ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-16

May 31, 2013

ALBERTA HEALTH

Case File Number F5460

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked Alberta Health (the "Public Body") for water well information consisting of water chemistry and microbiological data. In Order F2012-14, the Adjudicator found that neither section 16(1) nor section 17(1) applied to the information. He therefore ordered the Public Body to give the Applicant access to copies of the responsive information in its possession.

The Adjudicator's order was conditional on the Applicant paying any required fees, or else being excused from paying fees, which was yet to be determined. Also yet to be determined was whether the Applicant was entitled to the creation of a record from the Public Body in a particular format under section 10(2).

Subsequent to the release of Order F2012-14, the Public Body admitted that there was additional information responsive to the Applicant's access request. Consistent with his findings and decisions in Order F2012-14, the Adjudicator ordered the Public Body to disclose the additional responsive information.

Section 10(2) contemplates the creation of a record, from a record that is in electronic form, using a public body's normal computer hardware and software and technical expertise. The Adjudicator found that section 10(2) did not require the Public Body to create a record in a particular format for the Applicant, as in some cases, it already had the record in the format desired by the Applicant, and in other cases, it did not have

possession of information in an electronic form from which the desired record could be created. Having said this, in order for the existing information to be most useful to the Applicant, the Adjudicator ordered the Public Body, where possible, to provide the responsive information to him electronically, rather than in the form of paper copies.

The Applicant argued that he was entitled to a fee waiver on the basis that the requested records related to a matter of public interest under section 93(4)(b) of the Act. However, because the Public Body decided, in the course of the inquiry, that it would not charge the Applicant any fees, the Adjudicator found that the issue as to whether the Applicant should be excused from paying fees was moot, and he declined to exercise his discretion to decide it.

Statute and Regulation Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10(1), 10(2), 13, 16(1), 17(1), 32, 72, 72(2)(a), 72(3)(c), 72(4), 93, 93(1), 93(4) and 93(4)(b); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, s. 11(4) and the Schedule.

Orders Cited: AB: Orders 99-005, 2001-016, F2006-023, F2011-R-001, F2012-06 and F2012-14.

Cases Cited: AB: *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] In an access request dated May 5, 2010, the Applicant requested the following from the Public Body under the *Freedom of Information and Protection of Privacy Act* (the "Act"):

> *All water well information from 1986 to present including water chemistry and microbiological data. Prior to 1986 these data were public information. Make data base available to the public.*

[para 2] On May 11, 2010, the Applicant provided the Public Body with the following clarification of what he was seeking:

> 1. *water chemistry data from all water wells which are not now in the public domain,*
> 2. *microbiological analysis from all water wells,*
> 3. *well test information which relates to flow capacity from wells,*
> 4. *drilling logs, well completion information and geological information determined while drilling.*
>
> *This request relates to all water wells which are not currently in the public domain and all future wells.*

[para 3] In a letter dated May 26, 2010, the Public Body advised the Applicant that it did not have any information responsive to items 3 and 4 set out above. By letter dated June 10, 2010, the Public Body refused access to the information set out in items 1 and 2 under section 17(1) of the Act, on the basis that disclosure would be harmful to the personal privacy of third parties. While not actually applying section 16(1), the Public Body also raised the possibility that the requested information fell within the exception to disclosure set out in that section, on the basis that disclosure of the information might harm the business interests of third parties.

[para 4] At the time of its response to the Applicant, the Public Body did not provide a fee estimate, noting that the fee estimate would be very high due to the number of records and that the requested information was being withheld in any event. In a letter to this Office dated March 24, 2011, the Applicant stated that he would not be able to pay the associated high fees and took the position that he should be excused from paying fees, on the basis that the requested records relate to a matter of public interest under section 93(4)(b) of the Act.

[para 5] In a form dated July 21, 2010, with an attached letter dated July 15, 2010, the Applicant requested a review of the Public Body's response to his access request. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicant requested an inquiry in a form, with an attached sheet, dated December 15, 2010. A combined written and oral inquiry was subsequently set down. The inquiry was also split into two parts, being Part A and Part B.

[para 6] In Order F2012-14, issued June 29, 2012 following Part A of the inquiry, I found that neither section 16(1) nor section 17(1) applied to the information set out in items 1 and 2 of the Applicant's access request. I therefore ordered the Public Body to give the Applicant access to the responsive information in its possession. My order was conditional on the Applicant paying any required fees, or else being excused from paying fees, which was to be determined in Part B of the inquiry. Also to be determined in Part B was whether the Applicant was entitled to the creation of a record from the Public Body in a particular format under section 10(2).

[para 7] This Order follows Part B of the inquiry.

II. RECORDS AT ISSUE

[para 8] Given what the Public Body indicated to be a large volume of information requested by the Applicant, this inquiry proceeded by way of a review of a sample of responsive records. For the purpose of Part A of the inquiry, and based on information provided to me by the Public Body at the time, I found the information that was responsive to the Applicant's access request to consist of any and all Certificates of Chemical Analysis, Microbiological Reports and Chemical Content Summaries, as described in Order F2012-14 (at para. 14), but not including any names, addresses and telephone numbers, as the Applicant did not seek this information.

[para 9] In a letter dated August 22, 2011, at the oral inquiry on October 18, 2011, and in a follow-up letter dated October 21, 2011, I repeatedly asked the Public Body to assure me that I had a sample copy of all types of records responsive to the Applicant's access request. In its last submission dated November 27, 2012, made in the course of Part B of the inquiry, it now admits that it has additional responsive information. The additional information that it now considers responsive is listed on page 2 of this last submission. The Public Body writes that the information is "within the scope of the Applicant's access request" and that it is "compelled to produce [it] by way of the Order F2012-14".

[para 10] Because the Public Body refers to the additional information as being subject to my order to give access in Order F2012-14, perhaps it takes the view that it adequately provided samples of all of the responsive information in the course of Part A of the inquiry, and that the additional information listed on page 2 of its last submission is sufficiently similar to those samples such that sample copies of the additional information did not have to be provided to me. However, I do see differences in the records. Whereas I was previously provided only with sample copies of the Certificates of Chemical Analysis, Microbiological Reports and two types of Chemical Content Summaries (one for trace chemicals and one for routine chemicals), the Public Body now acknowledges for the first time that it has possession, for instance, of Excel files, or spreadsheets, consisting of volatile compound results.

[para 11] The Applicant considers the Public Body's late indication of additional responsive records to be "troublesome". Quite frankly, I agree. In the end, however, I see no need to belabour the point, regardless of the reason for the Public Body's failure to previously provide sample copies of all responsive records in its possession. The Public Body has now admitted what information is in its possession that is responsive to the Applicant's access request. I will accordingly make an order granting the Applicant access, so as to reflect the Public Body's admission while remaining consistent with my findings and decision in Order F2012-14. Order F2012-14 was conditional in any event, meaning that the Public Body was not yet required to comply by actually giving the Applicant access to the information responsive to his access request. Following the present Order and Part B of the inquiry, it will now be required to do so.

[para 12] The Applicant argues that the Public Body has still not accounted for all of the information responsive to his access request. He believes that information held by other public bodies – such as Alberta Health Services, which oversees the Provincial Laboratory, which prepares the Microbiological Reports – is in the custody and or under the control of this Public Body, or that this Public Body should have transferred parts of the access request to other public bodies. He also considers a particular Order of this Office, being Order F2012-06, to be applicable, as it dealt with what he believes to be a comparable matter regarding custody and control. However, for various reasons set out in Order F2012-14 (at paras. 23-25), I explained that I would not be addressing the foregoing issues. I will not repeat those reasons here.

[para 13] The Applicant also now submits that he was making a continuing access request to the Public Body, despite my conclusion to the contrary in Order F2012-14 (at

para. 5). Further, while I found in Order F2012-14 (at para. 16) that a draft Aggregate Report was not at issue in this inquiry, the Applicant now makes submissions in respect of it (although he appears to be confirming that he is not interested in it). Finally, the Applicant thinks that the Chemical Content Summaries – which are provided semi-annually to the Public Body from the Centre for Toxicology located at the University of Calgary – are missing information from 1987 to 2001. However, in its letter of June 10, 2010 to the Applicant, the Public Body explained that the responsive information set out in item 1 of his access request (i.e., the chemistry data) has been in its possession only since 2002. Again, the Applicant is raising an issue regarding custody and control, which I already decided that I would not be addressing.

[para 14] In short, I will not revisit my decisions, as articulated in Order F2012-14, regarding the scope of the issues in this inquiry. Indeed, those decisions have already been made in an Order, and I have no statutory power to reconsider them.

III. ISSUES

[para 15] The Notice of Inquiry, dated August 31, 2011, set out the following issues for Part B of the inquiry:

> Does section 10(2) of the Act require the Public Body to create a record for the Applicant?
>
> Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?

[para 16] The Applicant makes submissions regarding the Public Body's more general duty to assist him under section 10(1) of the Act, as opposed to only section 10(2). He argues that the Public Body had a duty to transfer parts of his access request, but as explained above, I will not be addressing this issue. He also argues that the Public Body had a duty to search for responsive information held by other public bodies, but as explained above, I will not be addressing this issue. Finally, he argues that the Public Body has only recently comprehended what he is seeking through his access request, and had a duty to seek clarification from him much earlier in the process. For its part, the Public Body objects to the addition of this concern so late in the process. In any event, there is no point addressing whether the Public Body properly construed or clarified the Applicant's access request, as this Order deals below with what I consider to be the true nature and scope of the access request.

IV. DISCUSSION OF ISSUES

A. Does section 10(2) of the Act require the Public Body to create a record for the Applicant?

[para 17] Section 10(2) of the Act reads as follows:

10(2) The head of a public body must create a record for an applicant if

> *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
>
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 18] The Applicant has requested a "database" containing information about groundwater data. He stresses that he is not interested in any complicated database. He states that he considers the Chemical Content Summaries to be a database in the form of a spreadsheet, and that he would simply like to have additional information available in the form of such a spreadsheet. He wrote the following in his submission of November 10, 2011:

> The existing database [i.e., the Chemical Content Summaries] is sufficient for the chemical analyses. Creating a similar annual spreadsheet for the remaining components (trace metals, volatile hydocarbons, microbiology) would not be a difficult task using existing software. […] If AHW was to create a database, it would only have to include such fields as LSD location of the well, the well depth (when available), date of sample and the analytical data. This is a simple database and certainly not beyond the technical realm of a large organization.

[para 19] The Public Body argues that the creation of new types of spreadsheets to be given only to the Applicant is a new request on his part. It submits that, in the Applicant's access request of May 5, 2010, he asked for a publicly available database, not something short of that to be given only to himself. The Public Body further notes that I already concluded in Order F2012-14 (at para. 201) that disclosure of the information at issue was not in the public interest, meaning that no public database was required by that section.

[para 20] However, the issue in relation to section 10(2) of the Act remains engaged. In Order F2012-14, I found that the Applicant is personally entitled to the responsive information in the possession of the Public Body. This information falls within the scope of his initial access request, and is not a new request. In other words, I agree with the Applicant when he says that, first, he wanted the water chemistry and microbiological data for himself but that, second, he also wanted the information to be made available in a public database. While I found in Order F2012-14 that a public database was not warranted within the terms of section 32 of the Act, the question now to be answered is whether the Public Body should be required to create a record for the Applicant in a different format than it already exists in the Public Body's possession.

[para 21] The Public Body argues that what it considers to be the new access request on the part of the Applicant came late in the process, such that the Public Body was unable to present evidence at the oral hearing as to whether it could create what it considers the newly requested records using its normal computer hardware and software

and technical expertise. At the oral hearing, the Public Body's Corporate Solutions Architect only provided testimony regarding the creation of the "larger" public database. However, by letter dated September 21, 2012, I asked the Public Body to respond to the Applicant's request for the spreadsheets or "smaller" databases, which gave it the opportunity to provide additional evidence, such as by way of an affidavit. Indeed, that was the point of deferring the issue in relation to section 10(2), which I once intended to address in Order F2012-14.

[para 22] Moreover, a public body has the burden of proving that it does not have a duty to create a record under section 10(2) of the Act (Order 2001-016 at para. 34; Order F2006-023 at para. 88). The Public Body seems to expect the Applicant to adduce evidence as to the Public Body's normal computer hardware and software and technical expertise, when the Public Body is obviously in a better position to do so.

[para 23] Despite the Public Body's failure to provide additional evidence, I am able to dispose of the issue under section 10(2) on an entirely different basis, without reference to the Public Body's normal computer hardware and software and technical expertise. First, the Applicant is already satisfied with certain records in their existing format. Second, the alternate records that he wants created under section 10(2) are not within the capacity of the Public Body to create, given the existing form of the information in its possession. Third, another action that the Applicant requests of the Public Body, in reference to section 10(2), is not contemplated by the section. I will now explain.

[para 24] As indicated by the excerpt already reproduced above from the Applicant's submissions, he is satisfied with the Chemical Content Summaries in their existing form, as he considered them to be a type of database. While the excerpt refers only to the Summaries of the routine chemistry water results, with the Applicant indicating in parentheses that he wants a similar spreadsheet for trace metals, the Public Body is also in possession of Summaries of trace element chemistry water results from 2002 to 2011. The Applicant now appears to understand this, and is likewise satisfied with the Summaries of trace metal results in their existing form. In his submission of December 6, 2012, he wrote the following:

> During the Inquiry, [redacted versions of] three documents, previously submitted to the Adjudicator *in camera*, were distributed to the parties and discussed briefly. These documents are excerpts or portions of the database for the chemical analyses of ground water data exactly in the form that was requested. These spreadsheets contain the following data: sample date, land location, source, well depth, and all normal chemical properties. In addition, the Public Body also has in its possession other "non-routine" spreadsheets which contain similar information but for trace metals.

In short, the foregoing confirms that the Applicant is satisfied with both types of Chemical Content Summaries, in the form that they already exist with the Public Body, so there is no need to even consider the application of section 10(2).

[para 25] As for the Applicant's desire for spreadsheets consisting of information about volatile hydrocarbons, the Public Body says that it has eight Excel spreadsheets consisting of 31 sample volatile organic compound results from 2005 to 2010, indexed by legal land description. While this is not an exhaustive set of data, I have ordered the Public Body to give the Applicant access only to the information that it possesses. Further, because the available information is already in the form of a spreadsheet, as with the Chemical Content Summaries, there is again no need to consider the creation of some other form of record.

[para 26] The Applicant cites Order F2011-R-001, in which it was stated (at para. 26):

> [Section 10(2)] creates a separate duty to assist applicants, when the terms of the provision are met, by manipulating data existing in electronic form so as to produce it in a form more usable or more economical for the applicant -- for example, where a small data element is being sought from a larger database, or where unresponsive parts of documents could be removed electronically to reduce the size of the document that contains responsive data.

The above excerpt contemplates the manipulation of data in electronic form by a public body so as to make the data more useable for an applicant. Here, though, the Applicant indicates that he is satisfied with the existing spreadsheets, as he would be able to manipulate the data himself. He writes: "I have, on my computer, a spreadsheet program called 'Excel'. If I have the Excel file [from the Public Body], I can then manipulate the data in any manner I wish."

[para 27] Turning to the microbiological data, the Public Body does not have spreadsheets containing this information similar to those for the chemical analyses and volatile hydrocarbons. Rather, it has copies of the entire Microbiological Reports. Still, I find that section 10(2) does not require the Public Body to place the data elements in those Reports in a spreadsheet, so as to create a different record for the Applicant. First, it says that it only has 163 Microbiological Reports in its possession, out of the numerous that emanate from the Provincial Laboratory. Given this limited amount of information, a spreadsheet would not be particularly useful to the Applicant. In reference to a study conducted in the Beaver River Basin, the Applicant writes; "[I]f it is only a small amount of data… it would be acceptable in any form, as long as it was supplied in in its entirety". In Order F2012-14, I already ordered the Public Body to give the Applicant access to the whole of the Microbiological Reports in its possession (but for any names, addresses and telephone numbers).

[para 28] Second, if there are electronic versions of the Microbiological Reports, they exist, at best, as scanned copies of hard copies, given the appearance of the sample copy submitted to me. This means that a staff member of the Public Body would have to manually type the data elements into a spreadsheet, as opposed to create a record from a record that is in electronic form, using the Public Body's normal computer hardware and software and technical expertise, within the terms of section 10(2). I accordingly conclude that the section does not apply in respect of the microbiological data held by the Public Body.

[para 29] At the same time, the Applicant notes the following excerpt from Order F2011-R-001 (at para. 23; his emphasis):

> In contrast, section 10(2), which is a subclause under the heading "the duty to assist", specifies one particular way in which assistance is to be given to the applicant. This particular duty is, in my view, superadded to the duty to provide access to records to which applicants have a right (which is to be done by providing copies). Even in situations in which there is no duty to give this particular type of assistance, because the terms of section 10(2) are not met, I do not believe this is meant to obviate the duty of public bodies to provide copies under section 13.

I have already ordered and intend to again order the Public Body to provide the Applicant with copies of the responsive information that it possess in its existing form, as contemplated by section 13. In addition to this, I will specify, as a term of this Order, that the Public Body provide the information to the Applicant electronically rather than as hard copy printouts. The list of responsive records on page 2 of the Public Body's submission of November 27, 2012 consists of Excel spreadsheets and pdf files, which I presume can be transmitted to the Applicant electronically. I also presume that the Excel spreadsheets can be provided to the Applicant in a manner that permits him to manipulate the data himself.

[para 30] Finally, the Applicant argued, at least at one point, that the information that he has requested from the Public Body could be efficiently and economically transferred to a database already in existence and maintained by Alberta Environment and Sustainable Resource Development. However, this is not something that is contemplated by section 10(2). The provision contemplates the creation of a record of information from a public body's own computer hardware and software, not the transfer of information to another public body, or the population or incorporation of information in a record held by another public body.

[para 31] I conclude that section 10(2) of the Act does not require the Public Body to create a record for the Applicant.

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

[para 32] Section 93 of the Act reads, in part, 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.*
> …
>
> *(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,

…

(b) the record relates to a matter of public interest, including the environment or public health or safety.

…

[para 33] The Applicant indicated, in a letter of March 24, 2011 to the Public Body and this Office, that he was requesting a fee waiver on the basis that the records that he has requested relate to a matter of public interest, including the environment or public health or safety, under section 93(4)(b). In their various submissions dated October 22, November 14 and December 6, 2012, the parties make numerous points as to whether a fee waiver is or is not warranted in the circumstances of this case.

[para 34] However, in its last submission dated November 27, 2102, the Public Body now says that it cannot and therefore will not charge the Applicant any fees to process his access request. It cannot do so because, in order to grant access to all of the records at issue, as set out in both Order F2012-14 and this Order, the cost would be less than $150.00, and section 11(4) of the *Freedom of Information and Protection of Privacy Regulation* permits fees set out in the Schedule of the Regulation to be charged only if their amount is estimated to exceed $150.00.

[para 35] Because the Applicant will not be required to pay any fees under section 93(1), the issue as to whether he should be excused from paying them under section 93(4)(b) has become moot. 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). 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 36] The Applicant argues that it is unfair for the Public Body to now say that it will not be charging fees so late in the process, and he wants the issue regarding the fee waiver to still be decided. While it did take the Public Body a long time to determine what responsive information is actually in its possession, and to calculate the associated fees in order to give the Applicant access to it, the Public Body is entitled to convey or alter its position on a particular issue at any stage of the process. Moreover, in respect of the matter regarding fees, the review by the Office proceeded without the Public Body actually providing its fee estimate prior to the review taking place.

[para 37] Still, I do have the discretion to decide a moot issue, if I consider it appropriate. 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 38] 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 whether the Applicant should be excused from paying all or part of a fee, as provided by section 93(4). Because the Applicant will not be charged fees in any event, no adversarial relationship regarding fees prevails as between the two parties to this inquiry. I also find that the Applicant will not suffer any collateral consequences if the issue regarding a fee waiver is left unresolved. If he happens to make other access requests to other public bodies for information that is comparable to the information that it responsive to his access request to this Public Body, he can

raise the issue again at that time, and as against the particular public bodies in question.

[para 39] In fact, if I were to decide that the Applicant was entitled to a fee waiver because the records at issue in this inquiry relate to a matter of public interest, I would possibly be setting a precedent to arguably be followed by other public bodies to which he or others might later make a comparable access request, and which were not parties to the fee waiver issue in this inquiry. While I acknowledge that the effect might have been the same if the Public Body in this inquiry decided to charge the Applicant fees, and I therefore had to decide the issue regarding the fee waiver, the foregoing observation militates against my deciding the issue when I now do not have to.

[para 40] 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 should have theoretically granted the Applicant a fee waiver. Indeed, many of the foregoing points apply. It is far more appropriate to decide whether a fee waiver is warranted in the public interest if and when the Applicant chooses to make an access request for groundwater data to an entity having far more information and therefore possibly charging a far greater amount of fees.

[para 41] As for the different roles of the Commissioner and the legislative branch, I do not believe that a decision as to whether the Applicant should be excused from paying all or part of a fee on the basis of public interest 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 issue in this inquiry.

[para 42] Accordingly, I will not decide whether the Applicant should be excused from paying all or part of a fee, as provided by section 93(4) of the Act. 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 decision not 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, which it has now made late in the process.

[para 43] I note that the Applicant requests that the Public Body return all fees already paid, but none have been paid by the Applicant to my knowledge. The Public Body's letter of June 10, 2010 to the Applicant referred to the possibility of a $25 initial fee to process his access request, but it does not appear to have been charged. The letter of June 10, 2010 was the last of the Public Body's various letters and responses to the Applicant before the Applicant then requested a review by this Office the following month.

V. ORDER

[para 44] I make this Order under section 72 of the Act.

[para 45] I find that section 10(2) of the Act does not require the Public Body to create a record for the Applicant.

[para 46] Consistent with my findings and decisions in Order F2012-14, and given the admission of the Public Body as to what information is in its possession that is responsive to the Applicant's access request, I order the Public Body, under section 72(2)(a) of the Act, to give the Applicant access to the records that it indicates to be responsive at page 2 of its submission dated November 27, 2012, as well as to the Microbiological Reports in its possession, but not including the names, addresses and telephone numbers of any well owners, tenants or other individuals who submitted the water sample.

[para 47] Under section 72(4) of the Act, I specify, as a term of this Order, that the Public Body provide the foregoing information to the Applicant electronically in its existing form, rather than as hard copy printouts. I further specify that the electronic records be provided in a manner that permits the Applicant to manipulate the data himself (for instance, the data in the Excel spreadsheets should not be "locked" in some fashion). If the Public Body cannot comply with either of these two terms, for some reason that I may be overlooking, it should provide the information to the Applicant in the manner that it can, accompanied by an explanation as to why it cannot fully comply with the foregoing terms.

[para 48] I find that the issue as to whether the Applicant should be excused from paying all or part of a fee, as provided by section 93(4) of the Act, is moot, and I decline to exercise my discretion to decide it. However, because the Public Body has decided not to charge fees for its services in relation to the Applicant's access request, I confirm, under section 72(3)(c) of the Act, that the fees will be zero.

[para 49] For clarity, the condition set out in Order F2012-14 (at para. 209), regarding the Applicant paying any required fees under section 93(1), or else being excused from paying fees under section 93(4), no longer applies.

[para 50] 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 and with Order F2012-14.

Wade Raaflaub
Adjudicator