

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2009-039

April 30, 2010

CALGARY BOARD OF EDUCATION

Case File Numbers F4589, F4590, F4591, F4592, F4593

Office URL: www.oipc.ab.ca

Summary: The Applicant made five access requests under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Board of Education (the Public Body). The Public Body provided the Applicant with estimates of fees totaling \$1048.50, \$383.50, \$171.50, \$2798.50 and \$1750.00. The Applicant requested a waiver of fees. The Public Body denied his request for a fee waiver. The Applicant requested review by this office of the fee estimates and the decision to deny a waiver of fees.

The Adjudicator found that it was not clear whether the Public Body had set the fees by resolution. However, as she found that the Applicant was entitled to a fee waiver based on his inability to pay the fees, in any event, it was unnecessary to determine whether the fees had been set by the resolution.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72, 93, 95; *Freedom of Information and Protection of Privacy Regulation* A.R. 200/1995 s. 9; *School Act*, R.S.A. 2000, c. S-3, s. 61

Authorities Cited: AB: 99-027, 2001-042, F2003-023, F2006-001, F2007-016, F2007-020, F2007-023 **ON:** PO-2847

Cases Cited: *Bain v. Montreal (City)* (1883), 8 S.C.R. 252; *Argyll Community League (1978) v. Edmonton (City)*, [2009] A.J. No. 85; *Canada (Privacy Commissioner) v. Blood*

Tribe Department of Health, [2008] 2 S.C.R. 574; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860

I. BACKGROUND

[para 1] The Applicant made five access requests. The Public Body assigned File Number 2007-P-007 to the following request, which was made on August 20, 2007:

I request any and all information regarding any matter and specifically, but not being limited, to any evaluations assessments, terms placements and any and all other activities relating to my (employment) relationship with CBE between January 1, 1991 to the present.

The request includes any documents, memoranda (internal, interdepartmental or otherwise), notes, records, photographs, evaluations, opinions, schemata or diagrams, reports prepared or reproduced in any way and any all computer records (including emailed correspondence, commentary or memoranda) as apply to these matters AND any investigation of the matter by CBE; the administration of any school under the direction and authority of CBE and any third party (including any students, parents, guardians or caregivers of any students).

[para 2] The Applicant made four additional requests for access on October 17, 2007.

[para 3] The Public Body assigned file number 2007-G-008 to the following request:

I request the records pertaining to the administration of: my FOIP Request dated in or about February, 2002, being FOIP 2002-P-003.

The time frame for the request was January 24, 2002 to the date of the request.

[para 4] The Public Body assigned file number 2007-G-009 to the following request:

I request the records pertaining to the administration of: my FOIP request dated in or about September, 2002 being FOIP 2002-P-015.

The time frame for the request was August 24, 2002 to the date of the request.

[para 5] The Public Body assigned file number 2007-G-010 to the following request:

I request the records pertaining to the administration of: my FOIP Request dated in or about May, 2006, being FOIP 2006-P-006.

The time frame for the request was April 24, 2006 to the date of the access request.

[para 6] The Public Body assigned file number 2007-G-011 to the following request:

I request the records pertaining to the administration of:
a) my FOIP Request dated August 20, 2007, being FOIP 2007-P-007; and
b) my request for information as presented to the CBE on August 10, 2007, supported by the Authorization and Declaration dated August 10, 2007.

The time frame for the request was August 10, 2007 to the date of the access request.

[para 7] The Public Body provided the following fee estimates for these fee requests on April 16, 2008:

CBE File Number 2007-G-008

Locating and retrieving records .50 hrs @ 27.00 per hour 13.50
Preparing and handling records 30 hrs @27.00 per hour 810.00
Shipping (courier) 25.00
Photocopying records 800 pages @ 0.25 per page 200.00
Total estimate \$1,048.50

CBE File Number 2007-G-009

Locating and retrieving records 0.50 hrs @ 27.00 per hour 13.50
Preparing & handling records 10 hrs @27.00 per hour 270.00
Shipping (courier) 25.00
Photocopying records 300 pages @ 0.25 per page 75.00
Total estimate \$383.50

CBE File Number 2007-G-010

Locating and retrieving records 0.50 hrs @27.00 per hour 13.50
Preparing and handling records 4 hrs @ 27.00 per hour 108.00
Shipping (courier) 25.00
Photocopying records @ 0.25 per page 25.00
Total estimate \$171.50

CBE File Number 2007-G-011

Locating and retrieving records 0.50 hrs @ 27.00 per hour 13.50
Preparing and handling records 80 hrs @ 27.00 pre hour 2,160.00
Shipping (courier) 25.00
Photocopying records 2,400 pages @ 0.25 per page 600.00
Total estimate \$2,798.50

CBE File Number 2007-P-007

7,000 pages @ 0.25 per page = \$1, 750.00

[para 8] The Applicant requested that the Public Body waive the fees. The Public Body decided that it would not waive the fees on June 2, 2008. The Applicant requested that the Commissioner review the decision to deny fee waivers.

[para 9] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 10] The parties provided initial submissions. On July 8, 2009, I requested a copy of the bylaw or other legal instrument by which the Public Body set the fees it requires to be paid under section 93 of the FOIP Act. The Public Body provided a copy of the Report of the Public Accountability Committee meeting of May 5, 1998, and a resolution of December 4, 2007. This information was exchanged with the Applicant.

[para 11] As it was unclear from the documents provided by the Public Body whether the resolutions they contain had been in force at the time the Applicant made his access requests, on October 2, 2009 I requested a copy of the resolution that was in force at the time of the Applicant's access request. I also asked the Public Body to provide evidence that the Minutes of the Board of Trustees' Public Accountability Committee Meeting of May 5, 1998 applied at the time of the access request.

[para 12] The Public Body provided a resolution passed on October 17, 2006. It also provided the affidavit of an employee. This information was exchanged with the Applicant and the Applicant provided submissions in relation to them.

II. RECORDS AT ISSUE

[para 13] As the issue turns on the calculation of fee estimates, there are no records at issue.

III. ISSUES

Issue A: Did the Public Body properly estimate the fees for the services?

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

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly estimate the fees for the services?

[para 14] As noted in the background, above, I requested a copy of the bylaw or other legal instrument by which the Public Body set the fees it requires to be paid under section 95. The Public Body provided me with a copy of the "Report of the Accountability Committee" dated May 5, 1998, the minutes of a board meeting of September 22, 1998, a copy of a resolution dated December 4, 2007, which was made after the Applicant made his access requests, and a resolution made during a board meeting of October 17, 2006, which was made prior to the Applicants access requests. I requested this information from the Public Body as it was not clear to me that the head of a local public body could charge fees if a local public body had not first set them under section 95, and, if the Public Body had set the fees, I wanted to ensure that they were the same as those reflected in its fee estimates.

[para 15] The Public Body passed a resolution on October 17, 2006, entitled “Board of Trustees’ Policy – Board – Chief Superintendent Linkage B-4E: Delegation of Authority Resolution”. The relevant resolution is c.2, which states, in part:

BE IT RESOLVED...

C. THAT, pursuant to its powers under section 61 of the *School Act* and section 95 of the *Freedom of Information and Protection of Privacy Act*:

1. The Board of Trustees designates the Chief Superintendent as head of the Calgary Board of Education for purposes of the *Freedom of Information and Protection of Privacy Act*;
2. The Board of Trustees approves the charging of fees for services related to requests under the *Freedom of Information and Protection of Privacy Act*, which must not exceed the fees as provided in the regulations under the *Freedom of Information and Protection of Privacy Act*.

Section 61 of the *School Act* states, in part:

61(1) The board may authorize by resolution

- (a) any of its employees,*
- (b) a committee of the board or that is established by the board,*
- (c) a school council, or*
- (d) a joint committee established under section 63, to do any act or thing or exercise any power that the board may or is required to do or exercise subject to the directions and limitations set out in the resolution, except for those powers referred to in subsection (2).*

[para 16] This resolution was in effect at the time the Applicant made his access requests. However, the Public Body points to a resolution of September 22, 1998 as setting the fees the Public Body requires to be paid under section 93.

[para 17] The minutes of the meeting of September 22, 1998 state:

Board members gave consideration to the following...

Report of the Public Accountability Committee Meeting held May 5, 1998...

...

Moved by [a board member] that the following be approved:

THAT the Report of the Public Accountability Committee Meeting held May 5, 1998, be taken as submitted and adopted.

The motion was CARRIED UNANIMOUSLY

[para 18] The Public Body provided an affidavit of the Assistant Corporate Secretary for the Public Body in support of its position that fees were set by resolution at the meeting of September 22, 1998 and continue to be in force. The affiant states:

I have reviewed the Report of the CBE's Public Accountability Committee of May 5, 1998 and, specifically, the portion under the heading "FOIP – Designation of Head & Adoption of Fees" wherein the CBE's Board of Trustees' Public Accountability Committee made the following recommendation to the CBE's Board of Trustees:

THAT in accordance with Section 89(c) of the *Freedom of Information and Protection of Privacy Act*, the Board of Trustees approve the charging of fees for services related to requests under the Act as stipulated in the Act and in A.R. 200/95 the Freedom of Information and Protection of Privacy Regulation...

I have additionally reviewed the Minutes of the Regular Board Meeting of September 22, 1998 and note that in those Minutes, the CBE's Board of Trustees adopted the recommendation of the Public Accountability Committee with respect to the charging of fees under the *Freedom of Information and Protection of Privacy Act* (FOIP) detailed in paragraph 3 herein. A copy of the Minutes of the Regular Board Meeting of September 22, 1998 is attached hereto and marked as Exhibit "B".

By letter dated October 2, 2009, Teresa Cunningham, Adjudicator with the Office of the Information and Privacy Commissioner of Alberta, advised that she wanted evidence that the September 22, 1998 Minutes of the Regular Meeting of the Board, which incorporated the Report of the Public Accountability Committee, dated May 5, 1998, remained in effect at the time of [the Applicant's] FOIP requests.

To the best of my knowledge, no resolution has been passed by the CBE's Board of Trustees which has purported to rescind the approval of the charging of fees detailed in paragraph 3 herein.

[para 19] The Public Body argues that fees were set by resolution in a meeting of September 22, 1998 and that this resolution has not been rescinded. Further it argues that it has not passed any other resolutions that have the effect of setting fees. It reasons that fees have been set and are still in force and that it has met the requirements of section 95.

[para 20] As noted above, the Public Body supplied an affidavit that states that the school board adopted the recommendation of the Public Accountability Committee with respect to charging fees at its meeting of September 22, 1998. With respect to the Affiant, the minutes of that meeting do not support the statement that the Public Body adopted a recommendation with respect to charging fees. Rather, the minutes establish that the school board resolved to adopt a report of the Public Accountability Committee.

[para 21] The Report of the Public Accountability Committee of May 5, 1998, referred to in the September 22, 1998 minutes, contains a discussion of fees that may be charged under the FOIP Act. This Report concludes with two recommendations:

THAT in accordance with Section 89(a) of the *Freedom of Information and Protection of Privacy Act*, the Board of trustees designate the Chief Superintendent of Schools as the Head of the Calgary Board of Education for purposes of the Act

THAT in accordance with Section 89(c) of the *Freedom of Information and Protection of Privacy Act*, the Board of Trustees approve the charging of fees for services related to requests under the Act as stipulated in the Act and A.R. 200/95 the Freedom of Information and Protection of Privacy Regulation.

[para 22] Had a motion been made and passed to adopt each of the recommendations in the report and the fee schedule included in it, the effect would have been to set the fees the Public Body required to be paid under the FOIP Act. However, “adopting a report”, as the Public Body did at its meeting of September 22, 1998, means only that the board accepted the report. “Adopting a report” does not have the effect of passing a resolution to adopt any or all recommendations a report may contain. Rather, it means that a board acknowledges the report. In *Bain v. Montreal (City)* (1883), 8 S.C.R. 252, the Supreme Court of Canada decided that passing a resolution to adopt a report could not be construed as a resolution ordering the work recommended in the report to be done. The Court said:

Now, in no Legislative Assembly, as far as I have been able to learn, is the adoption of the report of a committee regarded as a resolution ordering that to be done which the report recommends should be done. It amounts to no more than a concurrence in the recommendation, and an undertaking that the members of the council, adopting the report will pass the resolutions and give the orders and take all proceedings necessary to give effect to the recommendation of the committee. The adoption of a report of a committee by the council would not, as would an order and resolution in due form passed ordering to be done that which was recommended in the report, be binding upon the Council of the next year.

[para 23] Passing a resolution to adopt the report of the May 5, 1998 Committee did not have the effect of passing a resolution to set the fees the Public Body required to be paid for services under the FOIP Act. At best, it amounted to an undertaking that the Committee would pass resolutions to give effect to the recommendations in the report in the future. For these reasons, I find that the September 22, 1998 resolution did not have the effect of setting fees for the purposes of section 95.

[para 24] I will therefore consider whether resolution C.2 of the October 17, 2006 Delegation of Authority Resolution, cited above at paragraph 14, sets the fees the Public Body requires to be paid. The Public Body made the following argument in relation to this resolution:

We should point out that Delegation of Authority Resolutions generally, and the October 17, 2006 Delegation Resolution, specifically, are completely separate from and have no effect whatsoever on the CBE’s ability to charge fees pursuant to the September 22, 1998 Resolution. Accordingly while the October 17, 2006 Delegation Resolution has no bearing on CBE’s ability to charge fees for services under FOIP. Delegation of Authority Resolutions are passed annually by the CBE’s Board of Trustees in order to deal with issues related to delegation of authority from the Board of Trustees to the Chief Superintendent. Accordingly, while the October 17, 2006 Delegation Resolution was in effect at the time the ...access requests were made, it does not add to, detract from, or have any effect on the September 22, 1998 Resolution and the CBE’s ability to charge fees as set out therein.

[para 25] It is difficult to imagine why the board of trustees would pass this resolution unless the board intended the resolution to have some effect on fee collection.

However, the resolution is not clear that the intent of the board of trustees was to set the fees. Given the evidence of the Public Body that its employees believe the resolution of September 22, 1998 to have set fees for the purposes of section 95 and its argument that the October 17, 2006 resolution had no effect on its ability to charge fees, it may be that the Public Body did not intend to set fees in its resolution of October 17, 2006.

[para 26] I note that the resolution refers to approving the charging of fees for services related to requests under the FOIP Act. However, I note that all the other individual resolutions contained within the Delegation of Authority Resolution address delegation of the Public Body's authority under the *School Act* to the superintendent, which is consistent with the Public Body's characterization of the purpose and function of resolution C.2. The fact that resolution C.2 refers to the Public Body's powers of delegation under section 61 of the *School Act* also supports this interpretation of resolution C.2. Consequently, resolution C.2 could be interpreted as the Public Body suggests, i.e. that it is intended to authorize the Chief Superintendent to charge fees for services related to access requests under the FOIP Act.

[para 27] Alternatively, despite the evidence of the Public Body's affiant and its submissions, it is possible that the intent of this resolution was to set fees in accordance with section 95 of the FOIP Act, although the language of the resolution is not as clear as it could be that this was the purpose of the Public Body in passing this resolution.

[para 28] In *Argyll Community League (1978) v. Edmonton (City)* [2009] A.J. No. 85, Shelley J. had to interpret a motion passed by a city council and decide whether that motion followed the procedures set out in a municipal bylaw. She said:

The Respondents submit that I ought to infer that, by approving the Motion, the members of Council who voted in favour were implicitly deeming the existing location to be essential for the redevelopment of the Velodrome. There is no doubt that this aspect of the Bylaw was discussed at the meeting. The meaning of "essential" was also the subject of some discussion. There was mention of "preferred", "suitable" and "potential" sites. Council received advice from legal counsel during the course of the discussion. Counsel confirmed that the reason the matter was before Council was because the Bylaw required Council to deem the location essential in order to approve the redevelopment project. The record shows that this advice and much of the discussion occurred between approximately 9:45 a.m. and noon. The record also shows that not all Council members involved in voting on the Motion were present during that time. At least one joined the meeting when it reconvened at 3:12 that afternoon. The vote was 7 to 6. Even if I were inclined to accept the Respondents' argument that, given the discussion at the meeting, the Motion ought to be construed in the manner suggested because the discussion should have alerted the Councillors to the fact that approving the redevelopment would require them to deem the existing location essential, I am not satisfied that all members who voted on the Motion could have had that appreciation since not all of them were present during key aspects of that discussion.

In light of the wording of s. 3.5.1 and the purposes and policies set out in the Bylaw, the deeming of the existing location to be essential is an extremely important requirement of the Bylaw. I have concluded that such a step should not be presumed or inferred. A plain reading of the Motion would not lead anyone to realize that Council had deemed the existing location to be essential. Any informed member of the public, aware of the requirements of the Bylaw and concerned about the construction of a large replacement facility at the existing location, would not be satisfied, on reading the Motion, that Council had taken the necessary step of deeming

the existing location to be essential by voting in favour of that Motion. That same member of the public should not have to read a 97-page transcript of the proceedings of the Council Meeting in order to determine whether this step might be read into the Motion. Nor am I satisfied that this same member of the public, after reading the 97-page transcript, would be certain that all members of Council who voted on the Motion were aware of all of the discussion leading up to it, understood the meaning of "essential" within the context of the Bylaw, and knew that in voting for the Motion they were deeming the existing location essential. In any event, I am not satisfied that any such inference should be drawn. I conclude that the Motion, even when read in conjunction with the 97-page transcript of the proceedings, does not address an essential precondition to the approval of the redevelopment of the Velodrome at the existing location - namely, the deeming of that location to be essential.

[para 29] In *Argyll Community League*, Shelley J. determined that the appropriate approach for determining what the municipal council had resolved to do was to consider the plain meaning of the motion from the perspective of a member of the public. She also considered that an important procedural requirement for compliance with a bylaw should not be presumed or inferred to have been met.

[para 30] In the present case, passing a resolution to set fees would be an important procedural requirement as this would comply with section 95. I have no evidence as to what the council discussed prior to passing the resolution of October 17, 2006, or who was present for the discussions, or what they thought they were deciding, even if this information were relevant to the interpretation of the resolution. I also have the argument of the Public Body that the resolution of October 17, 2006 was never intended to have the effect of setting fees and has no effect on the fees charged by the Public Body. I also note that the resolution itself does not actually state that it sets the fees that the Public Body requires to be paid under section 93 and indicates that it is intended to delegate authority.

[para 31] If one considers the interpretation of the resolution from the perspective of a member of the public, it is not entirely clear what the interpretation would be. It could be that a member of the public would consider the resolution of October 17, 2006 as adopting the fees authorized by the FOIP Act and therefore, those set out in the Regulation. If that is the case, then the Public Body has complied with section 95(b) and has set the fees it requires to be paid under section 93. However, it is equally possible that the resolution could be interpreted as approving charging fees, but delegating the decision regarding the actual amounts of fees that the Public Body requires to the Chief Superintendent. This reading is supported by the wording of the resolution, and the fact that the Public Body's FOIP coordinator cited section 93 and the current regulations as the authorities for the Public Body to require fees when she provided fee estimates to the Applicant, and made no reference to a resolution or to section 95. This reading is also consistent with the stated purpose of the resolution: that it delegates the Public Body's authority to the chief superintendent. If this reading is correct, then the Public Body has not set fees in accordance with section 95(b).

[para 32] I find that the purpose and effect of the October 17, 2006 resolution are unclear. As I have decided the outcome of this inquiry on the basis that the Applicant cannot afford to pay the fees and that it is appropriate to waive the fees in the circumstances, it is unnecessary for me to determine whether the Public Body set fees for

the purposes of section 95(b) when it passed the resolution of October 17, 2006, and I therefore make no findings in that regard. In addition, in view of my conclusions, it is unnecessary for me to decide whether the Public Body must set fees under section 95(b) if it intends to require them, or whether, if it has not done so, the head appointed by a local public body under section 95(a) may require them under section 93.

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

[para 33] Section 93(4) grants discretion to the head of a public body to waive fees. It states:

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 34] In order F2007-023, the Adjudicator explained the Commissioner's jurisdiction to review decisions regarding fee waivers and the nature of this kind of inquiry:

When deciding whether a public body has properly refused to grant a fee waiver, the decision-maker must look at all of the circumstances, information and evidence that exists at the time when the Public Body denied the fee waiver and also at the time of the inquiry (Order 2001-042 (para 19)). A decision-maker may consider all information and evidence at the inquiry, even if that information and evidence was not available to the public body at the time it made its fee waiver decision.

Section 72 of FOIP does not merely authorize the decision-maker to confirm a public body's decision or to require a public body to reconsider its own decision. Section 72(3)(c) of FOIP gives decision-makers the authority to render their own decision about whether to waive all or part of the fee or to order a refund. Under section 72(3)(c), the decision-maker has the authority to hear the case "de novo" as a new proceeding and to make a "fresh decision" (Order F2007-020 (para 30), OIPC External Adjudication Order #2 (May 24, 2002) Justice McMahon (para 45), Order 2001-023 (para 32)).

I must review a public body's decision on a case-by-case basis, and consider all of the information before me. Therefore, if I reach a different conclusion than a public body and find that a fee should be reduced or completely waived, I may make a "fresh decision" and substitute my own decision for the public body's decision. However, if I reach the conclusion that a public body properly applied section 93(4) when denying a fee waiver, I may confirm that decision.

[para 35] The Applicant argues that he is unable to provide the fees. He provided an affidavit dated June 7, 2009, which states:

I am presently a teacher at [name of school] in Calgary. In July 2007, I was placed on unpaid leave from that position by the CBE. I am currently on unpaid leave. I have no income from teaching since then. I have minimal other income.

...

The fee estimates exceeded \$6000.00 and are more than I could pay at the time. It is even more of a financial hardship now. Even broken down into the smaller requests, the costs are prohibitive.

I made a request of the CBE to waive the fees on the basis of financial hardship but on June 2, 2008, they denied my application.

The CBE knows I am on unpaid leave. They have also caused me to be without employment insurance until only recently since they did not file a record of employment (ROE) for me. I learned this when I applied for employment insurance and was told that I did not qualify as there was no ROE filed. When Service Canada addressed this on my behalf I was advised by the agent that CBE would file one shortly. It was several weeks after that when CBE did file a ROE but then an agent at Service Canada told me that they filed one indicating that I worked for them for only several months (not the lengthy years I have been with them) and that I did not qualify for EI. Then Service Canada pressed CBE again and a proper ROE was filed so that I eventually, after almost a year and a half without any EI or other income, received the benefits to which I am entitled.

[para 36] The Applicant made the following arguments:

The Applicant submits that in July 2007, he was placed on unpaid leave by the Public Body and therefore has no income so he cannot pay the fees.

The Applicant argues that he has told the Public Body this in his initial application for a waiver of the fees, which the Public Body subsequently denied.

The Applicant was on unpaid leave at the time he made the access requests in issue and he was in that situation when he made the initial application to the Public Body and also when he asked for Review.

The Public Body knew this but did not address it in its reasons for declining the request for non-payment.

...

Further, the Public Body is aware of the Applicant's being on unpaid leave as it is the Applicant's employer and placed him in that situation.

[para 37] On August 20, 2008, the Public Body made the following decision in relation to the Applicant's argument that he was unable to pay the fees:

In your letter of May 2, 2008 to the Public Body, you wrote that the fees and costs are an unreasonable burden to the Applicant. You also wrote, "Accordingly, and per the above, [the Applicant] states pursuant to subsection (4)(a) that he cannot afford the payment or in the event that he can, for the other reasons, set out above it is fair to excuse payment."

In your letter of July 30, 2008 to the Commissioner, you say the Applicant has no income and no benefits pertaining to illness and injury. You also wrote that the Public Body has knowledge that the Applicant has no income.

The Public Body argues it is only aware of the income which the Applicant had received from the Public Body. The Public Body says the Applicant could have other sources of income, or assets, or deficits of which the Public Body has no knowledge. Furthermore, the Public Body questions the Applicant's claim of inability to pay as the Applicant is able to retain counsel.

...

In my view, you have not provided the Public Body with documentation to support your client's claim that he cannot afford to pay the fees for each of the access requests.

[para 38] The Public Body made the following arguments in support of its decision to deny a fee waiver to the Applicant:

The burden of proving the existence of the grounds enumerated in Section 93(4)(a) lies with the applicant. Therefore, when claiming an inability to pay, an applicant must present information about his or her financial position. When the applicant is claiming "other reasons", he or she must provide the public body with sufficient information to allow the public body to make an informed and reasonable decision for waiving fees. This is particularly so since the head of a public body is accountable for the use of public resources...

In the circumstances, and with respect to [the Applicant's] alleged inability to afford the estimated fee payment, we note that [the Applicant] has, to date, provided no information whatsoever to support this allegation, but rather has made a bald assertion, with no evidence, that he would be unable to afford a payment of (for example) \$1,750.00 (the fee estimate for FOIP Request 2007-P-007).

In any event, a finding of financial hardship itself does not mean a public body must waive the fee. A public body must still consider all of the circumstances and exercise its discretion.

[para 39] In its rebuttal submissions, the Public Body provided the 2009 Assessment Value the Applicant's home and a copy of the land title certificate. The Public Body argues:

In fact, there is information which contradicts [the Applicant's] submission that he is unable to pay the fee estimates. A Land Title Certificate, dated June 12, 2009 and City of Calgary Tax Information Report, show that [the Applicant] has significant equity in his residence. The Land Titles Certificate shows that a mortgage of \$102,000 was placed on the home on December 12, 1989 and is the only encumbrance listed on title. However, as at June 12, 2009, nearly twenty years after the mortgage was entered into, the 2009 Assessment Value of [the Applicant's] home is shown to be \$400,500 on the City Online, City of Calgary, Tax Information Report. Copies of the Land Title Certificate, dated June 12, 2009, and the City Online, City of Calgary, Tax Information Report, dated June 12, 2009, are attached respectively at Tabs A and B. Accordingly, [the Applicant] appears to have at least \$300,000 in equity in his home. It is submitted that this evidence alone demonstrates that [the Applicant] clearly has the ability to pay the fee estimates. He would just prefer not to.

[para 40] Having reviewed the evidence, I am satisfied that the Applicant has established through evidence that it is more likely than not that he could not afford to pay the fees at the time he requested the fee waiver. He provided affidavit evidence to establish that he has been on an unpaid leave of absence from work since July 2007; consequently, he was without his primary source of income when he requested the fee waiver. The Public Body does not contest that he has been on unpaid leave and was on unpaid leave when he requested the fee waivers. Further, the Applicant provided

evidence that there was a delay of a year and a half in processing his employment insurance claim because his employer, the Public Body, did not complete a record of employment for him. As a result, he was not in receipt of employment insurance benefits when he requested the information or the fee waivers. The Public Body has not contested this evidence either. The Applicant also stated in his affidavit that the fees were more than he could afford at the time the Public Body estimated the fees and that paying them would result in even greater financial hardship to him at the date of the inquiry.

[para 41] In its decision to deny the fee waiver, the Public Body decided that its speculation regarding the Applicant's ability to pay outweighed the evidence of the Applicant. As noted above, the Public Body's decision not to waive fees on the basis of inability to pay was founded on the following:

The Public Body argues it is only aware of the income which the Applicant had received from the Public Body. The Public Body says the Applicant could have other sources of income, or assets, or deficits of which the Public Body has no knowledge. Furthermore, the Public Body questions the Applicant's claim of inability to pay as the Applicant is able to retain counsel.

As the Applicant's employer, the Public Body was aware that it was not providing him with employment income. It was also aware that by not creating a record of employment for the Applicant, employment insurance benefits would also be unavailable to him. It does not contest the Applicant's affidavit evidence to that effect. However, the Public Body decided to base its decision on information "*of which the Public Body has no knowledge*", rather than to consider information of which it did have knowledge. It is unclear what additional evidence would satisfy the Public Body that the Applicant was unable to afford the fees, given that it did not explain in its responses to him the records it considered would establish financial hardship, and given that it gave no weight to the circumstances which he did prove: that he was no longer receiving employment income, and had to wait over a year to receive employment insurance benefits, which, in the end, he did receive.

[para 42] I note that a key factor in the Public Body's decision was the fact that the Applicant was represented by counsel. From its decision, it appears that the Public Body considered that the evidence the Applicant presented about his inability to pay fees was effectively rebutted by being represented by counsel. The Public Body has not provided any evidence regarding the terms of the retainer between the Applicant and the Applicant's counsel that would lead me to believe he has the resources to pay the estimated fees without suffering undue hardship.

[para 43] That an individual is represented by counsel does not mean that the individual has financial resources. The terms of retainers vary. Legal representation can be performed *pro bono* and it can be subsidized through legal aid. Some lawyers and their clients enter contingency agreements. Still others agree to regular payments of legal fees, which can have an adverse effect on an individual's financial resources. Therefore, the mere fact that an individual is represented by counsel does not support a finding that the individual can or cannot afford to pay fees under the FOIP Act, and is irrelevant.

[para 44] I note that the Applicant gave evidence that he retained counsel to represent him in legal actions he has commenced regarding his employment situation. In other words, he has obtained counsel in order to ensure that his legal rights are enforced. In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, the Supreme Court of Canada explained the importance of the solicitor-client relationship and maintaining solicitor-client privilege:

Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":

[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

(*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36.)

It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.

[para 45] In my view, it is inappropriate to deny a fee waiver on the basis that an applicant is represented by counsel or that an applicant has not provided information regarding the retainer to allay a public body's suspicions that an applicant may have discretionary funds available.

[para 46] In *Descôteaux v. Mierzwinski* [1982] 1 S.C.R. 860 the Supreme Court of Canada determined that information regarding the nature of a retainer is subject to solicitor-client privilege:

In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

Considering the fact that an applicant has retained counsel as a factor weighing against granting a fee waiver undermines the important constitutionally protected right to be represented by counsel, in addition to being an irrelevant. Further, requiring an applicant

to provide information regarding the retainer in order to dispel a public body's unfounded suspicions about the applicant's financial status, would serve only to undermine the solicitor-client relationship. That an applicant is represented by counsel is not, in and of itself, a factor to be considered when determining whether an applicant can afford to pay fees under the FOIP Act. Requiring an applicant to cease to be represented by counsel in order to qualify for a fee waiver would itself constitute a serious hardship.

[para 47] The Public Body also reasons that the Applicant would not suffer financial hardship by paying the estimated fees because the Applicant may have equity in his home. As noted above, the Public Body provided a land titles certificate and a tax assessment prepared by the City of Calgary for 2009 in support of this argument. I find that this information does not rebut the Applicant's statements that he was on unpaid leave without employment insurance when he requested the fee waiver and would suffer financial hardship by being required to pay the fees. The assessment establishes only the City of Calgary's assessment based on the description and location of the property and was created for municipal taxation purposes. It does not indicate what the property is actually worth.

[para 48] Additionally, I do not accept the Public Body's argument that because he owns his home, the Applicant can afford to pay the fees but chooses not to. The assessment the Public Body provided in support of this argument does not establish that the Applicant actually has equity in the home, or that the Applicant could obtain a loan if he sought to use the equity in his home as collateral. The assessment does not establish that the Applicant has earnings, savings, assets, or is debt-free. An applicant is not required to give up living accommodation or take on debt that the applicant lacks the financial resources to repay in order to establish that he or she cannot afford to pay fees. An Applicant need only adduce evidence that would support a finding that it is more likely than not that the Applicant cannot afford to pay the fees.

[para 49] In this case, the Applicant has established that he was without his main source of income or employment insurance or other benefits when he made the request for a fee waiver. He has given affidavit evidence that he could not afford to pay the fees when he requested the fee waiver and still cannot afford to pay the fees. He has not paid them to date. The fees total \$6152, which I find is a large amount of money for someone in the circumstances of the Applicant at the time he requested the fee waiver and an amount that I find that the Applicant more likely than not still cannot afford to pay.

[para 50] For all these reasons, I find that the Applicant has established that he was and is unable to pay the fees estimated by the Public Body.

[para 51] However, section 93(4) states that the head of a public body *may* excuse all or part of a fee if the applicant cannot afford payment. Consequently, if an applicant establishes that he or she cannot pay the fees, a fee waiver is not automatic. Further, my jurisdiction under section 72(3)(c) of the FOIP Act is the following:

72(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

- (c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*

I must therefore consider whether the circumstances are appropriate for ordering a fee waiver before I may do so.

[para 52] Previous orders of this office have considered the following circumstances appropriate for granting a fee waiver:

- In Order F2007-016, the Adjudicator determined that it was appropriate to waive fees because the Applicant, who had limited financial resources, had taken steps to narrow her request, had requested her personal information, and had unsuccessfully attempted to obtain the information she sought in other ways.
- In Order 2001-042, the Commissioner decided that it would be appropriate to excuse an applicant from paying fees as it would have the effect of ending protracted and longstanding issues between the public body and the applicant.
- In Order F2006-001, the Adjudicator determined that a combination of an applicant's circumstances, and the unfairness and improper exercise of discretion on behalf of the public body in that case made the circumstances appropriate for granting a fee waiver.
- In Order F2003-023, the Adjudicator determined that it was appropriate to grant a fee waiver as the public body in that case had lost the information requested by an applicant.
- Order F2007-020 held that the delay in processing the applicant's access request was a circumstance that weighed in favor of granting a fee waiver.
- Order 99-027 notes that "misconduct in responding to an applicant" could be a reason to waive fees on the ground of fairness.

[para 53] In Order F2007-016, the Adjudicator summarized previous orders of this office and noted:

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).

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.

If an applicant has already received information or created it, but requests it as part of an access request and also requests a fee waiver in relation to this request, the applicant should establish either that the applicant did not receive these records, or no longer has them. Otherwise, a decision maker may find that the circumstances are inappropriate for granting a fee waiver, given that the applicant already possesses the information requested.

[para 54] In Order 99-027, the former Commissioner noted that a public body had taken steps to inform an applicant that 1038 records were the same as those included in a previous access request of the Applicant. As the Applicant did not then consider revising the access request to exclude those records, the former Commissioner concluded that it would not be fair to waive fees in relation to those records. However, he considered it appropriate to waive fees in relation to records that were entirely blank as a result of redacting information under the FOIP Act.

[para 55] In Order PO-2847, a decision of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator considered the following factors to be relevant to her decision to waive fees in a case where an applicant had established that he would suffer financial hardship if he were required to pay fees:

For a fee waiver to be granted under section 57(4), it must be “fair and equitable” in the circumstances. Relevant factors in deciding whether or not a fee waiver is “fair and equitable” may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[para 56] In my view, with the exception of the final factor, which I will discuss later in this order, these factors are similar to those considered by this office when considering whether to grant a fee waiver to an applicant who is unable to pay the fees.

[para 57] In his affidavit, the Applicant states that he has been shown or received some portions of his file in the past and states:

My first request was made on or about February 13, 2002, (2002-P003) regarding 3 sealed files that formed part of my personnel file and which I believe contain information about why I have been victimized, harassed, defamed and otherwise prejudiced. I made this request after I

realized there was something damaging in this file to my personal and professional reputation that I had not been aware of until that time. But I was experiencing the problems and ill-effects of whatever it was and want to know if I need to take steps to change my information or to take other steps that may be necessary to address these matters.

The second request was made on or about September 25, 2002, (2002-P-015) to see what documents the CBE had regarding two separate incidents at 2 secondary schools where I taught. After making my request for information about these 2 incidents... the CBE FOIP Coordinator, told me the CBE had nothing. I wanted to know what documentation about these two incidents was on my file. I needed this information for medical, insurance and because this information was being used in certain ways at work.

I sought the information through the proper channels at the time – I called the Area IV office and made an appointment to see my personnel file. I met with... the Consultant for Staffing at the time. He had 3 red file folders with him which he said I could not see. He allowed me to see the remainder of my file. He would not tell me why I could not see the red ones.

I made my first access request for the 3 files through FOIP (2002-P-003). I have received nothing responsive. In making the requests, I was specific about what documents I needed. Those I received were severed, consisted of blank or illegible pages or were non-responsive to my requests. I paid the full fee the CBE required of me for these materials...

[A portfolio officer] also found that materials had been improperly severed under s. 18 of FOIP but no further materials were released since these were also severable under s. 17 and s. 20. She stated that an inquiry could have a different result. I would have had to proceed with an inquiry on my own as the ATA was not representing me.

The Applicant's evidence is that he was shown his personnel file, but not given a copy of it. Further, when he made access requests under the FOIP Act for the sealed files he had been shown, he was given heavily redacted records, which did not enable him to learn the contents of the files he had requested.

[para 58] The Public Body made the following argument:

[The Applicant has admitted on more than one occasion that he has previously been provided with many of the records, which are the subject of the FOIP requests. For example, in a letter dated August 31, 2007... [counsel for the Applicant] advised that she had had an opportunity to review the materials that had previously been released to [the Applicant] under previous access requests.

Having reviewed the letter to which the Public Body refers, I am satisfied that the Applicant's counsel was not referring to "many of the records" but referring to the redacted records received by the Applicant in response to his previous request for sealed records, and that her point in writing was to advise that the severing was, in her view, unreasonable, and that her client sought records without information redacted, which was something he had not yet received.

[para 59] The Public Body wrote a letter on September 18, 2007 to extend the time for responding to the Applicant's access request under section 14. This letter states:

Your request involves a large number of records and requires clarification concerning the information you are seeking. In addition, a number of the documents you have specifically

requested require the CBE to make inquiries of third parties. Because of the volume of information and extensive search involved, your request could not be processed within the usual 30-day limit. Accordingly, the CBE unfortunately finds it necessary to invoke the provisions of section 14(1) of FOIP and extend the time for responding by an additional 30 days.

As noted, your request on behalf of [the Applicant] is very broad. Accordingly, in order for the Calgary Board of Education to respond to your request FOIP 2007-P-007 in which you are representing [the Applicant], please clarify whether or not you are requesting the following...

...

Processing fees may be applicable, and if this is the case, you will receive prior notification of the fee estimate. In addition, there may be a need to advise a third party about access to information that affects their personal privacy or business interests. If this is the case, you will receive notice of the consultation process with the third party concerning disclosure of the affected information.

[para 60] The Public Body describes this letter in the following way:

The above-cited correspondence demonstrates that the CBE gave [the Applicant] an opportunity to narrow the scope of Request 2007-P-007, the broad request for personal information. Despite its attempt to assist [the Applicant] the offer was rebuffed and it is submitted that his refusal to narrow the scope of the Request weighs in favour of refusing to grant a fee waiver to [the Applicant] in the circumstances.

The Public Body also characterizes a letter dated September 26, 2007 from the Applicant's counsel as a refusal of an offer it had made in its letter of September 18, 2007 to assist the Applicant to reduce the scope of his access request. However, I find that the Applicant's counsel only confirmed that the Applicant was seeking all the information requested and did not decline an offer made by the Public Body. I disagree with the Public Body's characterization of its correspondence to the Applicant as an offer to assist him which he refused. The letter does not suggest that the Applicant could or should narrow or limit the scope of his access request in order to reduce fees. Rather, the letter is intended to extend the time for responding to the access request under section 14 of the FOIP Act. This letter does not confirm that fees will be charged, only that processing fees *may be* applicable. In addition, it does not indicate that the Applicant may already have some of the information in the records, or that fees could be reduced if the request were narrowed so as to exclude records he may already have.

[para 61] As noted in the background above, the Applicant requested the following information in the access request referred to as 2007-P-007:

I request any and all information regarding any matter and specifically, but not being limited, to any evaluations assessments, terms placements and any and all other activities relating to my (employment) relationship with CBE between January 1, 1991 to the present.

The request includes any documents, memoranda (internal, interdepartmental or otherwise), notes, records, photographs, evaluations, opinions, schemata or diagrams, reports prepared or reproduced in any way and any all computer records (including emailed correspondence, commentary or memoranda) as apply to these matters AND any investigation of the matter by CBE; the administration of any school under the direction and authority of CBE and any third party (including any students, parents, guardians or caregivers of any students).

[para 62] The Applicant also gave evidence that he seeks the information described above so that he can learn exactly what is currently in his personnel file and review all the information within this context. As noted above, while the Public Body asserts that he has received some of the information previously, it has not pointed out the documents it considers that he has in his possession. Further, unless the Public Body points these documents out to him, the Applicant has no way of knowing that there is overlap between previous information he has received or been shown and records responsive to the present request. He does not know what records the Public Body has maintained, disposed of, or added, since he made requests for information in 2002 or 2003. Consequently, it is unlikely that the Applicant would be able to develop a compromise solution to allow the Public Body to reduce the number of requested records in order to reduce fees, as he would be unaware that there would be a need to compromise until the Public Body explained that he has received some of the records and pointed out which ones.

[para 63] Even if the Applicant has received some of the information he has requested in the past through other means, this does not necessarily weigh against a fee waiver. In Order F2007-016, the Adjudicator determined that an applicant was entitled to a fee waiver even though she was aware or had received some of the information contained in her file by other means. The Adjudicator said:

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.

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".

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.

[para 64] As was the case in Order F2007-016, the Applicant has established that he cannot afford to pay the fees, and one of his access requests, 2007-P-007, is for records containing his personal information. The Applicant deposed that he has been shown some of this information in the past by asking his employer to see it, and received redacted

versions of a portion of his file through a previous access request for this portion, but he is now requesting all the information in the records. Following the reasoning in Order F2007-016, I am satisfied that the fact that the Applicant may have received or be aware of some of the information through other means, such as through the employment relationship, this does not weigh against granting a fee waiver.

[para 65] The four remaining requests that are the subject of this inquiry do not specifically state that they are for personal information, although the responsive records may also contain his personal information. These requests are for information regarding the administration of the Applicant's previous requests under the FOIP Act.

[para 66] The Public Body argues that these requests are "broad and seek a great deal of information, both general and personal, from the CBE." However, I interpret these requests more narrowly, as requests for records containing information that would document the steps taken by the Public Body to process the Applicant's requests. I take support for this reading from the following argument of the Applicant:

As noted above, certain of the records at issue regarding the administration of access requests are documents that track the processing of an access request. The reasons for accessing these records is to attempt to understand how requests, and these in particular, are processed, what procedures the Public Body follows and why the requests have been hindered or delayed.

I find that none of these requests are likely to contain overlapping information, given that they relate to the procedures followed by the Public Body in relation to specific and different access requests made by the Applicant. Further, I find that the Applicant has not received this information previously. Additionally, I note that the records that were responsive to the original access requests would not be responsive, unless they document in some way the procedures or steps followed by the individual or individuals who processed the requests. Similarly, general information about procedures would not be responsive, as the Applicant requested information about the procedures followed in relation to his own access requests.

[para 67] In Order PO-2847, discussed above, the Adjudicator considered whether granting a fee waiver would shift an unreasonable burden of costs to an institution or public body. In that case, the Applicant had established that paying the fees would result in financial hardship. In addition, the institution had denied his request for a fee waiver because he had not provided the financial information of a family member for its review when making the decision whether or not to grant the fee waiver. The Adjudicator said:

Finally, I considered whether granting the fee waiver would shift an unreasonable burden of the costs from the appellant to the Ministry. In considering this factor, a key consideration was the amount of the fee. Had the fee been for a larger amount, I may have been inclined to find that requiring the Ministry to absorb the costs associated with providing the appellant with photocopies of the records would shift an unreasonable burden of cost from the appellant to the Ministry. In my view, the fact that most of the records consist of records the appellant exchanged with the Ministry weighs heavily against granting a fee waiver. However, given that the fee is \$1380.00 and the particular circumstances in this appeal, I find that granting the fee waiver would not shift an unreasonable burden of the cost from the appellant to the Ministry. In making this decision, I contrasted the appellant's ability to pay the fee with the manner in which

the Ministry responded to his request. In my view, there are aspects to the Ministry's response which [are] not reflective of the spirit or purpose of the *Act*.

[para 68] In Order F2007-016, the Adjudicator considered how the costs incurred by a public body should be weighed in a situation where an applicant had requested her personal information. The Adjudicator stated:

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.

This suggests that the total amount of fees may be a relevant factor if information other than personal information is requested. However, with regard to personal information, the Adjudicator considered the Act to limit the amounts that may be charged for processing access requests for personal information, which implied that costs should not be considered when deciding to grant a fee waiver on the basis of inability to pay.

[para 69] As four of the Applicant's access requests are not for his personal information, it is appropriate to consider whether the burden of costs is being shifted unreasonably to the Public Body, even though I find that the Applicant has established an inability to pay fees. I say this because the intent of the FOIP Act in allowing a public body to charge fees is to ensure the sustainability of the access to information regime without interfering with a public body's operations. The FOIP Act enables an applicant to access information regarding a public body's administration of its programs; however, processing access requests should not interfere unreasonably with a public body's ability to administer those programs. Consequently, it is important to consider the amount of the fees and weigh them in the context of the other factors when determining whether to grant a fee waiver.

[para 70] In weighing all the factors discussed above, I find that the Applicant has established that he cannot afford to pay the fees. Further, the decision of the Public Body not to consider granting a fee waiver in this case does not necessarily comply with the spirit and intent of the FOIP Act. I say this because the Public Body did not take into consideration the circumstances the Applicant had established and which were within its knowledge when it denied his request, but instead decided he could afford the fees based on the irrelevant consideration that he was represented by counsel.

[para 71] I acknowledge that \$4402, (the total amount of the estimated fees for the four requests that are not for personal information) is a large amount of money by most standards. However, I note that this amount reflects the Public Body's estimate only, and may not reflect the actual costs incurred by the Public Body once it processes the Applicant's access requests. In addition, I find that the information requested in the latter four requests is not likely to overlap with information responsive to the other access

requests and I do not believe that the Applicant has received information about how the Public Body has processed his access requests previously. In other words, the Applicant is not requesting information he has already received and is not making repetitious requests.

[para 72] In considering all these factors, I find that in the circumstances, given the financial situation of the Applicant, the fact that the Applicant has not received copies of the information previously, that the requests are not repetitious, that the fees may be less than estimated by the Public Body, and that the Public Body focused on irrelevant considerations when it decided to deny the fee waiver, shifting the burden of costs to the Public Body would not be unreasonable in this case. In addition, if consideration of whether granting a fee waiver would have the effect of unreasonably transferring the Applicant's costs to the Public Body is relevant to requests for personal information, I find the same reasoning applies to request 2007-P-007, and supports reducing the fees for that request to zero as well.

V. ORDER

[para 73] I make this Order under section 72 of the Act.

[para 74] I reduce the fees the Public Body has required the Applicant to pay in relation to case file numbers F4589, F4590, F4591, F4592, and F4593 to zero.

[para 75] I order the Public Body to perform its duties under the Act both to respond to and process the Applicant's access requests.

[para 76] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this order, that it has complied with this order.

Teresa Cunningham
Adjudicator