

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-005

July 13, 2010

ALBERTA JUSTICE AND ATTORNEY GENERAL

Case File Number F4960

Office URL: www.oipc.ab.ca

Summary: The Applicant requested a fee waiver from Alberta Justice and Attorney General (“the Public Body”) for records relating to the government’s strategy for replacing incumbent justices of the peace. The Applicant also questioned the amount of the fee estimate.

After discussing the scope of its access request with the Applicant, the access request was limited to records held by the Court Services branch of the Public Body. A preliminary search conducted by the Public Body resulted in an estimate of approximately 7000 possible responsive records. The Public Body provided a revised fee estimate to the Applicant, which the Applicant did not accept.

The Adjudicator found that the Public Body’s fee estimate was reasonable given the breadth of the access request, which resulted in the Public Body identifying a large number of possible responsive records in its preliminary search.

The Adjudicator also affirmed the Public Body’s decision to deny the Applicant’s request for a fee waiver.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 93 and 72; *Freedom of Information and Protection of Privacy Regulation*, A.R. 186/2008 ss. 13, and 14.

Authorities Cited: AB: Orders 96-002, F2004-002, F2006-032.

I. BACKGROUND

[para 1] On February 26, 2009, the Applicant, an organization, made the following access request to Alberta Justice and Attorney General (the “Public Body”) (“original access request”):

Please provide us with any records, including electronic records relating to the following:

1. Any strategy to obtain public support for an agenda that would result in it being more difficult for people to get out on bail;
2. The authorizations for [EPS members] to make statements to the media;
3. The campaign and process leading to replacing incumbent justices of the peace, who have now been replaced or are being replaced;
4. The strategy relating to the selection of replacement J.P.’s;
5. Information to support the claim that suspects are being wrongly released on bail.

[para 2] In accordance with section 93 if the Act, on May 12, 2009, the Public Body provided a fee estimate of \$5,209.00 to process the Applicant’s request, broken down as follows:

Description	Rate	Amount	Cost
Records Search time	\$6.75 per ¼ hour	122 hours	\$3294.00
Records Preparation time	\$6.75 per ¼ hour	70 hours	\$1890.00
Copies of Records	\$0.25 per page	100 pages	\$25.00

[para 3] The Public Body requested a deposit of half of the estimate, and gave the Applicant 30 days to accept the fee estimate.

[para 4] On May 25, 2009, the Applicant requested a fee waiver from the Public Body, based on its assertion that the records relate to a matter of public interest. The Applicant also sent a letter to the Office of the Information and Privacy Commissioner (“this Office”) requesting a review of the fee estimate. The Applicant’s request for a fee waiver was rejected by the Public Body on June 9, 2009.

[para 5] On June 19, 2009, the Applicant and the Public Body discussed the Applicant’s request and the Applicant agreed to narrow the scope of its request to responsive records found in the Court Services branch of Alberta Justice (“revised access request”). On this basis, on July 7, 2009, the Public Body provided the Applicant with a revised fee estimate of \$1,834.00, calculated as follows:

Description	Rate	Amount	Cost
Records Search time	\$6.75 per ¼ hour	22 hours	\$594.00
Records Preparation time	\$6.75 per ¼ hour	45 hours	\$1215.00
Copies of Records	\$0.25 per page	100 pages	\$25.00

[para 6] On July 15, 2009, the Applicant sent a letter to the Public Body stating that it thought the expense of the search and preparation of the records, "...should be borne by the Government in order to provide public access to information which is of public importance."

[para 7] In a letter to the Applicant dated July 20, 2009, the Public Body reiterated its rejection of the Applicant's request for a fee waiver on the basis of public interest. It stated it would require a deposit of half of the fee estimate before it would continue to process the Applicant's request.

[para 8] The Commissioner authorized an investigation to attempt to reach a settlement between the Applicant and the Public Body. This was unsuccessful and this matter was referred to inquiry. Both parties provided initial submissions. The Applicant also provided rebuttal submissions.

II. RECORDS AT ISSUE

[para 9] This inquiry relates to a review of a fee estimate and a request for a fee waiver for records relating to the policy surrounding the selection and dismissal of justices of the peace, therefore, there are no records directly at issue.

III. ISSUES

[para 10] The Notice of Inquiry dated March 19, 2010 states the issues for this inquiry as follows:

Issue A:

Did the Public Body properly estimate the fees for services?

Issue B:

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

[para 11] Given that the Applicant revised its request following the fee estimate for the original access request, and received a subsequent estimate based on the revised access request, I will confine my findings on issue A to the revised fee estimate of July 7, 2009.

IV. DISCUSSION OF ISSUES

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

[para 12] Section 93 of the Act allows public bodies to charge an applicant fees for services provided. The relevant parts of section 93 relating to fee estimates state:

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.

...

(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.

...

[para 13] The request was not for the Applicant's personal information; therefore, the following sections of the *Freedom of Information and Protection of Privacy Regulation* ("FOIP Regulations") are relevant in this inquiry.

13(1) An estimate provided under section 93(3) of the Act must set out, as applicable,

...

(d) the cost to produce a copy of the record,

(e) the time and cost for preparing and handling the record for disclosure,

...

(g) the cost of shipping the record or a copy of the record.

...

(4) An applicant has up to 20 days to accept the fee estimate or to modify the request to change the amount of fees assessed.

14(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on the receipt of an agreement to pay the fee, and on the receipt

(a) of at least 50% of any estimated fee that exceeds \$150,

...

(4) Fees, other than an initial fee, or any part of those fees will be refunded if the amount paid is higher than the actual fees required to be paid.

[para 14] I must determine if, based on the information before me, the estimate is reasonable and done in accordance with the Act and the FOIP regulations.

[para 15] The Applicant's submissions focused on the fee waiver. It did not provide detailed submissions on the fee estimate issue. It simply stated that the fee estimates (both original and revised) were outrageous. In its letter to the Public Body dated May 25, 2009, the Applicant did state, "You also seem to be implying that it will take 40 minutes to review each of the 100 pages. Please explain why it would take so long to review each page."

[para 16] Section 93(3) of the Act requires that the Public Body provide a fee estimate in advance of processing the request. Therefore, an estimate is a calculated guess at what it might cost to respond to an Applicant's access request. It is not the actual cost of processing the request. In Order F2004-002, the Adjudicator stated, "A fee estimate is simply that, an estimate. It is not an exact accounting of the time taken and the exact costs incurred." (Order F2004-002 at para 35).

[para 17] Although the Public Body can request 50% of the fee estimate as a deposit prior to processing an applicant's request, according to section 93(6) of the Act, an applicant is only responsible for the actual cost of processing the access request. If the actual cost of processing the request is less than the amount of the deposit, the public body must refund that portion of the deposit (s. 14(4) of the FOIP regulations).

[para 18] According to the Public Body, to prepare the fee estimate for the Applicant's original access request, the Public Body initiated a search. Once the initial phase of the search was complete, the program areas and the Public Body's FOIP Office estimated the number of pages that were responsive to the Applicant's request. The Public Body estimated approximately 7000 pages of responsive records in the Court Services branch.

[para 19] I do not have any information as to how the initial phase of the search was performed or how the estimate of 7000 pages of records was determined; however, given the broad parameters of the Applicant's request, this number does not seem excessively large. The Applicant also did not argue that the volume of potential responsive records found by the Public Body was excessive.

[para 20] Based on this preliminary search, the Public Body determined that it would take 22 hours to search for the responsive records. I also note that the Public Body did contact the Applicant to attempt to narrow its access request; however, the Applicant appears to have narrowed its access request only by limiting it to a branch of the Public Body. It did not limit what the Public Body was to search for. Given the breadth of the Applicant's request, this number of hours to search for responsive records is not excessive.

[para 21] Finally, the Public Body estimated 45 hours to prepare the responsive records for disclosure. As there are approximately 7000 records to review and prepare, this means that the Public Body estimates that it will be able to review approximately 155 records an hour – a reasonable estimate.

[para 22] The Public Body also estimated photocopying 100 pages at \$0.25 a page, a rate set by the FOIP Regulations. The Public Body explained in its submissions that the 100 pages is only an estimate as, until it is able to review the approximately 7000 possible responsive records, it will not know what needs to be photocopied. By estimating the cost of photocopying this way, the Public Body did not mean that there were only 100 pages of responsive records to review and prepare for disclosure, as the Applicant thought. The Public Body's estimate of time to review and prepare the responsive records is based on 7000 potential responsive records, and not 100.

[para 23] Given the extensive scope of the Applicant's access request, even after it was limited to records held in the Court Services branch of the Public Body, I find the Public Body's fee estimate is reasonable and done in accordance with section 93 of the Act and sections 13 and 14 of the FOIP regulations.

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

[para 24] Section 93(4) of the Act 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 25] The Applicant requested a fee waiver from the Public Body pursuant to section 93(4)(b) of the Act. The Public Body rejected the Applicant's request because, in its opinion, the access request did not qualify as a matter of public interest.

[para 26] In its submissions, the Applicant provided its initial access request, which stated:

It has become apparent to the [Applicant], over the past two or three years, that there has been an orchestrated political campaign to try to bring public pressure on justices of the peace in relation to judicial interim release (bail) hearings. It is clear that this campaign also seeks to marshal public support for legislative changes and changes in the judicial interim release hearing process. We believe that part of this overall strategy involved a termination or refusal to renew contracts of justices of peace and to have them replaced by lawyers who were seen to be onside with the views of the police and Alberta Justice.

[para 27] In support of this claim the Applicant described three media reports. The first was a report dated October 10, 2007, wherein the Calgary Police Chief criticized the justice system for allowing accused persons out on bail, and for failing to impose longer periods of incarceration on individuals found guilty of crimes.

[para 28] Next, the Applicant described a media story dated September 19, 2008, in which the Minister of Justice told the media that the government was reviewing the bail system in response to criticism that accused individuals were committing crimes after being released on bail.

[para 29] Finally, the Applicant cited a news broadcast dated February 16, 2009, in which two or three EPS members apparently express frustration over their view that bail was being granted in instances where it should not have been, only to have accused individuals commit crimes while out on bail. The individual reporting the story apparently also stated that there is significant cost and time involved in getting an accused back into custody, which is making many people question the bail system.

[para 30] The Applicant's arguments relating to the issue of the requested fee waiver can be summarized as follows:

- It is not motivated by commercial or other private interests;
- Other members of the public will benefit from the disclosure;
- The records will contribute to a public understanding of the issue;
- The records will contribute to a debate on the resolution of events of public interest;
- The records will be useful in clarifying a public understanding of issues where the government has itself established a public misunderstanding;
- The records do not relate to a conflict between the Applicant and the government except on the broad public policy issue;
- The Public Body should have anticipated the need of the public to have the records because the government should always anticipate that the public will question underlying basis for its policies;
- The Applicant will disseminate the contents of the records to the public.

[para 31] The Applicant stated that many of its assertions above were "self evident" and that it does not need proof of them but did explain, "...it is the Government which

has been making all sorts of statements in relation to the reasons for its policies and we are seeking the information underlying those reasons.”

[para 32] The Applicant appears to be relying on the 13 criteria established in Order 96-002 to assist in deciding whether fee waivers should be granted. In its submissions, the Public Body explicitly examines each of these 13 criteria in relation to this fee waiver request.

[para 33] In the Addendum to Order F2006-032, the Director of Adjudication states that in matters where a fee waiver is requested on the basis that the records are about a matter of public interest, she will apply the following three criteria instead of the 13 previously used by this Office:

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?

When considering this criterion, the following factors 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?

When considering this criterion, the following factors 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?

When considering this criterion, the following factors 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?

(Order F2006-032 at para 43)

[para 34] I will examine these three criteria in order to make my decision as to whether the Applicant’s request 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?*

[para 35] When considering this criterion, the following factors 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?

(Order F2006-032 at para 43)

[para 36] The Public Body submitted that no access request for these records has been made by anyone other than the Applicant. I have no evidence, from either party, that suggests that anyone, other than the Applicant, has expressed an interest in these records.

[para 37] The Applicant cited three news stories relating, to some degree, to an apparent controversy surrounding the bail system, and, specifically, the possible public and police perception that bail is being granted too readily and many of those being released on bail are committing crimes while on bail. As well, the news pieces, as described by the Applicant, indicate that the government is reviewing the matter in response to this perception.

[para 38] While these three new stories, reported during a period of two and a half years, indicate that there may be public interest in why accused individuals are being released on bail when apparently they should not have been, the stories do not support the idea that the public is interested in a government strategy in which the government is replacing justices of the peace seen as being too lenient on accuseds during bail hearings with individuals who will be more “onside with the views of the police and Alberta Justice”.

[para 39] Furthermore, in Order F2006-032, in response to a request for records regarding the management of publicly funded seniors’ facilities, the Director of Adjudication stated:

I agree that the motivation of the Applicant is significant in this case. I also agree with the Public Body that the Applicant’s motivation is on behalf of only a small proportion of the public. While it may be of more general public concern that publicly-funded facilities were being mismanaged, the Applicant has not provided any material that proves, or even directly suggests, that this is happening.

(Order F2006-032 at para 15)

[para 40] I believe that the same holds true in this inquiry. It is possible that the public may be interested in the Applicant’s theory of an “orchestrated political campaign”, should the theory prove to be correct and supported by the requested records. Certainly members of the public who may find themselves requesting an interim release will likely be interested in any attempt to replace justices of the peace seen to be lenient

with ones that will not grant bail applications readily. Possibly, such information might be of sufficient public interest to justify a fee waiver – though I make no decision about this question at this time. However, at this point the Applicant has provided insufficient evidence that anything to support this theory will come to light as a result of its access request.

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?*

[para 41] When considering this criterion, the following factors 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?

(Order F2006-032 at para 43)

[para 42] The Applicant is an organization and part of that organization's function is to monitor the criminal justice system. I do not think that the Applicant is motivated by commercial or other private interests. The records do not relate to a conflict between the Applicant and the government except in terms of potentially differing views as to what is appropriate government policy.

[para 43] I also believe that the Applicant will share the contents of the records with the public.

3. *If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government?*

[para 44] When considering this criterion, the following factors 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?

(Order F2006-032 at para 43)

[para 45] The Applicant's request is primarily for records relating to the government's strategy relative to justices of the peace. If the government is replacing justices of the peace, presumably it has a strategy that involves doing this, and records relating to this topic would shed light on this strategy.

[para 46] Records relating to any government decision-making meet the first of the three criteria listed above, and the first part of the third one, in that they shed light on the activity of the government, and thereby contribute to transparent and accountable government.

[para 47] However, even assuming (which has not been proven in this inquiry) that the government is replacing or has replaced justices of the peace, the Applicant has failed to provide any evidential basis for calling these actions into question. It is at this point mere speculation on the part of the Applicant that any such actions taken by government are being done for the purpose of responding to the criticisms of the Chief of Police and individual police officers that are outlined in the media reports. It is also mere speculation on the part of the Applicant that the review of the bail system that, according to the media report, was adverted to by the Minister of the Justice, involves replacing current justices of the peace with individuals who would be more “onside with the views of the police and Alberta Justice”. The media reports cited by the Applicant do not, in themselves, support the theory that the government has a strategy to replace justices of the peace in the manner and for the purposes which the Applicant suggests.

[para 48] In other words, the Applicant has not presented evidence to suggest that the records which it is requesting relate to the matter that, in its view, is of public interest.

[para 49] In this inquiry I believe that the most significant factor to consider is if this is an issue of public concern (the first criterion). I do not believe that a record can be said to relate to a matter of public interest when the Applicant has provided no evidence to show that the public is interested in what is being requested by the Applicant, nor any evidence to suggest that the records contain information that, were it known to the public, would be of interest to it.

[para 50] Taking into account the factors above and the fact that the Applicant’s request is very broad, and that the Public Body has tried to help the Applicant narrow its request, I find that the Public Body was correct in denying the Applicant’s request for a fee waiver.

V. ORDER

[para 51] I make this Order under section 72 of the Act.

[para 52] I confirm that the Public Body’s fee estimate was reasonable.

[para 53] I find the Applicant should not be excused from paying the fee. I, therefore, confirm the Public Body’s decision to refuse to grant the Applicant a fee waiver based on public interest.

Keri H. Ridley
Adjudicator