containing her personal information, which records she has either not previously received or did not provide herself.

[para 49] In applying certain factors and criteria above as they relate to consideration of a fee waiver, I have concluded that there is a distinction between access to records containing personal information and access to general government records. I have also limited the relevance of certain criteria in this inquiry because the fee waiver was requested on the basis of inability to pay rather than public interest or fairness. However, it should be remembered that the decision to excuse payment of all or part of a fee under section 93(4) of the Act is a discretionary one, which may be based on a variety of factors. There may be relevant circumstances present in other cases or inquiries that appropriately lead to a decision *not* to grant a fee waiver, even though the request is based on inability to pay, is for personal information and excludes records already provided to or by the applicant.

V. ORDER

[para 50] I make this Order under section 72 of the Act.

[para 51] With respect to obtaining access to records containing the Applicant's personal information for the period from January 1, 2005 to February 21, 2006, I reduce, under section 72(3)(c) of the Act, the fee that the Public Body may charge to zero.

Wade Riordan Raaflaub
Adjudicator