

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2009-006

April 27, 2009

AGRICULTURE FINANCIAL SERVICES CORPORATION

Case File Number F4009

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for records for all communications or papers with his name to the Agriculture Financial Services Corporation (the Public Body). The Public Body estimated the fees would be \$600.00. The Applicant requested a waiver of the fees under section 93(4) of the Act and the Public Body denied the request. The Applicant requested review by this Office of the Public Body's decision not to waive fees.

The Adjudicator found that the Applicant had not established that he was unable to pay the fees. In addition, she found that it would not be fair in the circumstances to waive the fees. Further, she found that the requested fees did not relate to a matter of public interest and so it was not appropriate to waive fees on the basis of the public interest. The Adjudicator found that it had not been established that any of the conditions set out in section 93(4) as a basis for waiving fees existed, and she upheld the decision of the Public Body.

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

Authorities Cited: **AB:** Orders 96-002, F2007-016

I. BACKGROUND

[para 1] On February 26, 2007, the Applicant made an access request to the Public Body for all communications or papers with his name on it, including correspondence sent to him by the Public Body and by him to the Public Body. On March 1, 2007, the Public Body responded to the Applicant's access request. The Public Body explained that it had located approximately 2400 pages of records responsive to the access request and estimated that the fees, reflecting \$600 for photocopying and \$200 for preparation would be \$800.00.

[para 2] The Applicant requested that the Public Body waive the fees. On March 9, 2007, the Public Body refused to waive the fees. The Public Body's letter documents that the Public Body and the Applicant discussed whether the scope of the request could be reduced in order to lessen the fees; however, the Applicant confirmed that he would not reduce the scope of the access request. On March 13, 2007, the Public Body wrote the Applicant to explain that it had made an error in the fee estimate. The Public Body explained that as the Applicant had requested his own personal information, that it would not charge for preparation. The revised fee estimate was \$600.00.

[para 3] On March 13, 2007, the Applicant requested review by this office of the Public Body's decision not to waive the fees.

[para 4] The Commissioner ordered mediation to resolve the issue. As mediation was unsuccessful, the matter was scheduled for a written inquiry. The Public Body provided initial submissions, which were shared with the Applicant. The Applicant subsequently provided initial and rebuttal submissions and these were shared with the Public Body.

II. RECORDS AT ISSUE

[para 5] As the issue relates to fee waiver, there are no records at issue.

III. ISSUES

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

IV. DISCUSSION OF ISSUES

[para 6] Section 93 of the Act authorizes public bodies to charge applicants fees for services and also grants the head of a public body the discretion to waive fees. It states, in part:

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.

(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).

(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 7] In his initial request for waiver of fees, the Applicant requested that the Public Body waive the fees on the basis that he is unable to afford the fees. In support of this request, he stated that the Public Body owes money to him and is forcing him into bankruptcy. In his rebuttal submissions, he states that the equity in his farm is dwindling. He states that the Public Body has initiated a policy of terrorizing his family and ruining his farm, and that as a result of this policy, he has had to seek "off farm income".

[para 8] The Public Body argues that the onus is on the Applicant to prove that a fee waiver is justified. The Public Body relies on Order 96-002, a decision of the former Commissioner for this position. It takes the position that the Applicant has not established that he is unable to pay the fees. Further, the Public Body notes that the Applicant has not narrowed his request to exclude materials sent by himself to the Public Body, or sent by the Public Body to him. The Public Body points to the fact that the Applicant has paid the appeal fee in appeals in relation to its own processes and insurance premiums, as evidence suggesting that the Applicant can afford the fees for this access request.

[para 9] In Order 96-002, the former Commissioner found that the burden establishing that an applicant cannot afford a payment lies on an applicant. He said:

It is my view that, the Applicant's arguments regarding the purpose of the Act and the importance of ensuring openness in Government are well founded. However, they do not overcome a very practical problem; namely that, while the head of the public body should turn his mind to the public interest at issue, he cannot specifically know whether the applicant can afford the payment, what other reasons the applicant might have that make it fair to excuse payment or why it is in the public interest to excuse payment. These are the grounds for excusing payment stipulated in section 87(4), and it is only on the basis of one of these that payment can be excused. This situation is distinct from those cases under section 67 where the head of the public body has made a decision not to give access and, knowing why access was refused, is called upon to justify the refusal.

I therefore ruled that, in the case of an application to be excused from paying fees, the burden of proof must be carried by the applicant.

[para 10] In Order F2007-016, the Adjudicator commented on the burden of proof in relation to requests for fee waivers on grounds of an inability to pay. He said at paragraphs 13 and 14:

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.

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).

I agree with the approach adopted by the Adjudicator set out in Order F2007-016. In my view, an applicant has an evidential burden to establish an inability to pay, rather than the burden of proof in the inquiry. If an applicant meets the evidential burden by pointing to evidence or by adducing evidence to establish that the applicant cannot afford payment, then the burden shifts to the Public Body to establish that it considered all the circumstances and properly exercised its discretion when it denied the fee waiver.

[para 11] In the present inquiry, I find that the Applicant has not established that he is unable to pay the fees. While the Applicant asserts that the Public Body owes him money, it does not follow that the Applicant is unable to pay the fees, even if the assertion were proven. Further, while the Applicant's evidence establishes that he has both farm and "off farm income", his evidence does not establish that these two forms of income are insufficient to pay the fees.

[para 12] I infer from the Applicant's arguments that he also takes the position that it is unfair for the Public Body to charge fees for producing copies of the records he requested. The Public Body has also made arguments in relation to whether it is fair to excuse the fees. I will therefore consider whether it is fair to excuse payment of fees in this case.

[para 13] As noted above, the Applicant essentially argues that the Public Body has delayed payments to him, and has instituted a campaign of terrorizing his family and ruining his farm. For these reasons, I infer that he takes the position that the Public Body has improper motives for charging fees, or should not be permitted to charge fees.

[para 14] The Public Body argues that the Applicant has an evidential burden to point to or adduce evidence to establish that it would be fair to waive fees, and that the Applicant has not met the evidential burden. The Public Body acknowledges that the Applicant believes that the Public Body seeks to bankrupt him, but takes the position that this belief is insufficient to establish that it would be fair to excuse payment.

[para 15] I agree that the Applicant has an evidential burden to establish the existence of factors that would lead one to conclude that it would be fair to excuse payment. I find that the Applicant has not done so in this case. In making this finding, I am taking into consideration that there are 2400 pages of responsive records that the Public Body must photocopy in order to respond to the Applicant's request, that the Act authorizes a Public Body to charge fees and that the Regulation authorizes the Public Body to charge \$.25 per page for copying records, and that the Applicant has not established that the Public Body has improper motives for charging the fees authorized by the Act and Regulation.

[para 16] The Public Body also made arguments as to whether the records requested relate to the public interest for the purposes of section 93(4)(b). The Public Body argues that the requested records contain that Applicant's personal information or records of his dealings with the Public Body. The Public Body states that it reviewed the criteria for granting a fee waiver in the public interest and found that the criteria are not met.

[para 17] I agree with the Public Body that the requested records do not relate to a matter of public interest, such as the environment, public health, or safety. Instead, the records relate to the Applicant's personal dispute and he has requested them for the stated purpose of assisting his appeal of a decision of the Public Body. In any event, the Applicant has not raised the issue of whether the public interest is a basis for a fee waiver with the Public Body.

[para 18] To summarize, I find that the Applicant has not established that he is unable to pay the fees, or that for any other reason it is fair to excuse payment. I also find that the requested records do not relate to a matter of public interest.

[para 19] For these reasons, I find that the Applicant should not be excused from paying all or part of the fees.

V. ORDER

[para 20] I make this Order under section 72 of the Act.

[para 21] I confirm the fees charged by the Public Body.

Teresa Cunningham
Adjudicator