ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-006

September 8, 2010

CALGARY BOARD OF EDUCATION

Case File Number F4899

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked for records from the Calgary Board of Education (the "Public Body"). When the Public Body estimated photocopying charges of $32.50, the Applicant asked to examine the records rather than receive copies. The Public Body refused to allow the Applicant to examine the records, relying on section 4(b) of the *Freedom of Information and Protection of Privacy Regulation* (the "Regulation").

Section 4(b) of the Regulation allows a public body to require an applicant to be given a copy of requested records, rather than the opportunity to examine them, if allowing examination of the records might result in the disclosure of information that the public body must refuse to disclose, or has exercised discretion to refuse to disclose. However, the Adjudicator noted that the provision applies only after a public body has decided to give access. As the Public Body, here, had not yet decided to give the Applicant access to records, the Adjudicator found that he could not review any decision not to allow the Applicant to examine records.

The Applicant raised the issues of whether the Public Body properly estimated fees for services under section 93 of the Act and as provided for in the Regulation, whether it properly set fees under section 95(b) of the Act, and whether it was required to set fees under section 95(b) in order to estimate and charge fees. However, in the course of the inquiry, the Public Body decided not to charge the Applicant any fees. The Adjudicator

accordingly found that the issues regarding fees were moot. He also found that it was not appropriate to exercise his discretion to decide them in the circumstances of the case.

Statute and Regulation Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7, 7(3), 17(1), 72, 72(3)(c), 93, 93(1), 93(3.1), 93(4)(a), 93(4)(b) and 95(b); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, ss. 4 and 4(b).

Authorities Cited: AB: Orders 99-005, 2001-028 and F2009-039; *Grimble v. Edmonton (City)* (1996), 181 A.R. 150 (C.A.). **CAN:** *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.), [1989] 1 S.C.R. 342.

I. BACKGROUND

[para 1] On February 9, 2009, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act"), in which he asked the Calgary Board of Education (the "Public Body") for information relating to an internet posting that had been directed to the Applicant, and that the Applicant had found to originate from a computer of the Public Body.

[para 2] In a letter dated March 9, 2009, the Public Body estimated fees of $32.50, in order for it to provide the requested records.

[para 3] In a letter dated March 16, 2009, the Applicant asked to examine the records rather than obtain copies. The Public Body denied his request, by letter dated March 17, 2009, citing section 4(b) of the *Freedom of Information and Protection of Privacy Regulation* (the "FOIP Regulation" or "Regulation").

[para 4] In a letter to the Commissioner dated March 19, 2009, the Applicant requested a review of the Public Body's refusal to allow him to examine the records that he requested, arguing that the Public Body had charged him, in the past, for blank pages with all information severed. As the Applicant raised the question of whether the Public Body may properly charge for blank pages, he implicitly requested a review of the fee estimate.

[para 5] The Commissioner authorized a portfolio officer to investigate and try to settle the matter between the parties. This was not successful, and the Applicant requested an inquiry by letter dated June 23, 2009. A written inquiry was set down.

II. RECORDS AT ISSUE

[para 6] As the Public Body has not yet provided the Applicant with any records responsive to his access request, there are no records at issue. The Public Body estimates the responsive records to number 130 pages.

III. ISSUES

[para 7] The Notice of Inquiry, issued March 26, 2010, set out the following issues:

> Did the Public Body properly refuse to allow the Applicant to examine the records as authorized by section 4 of the FOIP Regulation?
>
> Did the Public Body properly estimate fees for services under section 93 of the Act and as provided for in the FOIP Regulation?

[para 8] On my review of the parties' initial and rebuttal submissions, I added the following issue to the inquiry, by letter dated June 16, 2010:

> Did the Public Body set fees under section 95(b) of the Act? If not, was it required to do so in order to charge, and therefore estimate, fees for services under section 93 of the Act and the FOIP Regulation?

[para 9] By letter dated June 25, 2010, the Public Body advised that it had decided to waive the fees associated with the Applicant's access request. It therefore argued that the second and third issues above, regarding fees, were moot. I found that I could not decide whether the issues were moot, and whether I should nonetheless decide them even if they were moot, without fuller submissions from both parties. I therefore added the following issue to the inquiry, by letter dated June 29, 2010:

> Are the second and/or third issues [regarding fees] moot? If so, should either or both of them nonetheless be decided?

[para 10] When adding the above issue, I asked the Applicant to indicate whether he was willing not to proceed with the issues regarding fees, in which case I would remove them from the inquiry. He advised, by letter dated July 7, 2010, that he wanted to proceed with them.

IV. DISCUSSION OF ISSUES

A. Did the Public Body properly refuse to allow the Applicant to examine the records as authorized by section 4 of the FOIP Regulation?

[para 11] Section 7 of the Act reads, in part, as follows:

> *7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.*
> …
>
> *(3) In a request, the applicant may ask*

(a) for a copy of the record, or

(b) to examine the record.

[para 12] Section 4 of the FOIP Regulation reads:

> *4 Where a person is given access to a record, the head of the public body may require that the person be given a copy of the record, rather than the opportunity to examine it, if the head is of the opinion that*
>
> *(a) allowing examination of the record would unreasonably interfere with the operations of the public body,*
>
> *(b) allowing examination of the record might result in the disclosure of information that the head of the public body must refuse to disclose or has exercised discretion to refuse to disclose under the Act, or*
>
> *(c) allowing examination of the record might result in the disclosure of information where that disclosure is restricted or prohibited by an enactment or a provision of an enactment that prevails despite the Act.*

[para 13] The Applicant argues that he has the right to examine the records that he has requested because the form that he was asked to complete gave him the choice to "receive a copy of the record" or "examine the record". However, the Public Body correctly responds that section 7(3) of the Act does not give the Applicant an absolute right to decide how disclosure will be made, as section 7(3) must be considered along with what is now section 4 of the Regulation (Order 2001-028 at para. 16). In other words, the form completed by the Applicant was simply asking his preference, which is then subject to the Regulation.

[para 14] Section 4(b) of the Regulation grants a public body the discretion to require that an applicant be given a copy of a requested record, rather than the opportunity to examine the record, if allowing examination of the record might result in the disclosure of information that the public body must refuse to disclose, or has exercised discretion to refuse to disclose, under the Act.

[para 15] Here, the Public Body notes that the Applicant has requested access to records involving an alleged incident in which certain comments were posted on a website using a computer owned by the Public Body. It submits that the responsive records contain third party personal information that falls under the mandatory exception to disclosure set out in section 17(1) of the Act, in that disclosure would be an unreasonable invasion of personal privacy. The Public Body also says that the records may contain information that it must or may refuse to disclose under other sections of the Act. It accordingly argues that section 4(b) of the Regulation is applicable in this case.

[para 16] The Public Body suggests that it *intends* to sever information from the records requested by the Applicant, and *intends* to give him access to the remaining information. Effectively, it is still at the stage of *considering* whether to grant access to none, some or all of the requested information. However, section 4 of the Regulation applies "where a person is given access to a record". In other words, it applies only after a public body has *decided* to give a person access to a record. The fact that a public body must first make a decision regarding access is also apparent by the phrase "*has exercised* discretion to refuse to disclose". For clarity, the word "might" in section 4(b) is not in reference to the possibility that information might be excepted from disclosure if a public body were to go on to process the access request; it is in reference to the possibility that examining the records might result in the disclosure of information that a public body has already decided to withhold after processing the access request.

[para 17] As the Public Body in this case has not yet fully responded to the Applicant's access request, in that it has not yet decided to give him access to all or part of the information that he has requested, I am not able to determine whether, or find that, the Public Body properly exercised its discretion in refusing to allow the Applicant to examine the requested records. Likewise, I am not able to find that the Public Body did not properly exercise its discretion and that it should allow the Applicant to examine the requested records.

[para 18] In order for an issue under section 4 of the Regulation to properly be the subject of a request for review, a public body must first respond to an applicant's access request by agreeing to give him or her access to information, and then refuse to allow the applicant to examine records. Usually, although it may not be necessary in every case, the public body would then also submit copies of the records it has decided to disclose to the applicant, including indications of any and all severed information, so that the Commissioner or his delegate can decide whether the applicant's examination of the records to be disclosed would result in one or more of the outcomes contemplated by section 4 of the Regulation.

[para 19] I conclude that I cannot decide whether the Public Body properly refused to allow the Applicant to examine the records as authorized by section 4 of the Regulation.

[para 20] The Applicant argues that, if examining the original records will enable him to see withheld information, the Public Body should have to make and sever copies and then allow him to examine the copies. However, the Public Body correctly points out that the Act and Regulation provide for an applicant to either examine the original records or be given copies; there is no authority by which an applicant can require a public body to make and sever copies so that an applicant can examine those copies, thereby avoiding the obligation to pay any fees that may be charged for producing those copies.

[para 21] Because it was possible that I did not have the ability to decide the above issue regarding examination of the records, I arranged for the issue regarding the fee

estimate to be included in the Notice of Inquiry. The issue regarding the fee estimate captured, in a different way, the Applicant's concerns set out in his request for review. The Applicant believed that he would be charged for copies of blank pages, which is why he asked to examine the records instead.

[para 22] However, in the course of the inquiry, the Public Body decided not to charge the Applicant any fees in relation to his February 9, 2009 access request. This accordingly raises the question of whether the issues regarding fees are moot, which I will now discuss.

B. Did the Public Body properly estimate fees for services under section 93 of the Act and as provided for in the FOIP Regulation?

C. Did the Public Body set fees under section 95(b) of the Act? If not, was it required to do so in order to charge, and therefore estimate, fees for services under section 93 of the Act and the FOIP Regulation?

D. Are the second and/or third issues [regarding fees] moot? If so, should either or both of them nonetheless be decided?

[para 23] Sections 93 and 95(b) of the Act read as follows:

> *93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*
>
> *(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.*
>
> *(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.*
>
> *(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).*
>
> *(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,*
>
> *(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*
>
> *(b) the record relates to a matter of public interest, including the environment or public health or safety.*

(4.1) If an applicant has, under subsection (3.1), requested the head of a public body to excuse the applicant from paying all or part of a fee, the head must give written notice of the head's decision to grant or refuse the request to the applicant within 30 days after receiving the request.

(5) If the head of a public body refuses an applicant's request under subsection (3.1), the notice referred to in subsection (4.1) must state that the applicant may ask for a review under Part 5.

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

…

95 A local public body, by bylaw or other legal instrument by which the local public body acts,

…

(b) may set any fees the local public body requires to be paid under section 93, which must not exceed the fees provided for in the regulations.

[para 24] As the second and/or third issues in this inquiry, regarding fees, will not have to be discussed if I find that they should not be decided, I will discuss the fourth issue, regarding mootness, first.

[para 25] An issue is "moot" when it presents no actual controversy, or the issue has ceased to exist because the matter has already been resolved; a matter is also said to be "moot" when a determination is sought on the matter which, when rendered, cannot have any practical effect on the existing controversy (Order 99-005 at para. 27).

[para 26] The Supreme Court of Canada has explained mootness as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. [*Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.), [1989] 1 S.C.R. 342 at p. 353 or para. 15, cited in Order 99-005 at para. 28.]

[para 27] On June 25, 2010, the Public Body wrote to this office, advising that it had decided to waive the fees associated with the Applicant's access request. It did so because it took the view that the Applicant had effectively requested a fee waiver by raising the late issue of whether the Public Body has the authority to charge fees.

[para 28] On my review of the Applicant's access request, his other correspondence to the Public Body and this office, and his submissions in the inquiry, I find that the Applicant did not request a fee waiver. The late issue raised by him was whether the Public Body has the authority to charge fees in the first place, not whether it should grant him a fee waiver. In his submissions responding to the issues that I added to the inquiry, the Applicant confirms that he has not requested a fee waiver. He says that the Public Body has purported to grant a fee waiver in order to avoid having its policies relating to fees examined.

[para 29] Section 93(3.1) of the Act contemplates a fee waiver being requested by an applicant. Given the existence of this provision, it is arguable that, because the Applicant here did not request a fee waiver, the Public Body could not grant one. On the other hand, I note that section 93(3.1) was added to the Act in 2003, making it arguable that the scheme has all along permitted a public body to grant a fee waiver of its own accord. However, a counter-argument remains, in that a public body has the discretion to grant a fee waiver only if one of the three circumstances exist for granting one under section 93(4)(a) and (b). Here, the Public Body says that it granted a fee waiver "in view of the modest amount of the fee estimate, and being cognizant of its obligations to be prudent in the stewardship of public resources". This certainly has nothing to do with the Applicant's ability to afford payment, or with the records relating to public interest. I also doubt that the Public Body is describing "any other reason [for which] it is fair to excuse payment" under section 93(4)(a), as the term "fair" is presumably in reference to fairness to an applicant, not fairness to the taxpayers or the public body.

[para 30] Finally, there is my overriding concern that the Public Body cannot grant a fee waiver if it did not properly set fees under section 95(b) of the Act and was required to do so. In my view, there can be no fee waiver if there can be no fees.

[para 31] Despite my raising the various preceding points, I do not have to decide them. This is because I interpret the Public Body's decision conveyed in its letter of June 25, 2010 to be a decision to *retract* its fee estimate, which it has the ability to do of its own accord. The distinction I am making is that, whether or not the Public Body can waive fees generally or in this particular case, it can retroactively decide not to charge fees in the first place. Further, this can be done whether or not the Public Body has the authority to charge fees. If it does have the authority to charge fees, section 93(1) does not say that a public body "must" require an applicant to pay fees for services; the section says "may". If it does not have the authority to charge fees, the Public Body's decision to retract its fee estimate is also permissible; in fact, such a decision would be entirely appropriate.

[para 32] Because the Public Body has decided not to charge the Applicant any fees for its services, I conclude that the both the second and third issues in this inquiry are moot. There is no longer any controversy, in relation to the fee estimate and the Public Body's authority to charge fees, to be resolved here. If, hypothetically, I were to decide that the Public Body does not have the authority to charge fees or that its original fee estimate of $32.50 was improper, there would be no practical effect, as the Applicant is not being charged fees anyway.

[para 33] As to whether I should exercise my discretion to decide the moot issues regarding fees, the following criteria or guidelines may be considered:

> (i) *Adversarial context*. The issue must exist within an adversarial context. That requirement is satisfied if the adversarial relationships will prevail even though the issue is moot. Consider whether a party will suffer any collateral consequences if the merits are left unresolved, or whether a party will continue to be engaged in an adversarial relationship.
>
> (ii) *Judicial economy*. The special circumstances of the case must make it worthwhile to apply scarce judicial resources to resolve it. The factors to consider include (i) whether the decision will have some practical effect on the rights of the parties, even if the decision will not have the effect of determining the controversy that gave rise to the action; (ii) whether the case involves a recurring issue of brief duration, such that the dispute is likely to occur again, and always disappear before it is ultimately resolved; and (iii) a consideration of the public interest, namely, whether there is a social cost of continued uncertainty in the law in leaving the matter undecided.
>
> (iii) *Role of the legislative branch*. Consider whether exercising the discretion would be an intrusion into the role of the legislative branch, if a decision were to be made in the absence of a dispute affecting the rights of the parties.
>
> [Order 99-005 at para. 53, citing *Grimble v. Edmonton (City)* (1996), 181 A.R. 150 (C.A.) at paras. 11 to 16, in turn summarizing *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.), [1989] 1 S.C.R. 342 at pp. 358 to 362 or paras. 31 to 42.]

[para 34] The Public Body argues that there is no adversarial context between the parties, and nothing at stake regarding fees, given that the Applicant will not be required to pay fees in any event. The Public Body further states that, out of an abundance of caution, it plans to pass additional bylaws and resolutions under section 95(b) of the Act, in September 2010, "which will put this matter beyond doubt". It accordingly argues that a decision on my part would have no precedential value, as any future case regarding the Public Body's authority to charge fees would be in reference to the upcoming bylaws and resolutions. Regarding judicial economy, the Public Body submits that it would be a

waste of public resources to decide whether a photocopying fee estimate of merely $32.50 was proper. Finally, it argues that a decision on the moot issues would usurp the function of the legislative branch because the role of the Commissioner or his delegate is to interpret the Act in a particular factual context, not make pronouncements on matters where an adjudicative function is no longer required.

[para 35] The Applicant did not make specific submissions regarding the three criteria for deciding a moot issue. However, he says that I should still decide whether the Public Body has the authority to charge fees, and whether its fee estimate was proper, because similar issues were previously raised but not resolved in Order F2009-039 (at paras. 30 to 32). He submits that he did not request a fee waiver in this particular case, and he believes that the Public Body has chosen retroactively not to charge fees in order to avoid a possible conclusion that it has not had the authority to charge fees all along.

[para 36] On my consideration of the three criteria first set out in *Borowski v. Canada (Attorney General)*, I find that it is not appropriate for me to exercise my discretion to decide the moot issues regarding fees. Because the Applicant will not be charged fees in relation to his February 9, 2009 access request in any event, no adversarial relationship regarding fees will prevail in this inquiry. I also find that the Applicant will not suffer any collateral consequences if the issues regarding fees are left unresolved. If he happens to have other access requests in progress with the Public Body, or happens to make future access requests to it, any issues regarding fees and fee estimates can be decided in the context of the particular facts of those cases.

[para 37] Regarding judicial economy, I see no special circumstances in this case that make it worthwhile to apply scarce resources of this office to resolve whether the Public Body would have had the authority to charge fees, or whether its original fee estimate of $32.50 would have been proper. In fact, I am aware that Order F2009-039 cited by the Applicant – which involves issues relating to fees and the same two parties to this inquiry – is the subject of an application for judicial review. Because this other Order raised the question of whether the Public Body has the authority to charge fees, it is possible that the Court of Queen's Bench will decide or at least comment on that question. I see no point in my deciding an issue first identified in the context of the inquiry resulting in Order F2009-039 when the Applicant and Public Body will possibly have an opportunity to address that issue during the upcoming judicial review.

[para 38] As for the different roles of the Commissioner and the legislative branch, I do not believe that a decision as to whether the Public Body has the authority to charge fees, or whether its original fee estimate of $32.50 was proper, would be an intrusion into the role of the legislative branch. However, on weighing this consideration against the other criteria for deciding a moot issue, I conclude that I should not exercise my discretion to decide the moot issues in this inquiry.

[para 39] Accordingly, I will not decide whether the Public Body properly estimated fees for services, whether it set fees under section 95(b) of the Act, or whether it was required to set fees under section 95(b) in order to estimate and charge fees. However,

given the Public Body's decision not to charge fees, I will make an order confirming that below. This is not meant to be an indirect decision, on my part, regarding the appropriateness of the Public Body's fee estimate, or regarding its authority to charge fees. Rather, I am attempting to provide some practical relief to the Applicant, following the Public Body's decision not to charge fees partway through the inquiry.

V. ORDER

[para 40] I make this Order under section 72 of the Act.

[para 41] As the Public Body has not yet decided to give the Applicant access to any records, I cannot review whether it properly refused to allow the Applicant to examine the records as authorized by section 4 of the FOIP Regulation.

[para 42] As I find that the issues regarding fees are moot, and that it is not appropriate for me to exercise discretion to decide them, I make no decision as whether the Public Body set fees under section 95(b) of the Act; whether it was required to do so in order to charge, and therefore estimate, fees for services under section 93 of the Act and the FOIP Regulation; or whether it properly estimated fees for services under section 93 of the Act and as provided for in the FOIP Regulation.

[para 43] However, because the Public Body has decided not to charge fees for its services in relation to the Applicant's access request of February 9, 2009, I confirm that the fees will be zero, under section 72(3)(c) of the Act.

Wade Riordan Raaflaub
Adjudicator