

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2016-25

July 13, 2016

TOWN OF ST. PAUL

Case File Number F7072

Office URL: www.oipc.ab.ca

Summary: An individual made a request to the Town of St. Paul (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for “all records related to expense claims made by members of the Town of St. Paul council.” The request included supporting documentation for each claim; the time frame for the request was October 1, 2007 to March 15, 2013.

The Applicant requested a waiver of the fees the Public Body has charged; the Public Body declined to waive any fees.

The Applicant requested a review of the Public Body’s decision, arguing that the fees for his request ought to be waived in the public interest under section 93 of the Act.

The Adjudicator determined that if the public were made aware of them, the records would contribute to public understanding of a matter that is of concern to the public, and would contribute to an open, transparent and accountable government. However, the Applicant did not provide any indication whether he would disseminate any or all of the information in the records beyond himself, such that the public would benefit from his access request.

The Adjudicator determined that 50% of the fees for the Applicant’s request should be waived, and ordered the Public Body to refund the Applicant that amount.

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

Authorities Cited: AB: Orders 96-002, F2006-032, F2007-023, F2009-034.

I. BACKGROUND

[para 1] An individual made a request dated March 15, 2013, to the Town of St. Paul (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for “all records related to expense claims made by members of the Town of St. Paul council.” The Applicant also asked for supporting documentation for each claim; the time frame for the request was October 1, 2007 to March 15, 2013.

[para 2] The Public Body responded to the Applicant by email dated April 4, 2013, asking questions to clarify the Applicant’s request and providing a fee estimate of \$1200. The Applicant responded to this email by confirming the scope of his request, and stating that he should not be required to pay a fee, as the records are a matter of public interest. The Public Body refused to waive the fee for the request.

[para 3] On April 26, 2013, the Applicant requested a review of the Public Body’s decision by this Office. The Commissioner authorized an investigation to attempt to settle the matter but this was not successful. The Applicant then requested an inquiry.

II. ISSUE

[para 4] The issue in this inquiry, as set out in the Notice of Inquiry, dated March 10, 2016, is:

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

III. DISCUSSION OF ISSUE

[para 5] The Applicant’s fee waiver request was based on his contention that the records relate to a matter of public interest (section 93(4)(b)).

[para 6] Section 93 of the Act states in part:

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,

(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 7] In Order 96-002, former Commissioner Clark stated two general principles that apply in determining whether to grant a fee waiver in the public interest (at p. 16):

1. the Act was intended to foster open and transparent government, subject to the limits contained in the Act, and
2. the Act contains the principle that the user should pay.

[para 8] In Order F2006-032 the adjudicator set out a non-exhaustive list of criteria for determining whether to grant a fee waiver in the public interest (these criteria are a revised version of thirteen criteria set out in Order 96-002):

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?

[para 9] In Order F2009-034 the adjudicator summarized the “public interest” issue as follows:

As noted by the Public Body, the requested records should be of significant importance in order for the cost of processing the access request to be passed on to taxpayers (Order 2000-011 at para. 52). Fee waivers on the basis of public interest are to be granted only when there is something about the records that clearly makes it important to bring them to the public's attention or into the public realm (Order F2006-032 at para. 39). It is not sufficient for there to be some marginal benefit or interest in the record; there should be a compelling case for a finding of public interest (Order F2007-024 at para. 47).

[para 10] The Public Body provided one submission to this inquiry, in which it stated:

The Town of St. Paul would like to again stress the time and cost that was required to obtain, photo copy and compile the information requested by the Applicant, [...]

Through correspondence, [the Applicant] requested that the Town of St Paul provide him with all expense claims made by Town Councillors from October 1, 2007 to March 15, 2013. To clarify this request, it involved Town staff having to obtain expense claims from each of the three (3) Councils that were in office for the years 2007 to 2013 (3 Terms= (3 x 7) Councillors x 7 Years= 147 files).

As mentioned earlier in this submission, The Town of St Paul after determining the time and cost to compile this information followed Section 93(1) of the Freedom of Information and Protection of Privacy Act which allows the public body to have the applicant pay the fees for services.

[para 11] This submission did not address why the Public Body refused to grant the Applicant's requested fee waiver, other than to say that it took considerable time and expense to respond to the request. By letter dated May 9, 2016, I asked the Public Body to provide me with more detailed explanation as to why it determined that the Applicant's request for a fee waiver should not be granted. In my letter, I provided the tests cited above, and asked the Public Body to address the factors in those tests. However, the Public Body did not provide a response to my letter.

[para 12] The Commissioner's jurisdiction to review decisions regarding fee waivers was described in Order F2007-023 (at paragraphs 23-25):

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

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

OIPC External Adjudication Order #2 (May 24, 2002) Justice McMahon (para 45), Order 2001-023 (para 32)).

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

[para 13] The Public Body's submission does not indicate that it considered any of the factors set out in previous Orders of this Office in making its decision regarding the Applicant's fee waiver request. Therefore, I will substitute my own decision for the Public Body's, relying on the somewhat limited information that has been provided to me.

Will the records contribute to the public understanding of a matter or issue that is of concern to the public?

[para 14] The Applicant attached to his Request for Review correspondence between him and the Public Body concerning his request. In an email dated April 9, 2013, the Applicant told the Public Body:

I just think that this shouldn't cost any money. I also think that this is a public interest issue. The government of Alberta puts their expenses online for senior people. AHS does the same. I think the public is interested in knowing what politicians are expensing with public dollars. This would make the town more open and transparent and accountable.

[para 15] I take notice that many media reports have focused on expense claims of public sector officials and employees, including those within the Government of Alberta departments, as well as those in provincial agencies, boards and commissions, and municipalities. This is a popular subject for the media to report on, and is clearly of interest to the public.

Is the applicant motivated by private or public interests?

[para 16] In a letter attached to his Request for Review, the Applicant stated "[m]y only interest is bringing government to account. This does not benefit me commercially or privately."

[para 17] However, it was not clear how the Applicant intended to use the requested information. In his Request for Inquiry, the Applicant indicated he is looking for a 'refund', which suggests that he has received records in response to his request. By letter dated June 10, 2016, I asked the Applicant to tell me how he has or would use the requested information. I said:

In a letter attached to your Request for Review, you stated "[m]y only interest in bringing government to account. This does not benefit me commercially or privately."

In an email to the Public Body (dated April 9, 2013), you told the Public Body:

I just think that this shouldn't cost any money. I also think that this is a public interest issue. The government of Alberta puts their expenses online for senior people. AHS does the same. I think the public is interested in knowing what politicians are expensing with public dollars. This would make the town more open and transparent and accountable.

Further, in your letter attached to your Request for Inquiry, you said:

In my other file, 8206, I found through researching the expenses that a councilor was double-dipping. This is a bona fide reason for council's releasing expenses so that the public may know more about how their tax dollars are used.

How do you plan to use the records resulting from this access request? If you have already received the records from the Public Body, how have you used them? For example, have you made them publicly available (entirely or in part)?

I do not have any information about your other file, 8206; however, your reference to that file indicates that a past access request resulted in records that uncovered wrongdoing by council. How did you use those records? For example, did you disseminate some or all of the information in those records?

Order F2009-034, cited above, states that “[f]ee waivers on the basis of public interest are to be granted only when there is something about the records that clearly makes it important **to bring them to the public's attention or into the public realm**” (my emphasis). Please provide me with any other information you believe is relevant to the question of how the records responsive to your access request have been, or would be, brought to the public's attention or into the public realm.

[para 18] The Applicant did not respond to these questions; therefore I have only the brief statements cited above upon which to decide how the second factor applies in this case.

[para 19] The Applicant has stated that the records at issue do not benefit him commercially or privately. The Public Body has not given me any reason to doubt this statement and I accept it.

[para 20] I also accept the Applicant's statement that he is interested in bringing the government to account. However, the Applicant has not told me whether he intends to make the information in the responsive records available to the public (or at least available to people other than himself).

[para 21] The Applicant states that previous access requests have uncovered wrongdoing by council members; however, he did not tell me whether he ever informed other members of the public of the wrongdoing referenced in those records.

[para 22] Waiving fees in the public interest assumes that the public has an interest in the records and will be informed in some manner about the content of the records. Even if the content of the records requested by the Applicant is of interest to the public, the public interest is not met if the Applicant has no intention of disclosing any of the information in the records to the public. In other words, disclosure of the records to the

Applicant will not necessarily “bring them to the public’s attention or into the public realm”, which is what the second factor is addressing.

[para 23] Bringing the records to the public’s attention does not necessarily require newspaper articles or online disclosure; it may in some cases include discussions with neighbours, at community meetings, council meetings, etc. As the Applicant did not respond to my questions, I do not know if he intends to do any of these things and I cannot assume that he does. Therefore, while I have accepted his statement that he is not motivated by commercial or private interests, I do not know whether the records will be brought into the public realm such that the public would benefit from the Applicant’s access request.

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

[para 24] An applicant must present convincing evidence or arguments that a concern exists or likely exists (Order F2006-032, at para. 26).

[para 25] The Applicant has stated that a previous access request uncovered wrongdoing by the council; however, he did not provide any evidence or other support for this statement. Nevertheless, disclosing expense claims made by a municipal council will show how that council uses some of its tax dollars. It seems clear that disclosing expense claims will contribute to increased transparency regarding how the council exercises its fiscal responsibilities with respect to expense claims. In other words, it seems clear that disclosing expense claims will contribute to open, transparent and accountable government.

Weighing the relevant factors

[para 26] I have found that the records would contribute to public understanding of a matter that is of concern to the public, and would contribute to an open, transparent and accountable government, if they were brought to the attention of the public. However, the Applicant did not provide any indication whether he would disseminate any or all of the information in the records beyond himself, such that the public would benefit from his access request.

[para 27] To justify transferring the cost of the access request from the Applicant to the taxpayer, there must be some benefit to the public from the disclosure of the records. I found that the records at issue relate to a matter that is of interest to the public; therefore, a fee waiver in the public interest seems warranted. However, I cannot justify transferring the entire cost of the request to the taxpayer without knowing whether the taxpayer will benefit at all from the access request. Therefore, I will order the Public Body to waive 50% of the total fee relating to the Applicant’s request. As the Applicant appears to have already paid the fee, the Public Body is to refund half of the total fee paid.

IV. ORDER

[para 28] I make this Order under section 72 of the Act.

[para 29] I find that the Applicant should be excused from paying half the fee based on public interest.

[para 30] I order the Public Body to refund half of the total amount paid by Applicant for the records responsive to his request.

[para 31] 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 the Order.

Amanda Swanek
Adjudicator