

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-004

July 6, 2010

ALBERTA SOLICITOR GENERAL AND PUBLIC SECURITY

Case File Number F4751

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to the Alberta Solicitor General and Public Security (the Public Body) to records relating to safety measures in place in the courthouses. The Public Body estimated the fees for processing the Applicant's access request at \$411.91. The Applicant requested a fee waiver on the basis that the records related to matters of public interest. Specifically, he argued that they would reveal information relating both to a limitation on the ability of Albertans to visit the courthouses and to a risk to public safety.

The Adjudicator determined that the Applicant had not established that the security measures in place in the courthouses limited the ability of Albertans to visit the courthouses. She also found that it had not been established that there was a risk to public safety. She therefore found that the Applicant had not established that the requested records would contain information relating to these matters. As a result, she found that the Applicant had not established that the records related to a matter of public interest. She confirmed the decision of the Public Body to refuse to waive fees on the basis of public interest.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 32, 72, 93

Authorities Cited: **AB:** 96-002, F2006-032

I. BACKGROUND

[para 1] On July 6, 2008, the Applicant made a request to the Alberta Solicitor General and Public Security (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for access to the following records:

- 1) All the minutes of the Perimeter Security Advisory Committee
- 2) All reports of the risk analysis for the Alberta Courts Perimeter Security
- 3) All the reports of the rationale of the Perimeter Security of the Alberta Courts
- 4) A summary of the security incidents in the Alberta Courts over the last 10 years
- 5) A cost breakdown of the capital and running costs for Perimeter Security.

[para 2] The Public Body wrote to the Applicant on November 6, 2008 to acknowledge that it had received his request on October 6, 2008. The Public informed the Applicant that its estimate of the fees associated with processing his access request was \$411.91. The Public Body also communicated its decision that it would not waive the fees for processing the request because it was not satisfied that the Applicant's access request was in the public interest.

[para 3] On December 29, 2008, the Applicant requested that the Commissioner review the Public Body's decision to refuse to waive the fees.

[para 4] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Both parties provided initial and rebuttal submissions.

II. ISSUES

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

III. DISCUSSION OF ISSUES

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

[para 5] Section 93(4)(b) of the FOIP Act sets out the situations in which fees may be waived in relation to an access request. 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.*

If the records requested by an applicant relate to a matter of public interest, then the head of a public body has discretion to excuse the applicant from paying fees.

[para 6] In Order 96-002, the former Commissioner noted that the concept of public interest is broad, and that not all matters arguably relating to the public interest warranted fee waivers. He said;

I would like to make some general comments on the concept of “public interest”. It is possible to have the term “public” apply to everyone (“the public good”) and to anyone (John or Jane Public who are the objects of government programs and policies). Similarly “interest” can range between individual curiosity and the notion of interest as a benefit, as in a collective interest in something. The weight of public interest will depend on a balancing of the weights afforded “curiosity,” “benefit” and “broad” versus “narrow” publics. Where an access request relates to a matter that is of “interest” in both the sense of curiosity and benefit and the relevant “public” is broad, the case for removing all obstacles to access is very strong. So a matter that is the subject of curiosity to the larger public and also relates to a benefit to the broad public would present a very strong case for the waiver of fees. A matter which is of curiosity to many but affects no general benefit would present a less compelling case. Similarly, a matter that affects a benefit but in which few citizens are interested may present a less compelling case. In the less compelling cases, the importance of respecting the integrity of the legislated fee structure could outweigh the public interest dimension.

In that order, the former Commissioner also developed a list of thirteen criteria to assist a decision maker to decide when it is appropriate to grant a fee waiver in the public interest.

[para 7] In Order F2006-032 at para. 43, the Adjudicator noted that some of the thirteen criteria set out in Order 96-002 were repetitive or not relevant in every case. She set out a revised, non-exhaustive list of three main criteria and several possibly relevant sub-criteria to consider in determining whether an applicant should be excused from paying all or part of a fee on the basis of public interest. She proposed the following questions:

The first set of criteria (numbers 1 to 3) is relevant to decide if a record “relates to a matter of public interest”:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:

- Have others besides the applicant sought or expressed an interest in the records?
- Are there other indicators that the public has or would have an interest in the records?

2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:

- Do the records relate to a conflict between the applicant and government?
- What is the likelihood the applicant will disseminate the contents of the records?

3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:

- Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?

- Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
- Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?

In my view, these factors need only be considered once it has been established that the requested records are likely to contain information relating to the matter the Applicant points to as being in the public interest. While the first criterion could certainly be interpreted as addressing this issue, the factors to be considered when answering this question indicate that this criterion addresses the extent to which the public interest is engaged in the matter contained in the records. However, for the purposes of section 93(4)(b), before considering the extent to which the public interest is engaged in a matter, it is necessary to consider whether the records are likely to relate to the matter.

[para 8] If neither party adduces evidence that the requested records are likely to contain information relating to the matter or matters that the Applicant argues to be in the public interest, there is no need to evaluate the extent to which the matter in question is in the public interest using the criteria in Order F2006-032 or to consider whether discretion should be exercised to waive fees in the public interest.

[para 9] In its submissions, the Public Body takes the position that the Applicant has failed to show how the details or specifics he is seeking are in the public interest.

[para 10] The Applicant makes the following argument:

In April 2008, the applicant attended the Traffic Court at the then recently opened Calgary Courts Centre. Prior to the opening of the Calgary Courts Centre there were a number of Courthouses around town: The Court of Queen's Bench, the Appeals Court, The Provincial Court, Traffic Court etc. Typically, there was a security guard stationed at the front door of the given courthouse, who would typically respond to directional enquiry, while courtroom security was provided by one or more sheriffs. Additional courtroom security particularly at the traffic or provincial court would also be provided by police officers who were involved with an upcoming case. In the new court building courtroom security is still provided in the same manner as previously while Courthouse security is provided by a phalanx of guards at the front door and members of the public are obliged to undergo an airport like security search of their persons and belongings. Court staff – lawyers, policemen and the like – go through another line and are obliged to show identification. In the previous system there was no search procedure in place and the public and other parties were free to come and go at their leisure.

My reaction to the search and seizure processes emplaced at the time of attending at the Traffic Court was and still is, an infringement on the civil liberties of all Albertans and a restriction on the accessibility of the public to the courts. I was also concerned about the issue of the safety of Alberta's courts that led to the decisions that necessitated the development of these procedures... It was these concerns that led to my initial application to the FOIP office of the SGPS and dated 6/July /08 and received on 11/July/08 and thence reiterated in my correspondence of 14/Dec/08 and received on the 29/Dec/08.

...While the initial focus of this enquiry is directed at the reasons identified in section 93(4) of the Act I must ask the commissioner to consider section 32 (1a) of the Act which states:

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant:

a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant.

Given the public body's – and here it is not one but two ministries – concern about the public's safety, identified in the 4 press releases in para. 26 of the order [Order F2007-024] which are headed "Albertan's safety top priority in courthouse security expansion"... one must ask what were the conditions which were putting Albertans at so much risk that both the SPGS and Ministry of Justice had decided to put so much effort and expense into putting these security systems into play. It would appear, then, that under this section of the Act the public body is obliged, willy-nilly, to provide to me as an applicant, without delay / hindrance and – I submit -- payment of any fee, information pertaining to this risk including the risk assessment, reports on the rationale for the perimeter court security, a summary of the incidents over the last ten years and all the other information requested in my original application for information.

[para 11] From the above, I understand the Applicant to draw the following conclusions to establish that the records he has requested relate to a matter of public interest: (1) security limits access by the public to the courthouses, and (2) there must be a situation putting Albertans at great risk if the Public Body has implemented security measures in the courthouses. The Applicant therefore reasons that disclosing the requested records will have the effect of disclosing matters relating to the public interest because access to the courthouses is in the public interest, and so is a great risk to the safety of Albertans.

[para 12] In my view, neither proposition is supportable. The Applicant has not adduced or pointed to any evidence to support his contention that courthouse security in any way limits or undermines the ability of members of the public to attend the courthouses. Moreover, the implementation of security measures in and of itself does not lead to the conclusion that there is a risk to the safety of Albertans. Rather, safety or security measures can be preventative: they may have been put in place to reduce or eliminate any possibility of risk in the courthouses. Assuming that there was a risk that has been eliminated by the security measures in place in the courthouses, there would be no need to inform the public of the risk under section 32(1)(a) of the FOIP Act, as any risk of significant harm would be eliminated. Without evidence that there is a serious risk to the safety of Albertans, I am not prepared to conclude solely on the basis that there are security protocols in place in the courthouses, that there is one. For these reasons, I am unable to conclude that the records requested by the Applicant are likely to relate either to any limitation on the part of Albertans to attend the courthouses, or to a risk to the safety of Albertans.

[para 13] As the Applicant has not established that the request he has made for records would, in any way, relate to the matters that he argues are in the public interest, i.e. that access to the courthouses has been limited by security protocols, or that there is a serious risk to the security of Albertans, I need not consider whether the issues he contends are in the public interest are in the public interest for the purposes of exercising discretion to grant a fee waiver. As I have found that the Applicant has not established

that the records relate to the issues he argues are in the public interest, I need not address the criteria set out in Order F2006-032 for determining the degree to which there is a public interest in the records.

[para 14] The Applicant also argued in his initial submissions that he should be entitled to a fee waiver based on inability to pay. However, he has not raised this issue with the Public Body. I therefore do not have the Public Body's decision on this matter before me. As my jurisdiction in this matter is limited to reviewing decisions made by the Public Body, I cannot address the Applicant's arguments in relation to whether he is entitled to a fee waiver under section 93(4)(a).

V. ORDER

[para 15] I make this Order under section 72 of the Act.

[para 16] I find that, in the circumstances before me, the Applicant should not be excused from paying all or part of a fee under section 93(4)(b) of the Act. I confirm the Public Body's decision to refuse to grant the Applicant a fee waiver based on public interest.

Teresa Cunningham
Adjudicator