

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2007-024

January 11, 2008

ALBERTA SOLICITOR GENERAL AND PUBLIC SECURITY

Review Number F3710

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

Summary: The Applicant requested a fee waiver for records pertaining to courthouse perimeter security, which 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 fees should be waived because the record is a matter of public interest. The fees at issue are a \$25.00 initial fee and a fee estimate of \$1,556.00 for 500 pages of records.

The Adjudicator found that the Public Body reasonably formed the opinion that the record was not a matter of public interest, properly exercised its discretion when deciding to refuse the fee waiver, and therefore, properly refused to waive the fees under section 93(4)(b) of FOIP. She confirmed the Public Body's decision to refuse to excuse the Applicant from paying all or part of the fee, pursuant to section 93(4)(b) of FOIP.

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

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

I. BACKGROUND

[para 1] On February 16, 2006, the Applicant made an 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"), as follows:

All records relating to the business of the "Judicial Perimeter Security" and the "Comprehensive Security Plan" (as that plan relates to courthouse security and the takeover of the RCMP provost).

[para 2] In the covering letter of February 16, 2006, the Applicant said he was paying the initial fee of \$25.00, and was requesting a fee waiver, on the basis of public interest. The Public Body received the Applicant's request on February 27, 2006. On February 28, 2006, the Public Body contacted the Applicant and clarified the request to include:

- The reasoning behind the perimeter security measures at the courthouses;
- The needs assessment for the perimeter security measures at the courthouses;
- Who or what parties initiated the "Judicial Perimeter Security" and "Comprehensive Security Plan";
- How the plan relates to the takeover of the RCMP provost;
- The actual plans (including PowerPoint presentations); and
- Who or what parties were consulted in creating and implementing the plans.

[para 3] On February 28, 2006, the Public Body initiated the search for responsive records. In a letter dated March 7, 2006, the Public Body verbally confirmed the scope of the request with the Applicant. In a letter dated March 20, 2006, the Public Body provided the Applicant with details of the fee estimate. The estimate was \$1,556.00 and was based on 500 pages of responsive records.

[para 4] In the letter dated March 20, 2006, the Public Body requested a 50% deposit in the sum of \$778.00 in order to continue processing the request. The Public Body requested a response within 20 calendar days. Also in that letter, the Public Body asked the Applicant for written reasons for the claim of public interest.

[para 5] In a letter dated April 24, 2006, the Public Body advised the Applicant that the request was considered to be abandoned as it had not received payment or any form of response. The letter advised the Applicant of the right to ask the Commissioner for a review. In a handwritten fax to the Public Body, dated April 26, 2006, the Applicant gave reasons for making the claim of public interest.

[para 6] In a letter dated May 1, 2006, the Public Body agreed to keep the request open. The Public Body again provided the Applicant with the details of the fee estimate and requested payment of \$778.00 within 20 calendar days in order to continue processing the request. Also in that letter, the Public Body advised that the fee waiver was denied, for the following reason:

We note again, that you have requested a fee waiver; however after serious consideration, we will not waive the fees on this request as we are not satisfied that your request is in the public interest. The Office of the Information and Privacy Commissioner established 13 criteria for the determination of public interest in Order 96-002. The responsibility lies with the applicant to make a case for public interest using these 13 criteria. We have attached these criteria for your use.

[para 7] In a letter dated June 5, 2006, 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 communication. The letter also advised the Applicant of the right to ask the Commissioner for a review. The Applicant requested a review of the Public Body's decision to deny the fee waiver, but the Applicant was not satisfied with the mediation authorized.

[para 8] The matter was set down for a written inquiry. The Information and Privacy Commissioner, Frank Work, Q.C. (the "Commissioner"), delegated me to hear the Inquiry. At the Inquiry, the Public Body submitted a written initial submission that was provided to the Applicant. The Applicant did not provide a submission.

[para 9] When preparing for the Inquiry, the Public Body discovered that there were approximately 5,000 pages of responsive records (as opposed to the original estimate of 500 pages), which it provided at the Inquiry. The Public Body adjusted the estimate accordingly and advised that the fee estimate is now \$2,546.00. However, the matter before me is denial of the fee waiver for the \$1,556.00 fee estimate. That is what the Applicant asked to be reviewed, and my jurisdiction is confined to that matter.

II. RECORDS/INFORMATION

[para 10] The matter before the Inquiry is whether the fees should be waived, so there are no records at issue in the usual sense.

III. INQUIRY ISSUE

[para 11] 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. 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 12] 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 13] In this Order, references to the 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 Order H2007-023 (paras 14-29, 42-44, 48-49), so those discussions will not be repeated in this Order.

[para 14] The fees at issue are a \$25.00 initial fee and a fee estimate of \$1,556.00 for 500 pages of records. The Public Body takes the position that the record is not a matter of public interest under section 93(4)(b) of FOIP, so the Public Body is allowed to refuse to excuse payment of the fees. In contrast, the Applicant says the fees should be excused because the public has an interest in security measures for public buildings including courthouses.

[para 15] There is a shared burden of proof for public interest under section 93(4)(b) of FOIP. Due to the shared burden, even though the Applicant did not provide a submission, I must still review whether the Public Body properly refused to waive the fees under section 93(4)(b) of FOIP and consider all of the information before me in this particular case.

[para 16] 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 17] 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 18] The 13 criteria are essentially sub-criteria, so for clarity, this Order refers to the 13 criteria as "factors". The following discussion summarizes the argument of the parties in the Public Body's written submission at the Inquiry and in the Applicant's two letters. 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 including the records, when balancing the factors to determine the degree of public interest in the record.

[para 19] 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 of factors to be considered and some factors are not relevant to every situation. However, the 13 criteria provide a range of factors 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 20] The Applicant wrote the following two letters to the Public Body, which touch on the Applicant's assertion that the record is a matter of public interest:

- Letter dated February 16, 2006, where the Applicant requests the fee waiver on the basis of public interest, which says:

We ask that you waive this fee and any other fees or disbursements because this is clearly a matter which is in the public interest. The public has an interest in what sort of security measures are undertaken which affect the public in relation to public buildings, especially the buildings as important as public courthouses.

- Handwritten fax dated April 26, 2006, where the Applicant responds to the Public Body's request for reasons for the claim of public interest, which says:
 1. Access to justice and the openness of the Courts are very important issues and rights in this area must be jealously safeguarded. These measures are causing significant public concern that they will act as a deterrent to the public in attending at Alberta's courthouses, thereby restricting those rights;
 2. The process leading to these measures was conducted in secret, without consultation with key stakeholders, (e.g., Criminal Trial Lawyers' Assoc., Elizabeth Fry, John Howard Society, Native Counselling). Clearly, the public has an interest in knowing why these measures were taken and what process led to them.

[para 21] The Public Body says that, although specifically asked to do so and even after the Applicant was provided with the 13 factors, the Applicant did not provide reasons that specifically address any of these factors. In the absence of a submission from the Applicant, I will consider the Applicant's letters that were provided to the Public Body at the time it made its decision regarding the fee waiver.

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

[para 22] The Public Body says that the Applicant is a lawyer in private practice in Alberta and there is no evidence to show that the Applicant's interest is other than a private interest. The Applicant did not address this factor. The only evidence I have before me is that the Applicant is a lawyer in private practice. I accept the Public Body's submission that the Applicant is motivated by commercial or private interests.

- This factor weighs against excusing payment of the fees.

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 23] I will consider the above four factors together as they are interrelated in the facts of this case. The Public Body says that disclosure of the records will not benefit members of the public. The Public Body says that disclosure of the record could even potentially cause public harm and be detrimental to the common good, for example, the information pertaining to detailed security measures.

[para 24] The Public Body summarizes the Applicant's position as follows:

It is the Applicant's position that the security measures implemented will deter the public in attending at Alberta's courthouses, thereby restricting the public's access to justice and the openness of the courts. The Applicant has also stated that the process leading to these measures was conducted in secret, without consultation with key stakeholders.

[para 25] The Public Body replies to the Applicant's assertions, as follows:

Security within Alberta provincial court buildings is nothing new and the Alberta Solicitor General began augmenting court security in 2005. Commencing in April 2006, new security measures using modern-day technology were implemented to enhance the safety of Albertans by keeping courthouses secure. Walk-through scanners, metal detectors, and x-ray inspection systems were put in place so all Albertans, including victims, witnesses, court workers, lawyers, and judges, could feel confident that while they are in a courthouse their safety and security is protected. The security measures were put in place to encourage the public's attendance at Alberta's courthouses.

As reported publicly by the Public Body on November 17, 2006, since the implementation of the enhanced security measures, over 1,800 restricted items such as pocket knives, box cutters, scissors, razor blades, screwdrivers, ammunition, drug pipes, and homemade brass knuckles were seized from individuals entering the courthouses.

It is the Public Body's position that the public have been provided with the information it needs to feel safe while attending Alberta's courthouses. The Public Body maintains that the disclosure of detailed security measures could potentially cause public harm and be detrimental to the common good.

[para 26] The Public Body says that it published a series of news releases in 2006 to publicly announce the implementation of enhanced security measures in Alberta's courthouses. The four news releases are as follows:

- April 8, 2006: Albertans' safety top priority in new provincial courthouse security;
- May 30, 2006: Courthouse security expands to four new locations;
- June 29, 2006: Courthouse security expands to two new locations; and
- November 17, 2006: Albertans' safety top priority in courthouse security expansion.

[para 27] The Public Body says that the press releases provided the information that is beneficial to the public about the new courthouse security measures, and that disclosure of the record at issue will not provide any broad public benefit or contribute to public understanding of the issue. In particular, the Public Body said:

It is the Public Body's position that the records do not relate to a matter of public interest and the disclosure of detailed information about security measures designed to protect the public would render them ineffectual and put public health and safety at risk.

[para 28] The record contains an extensive amount of information – 500 pages. I question whether the record would be meaningful to the public in its present form. It seems to me that the record could only have some potential of benefiting the public or contributing to public understanding or to public research if the information is analyzed and summarized before being provided to the public.

[para 29] 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 30] I do not disagree with the Applicant's general assertion that the public has an interest in ensuring that public buildings such as courthouses have adequate security measures. I do not disagree with the Applicant's general assertion that access to justice and openness of the courts are important issues to the public. There may be some curiosity about how security measures were instituted. However, I do not see how these general assertions satisfy any of these particular four factors for determining whether there is a "broad" degree of public interest.

[para 31] The only information before me that specifically pertains to these four factors is provided by the Public Body. I accept the Public Body's submission that members of the public, other than the Applicant, would not benefit from disclosure, and that any benefit must be considered in light of the possibility that there could even be detriment and public harm when disclosing detailed security measures to the public. In my view, the Public Body did anticipate the public need for information about the new courthouse security when it issued the four press releases.

[para 32] I do not see how there is even potential of benefit to members of the public or potential for increased public understanding with the record in its present form. Whether the record would add to public research on the operation of government depends upon the capacity to analyze and summarize a large amount of information. There is no evidence before me to show that the Applicant has either this intention or capability. Even if the Applicant had this capability, which the Applicant has not addressed, the Public Body has anticipated the public need for information about new courthouse security and has addressed this need with the press releases.

[para 33] I accept the Public Body's submission that the records, in and of themselves, would not likely benefit members of the public or contribute to the public understanding of the broader public issue of courthouse security. The parts of the record that could be disclosed under FOIP (which issue is *not* before me at the Inquiry)

might not provide meaningful information or add to public research on the operation of government. I see no indication that the Public Body should have anticipated a public need to disclose the record itself.

- These four factors weigh against excusing payment of the fees.

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

[para 34] 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 fees.

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

[para 35] The Public Body says the Applicant made only one FOIP request for access to the record and it has not received any other formal or informal requests for access to the records in question. 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 fees.

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 36] In regard to the above two factors, the Public Body says that it is not aware of any public debate on the implementation of enhanced security measures at Alberta's courthouses. Past concerns about inadequate courthouse security may have been resolved with the new measures. The Public Body says that disclosure of the detailed technical information about enhanced security measures that is contained in the record would not be useful in clarifying public understanding of the issue.

[para 37] The Applicant did not address these two factors. In my view, the technical and detailed nature of the record as well as the extent of the record might well create confusion rather than clarification or resolution for members of the public. I accept the Public Body's submission.

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

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

[para 38] The Public Body says that it is not aware of any conflict between the Applicant and the government. The Applicant did not address this factor. I accept the Public Body's submission.

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

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

[para 39] This factor is addressed in paragraphs 23 to 33 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 40] The evidence shows that the Public Body contacted the Applicant in a timely fashion and clarified the request. The evidence shows that the Public Body provided fee estimates to the Applicant in a timely manner and requested payment twice, but the Applicant did not respond to the Public Body with payment of 50% of the fee. The evidence shows that the Public Body twice considered the request to be abandoned, due to a lack of response from the Applicant.

[para 41] There is no evidence before me that the Public Body breached its duty to assist the Applicant in any way. The Applicant did not address this factor. I accept the Public Body's submission.

- This factor weighs against excusing payment of the fees.

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 42] The Public Body says there are 500 pages in the record and a waiver of the fees would be an unreasonable burden of cost to shift from the Applicant to Alberta taxpayers. 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 \$1,556.00 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 fees.

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

[para 43] The Public Body says that it is not known whether the Applicant will disseminate the contents of the record. The Public Body also says that the record should not be disseminated to the public, as the release of detailed security measures would render the security measures ineffectual and put public health and safety at risk. The Applicant did not address this factor.

- This factor is neutral in respect to excusing payment of the fees.

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

[para 44] It is not clear how disclosure of the record would foster open, transparent and accountable government. Disclosure of the record might shed light on the operation of the government, but there is no evidence to show that there is broad public interest in the specific process that led to the implementation of new courthouse security measures.

- This principle is neutral in excusing payment of the fees.

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

[para 45] Waiving the fees goes against the “user pay” principle as well as against the fee schedule 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 46] In my view, the information and evidence before me weighs against setting aside the integrity of the legislated fee schedule in the circumstances of this case. Therefore, the “user pay” principle predominates, in that taxpayers should not be paying for the Applicant’s fees to access a record that has a “narrow” rather than “broad” public interest and that is a matter of individual or private “curiosity” rather than public “benefit”.

- This principle weighs against excusing payment of the fees.

[para 47] In conclusion, after considering and weighing the 13 criteria and the two principles in order to determine whether the record relates to a matter of public interest, I find that the balance weighs against a finding that the record relates to a matter of public interest. Therefore, this weighs against a finding that payment of the fee should

be excused on the basis of public interest under section 93(4)(b) of FOIP. There may be some marginal benefit or interest in the record, but there is no “broad” public interest or compelling case for a finding of public interest.

[para 48] The Public Body properly considered the 13 criteria and all of the available information, including the records and the Applicant’s two letters, when refusing to excuse the fee, and on that basis determined that the record is not a matter of public interest under section 93(4)(b). There is no indication that the Public Body failed to properly exercise its discretion when refusing to waive the fees.

[para 49] In my view, the Public Body reasonably formed the opinion that in the circumstances of this case the criterion of public interest does not apply, properly exercised its discretion when deciding to refuse, and therefore, properly refused to waive the fees under section 93(4)(b) of FOIP. For all of these reasons, I intend to confirm the decision of the Public Body that the Applicant should not be excused from paying all or part of the initial fee in the sum of \$25.00 and the fee estimate in the sum of \$1,556.00, pursuant to section 93(4)(b) of FOIP.

V. ORDER

[para 50] I make this Order under section 72(3)(c) of FOIP:

- I find that:
 - The Public Body reasonably formed the opinion that the criterion of public interest under section 93(4)(b) of FOIP does not apply;
 - The Public Body properly exercised its discretion when deciding to refuse the fee waiver under section 93(4)(b) of FOIP;
 - Therefore, the Public Body properly refused to waive the fees under section 93(4)(b) of FOIP; and
- I confirm the Public Body’s decision to refuse to excuse the Applicant from paying all or part of the fee, pursuant to section 93(4)(b) of FOIP.

Noela Inions, Q.C.
Adjudicator