ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-39

October 11, 2016

ALBERTA ENERGY REGULATOR

Case File Number 000102

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Summary: A journalist (the Applicant) requested access for all records in the custody or control of the Alberta Energy Regulator (the Public Body), relating to "broad industry initiatives" (BII Initiatives). The BII Initiatives refer to a practice that was discontinued in 2014 by which the Public Body collected money from producers and provided this money to two industry associations: the Canadian Association of Petroleum Producers (CAPP) and the Small Explorers and Producers Association of Canada (SEPAC). The Applicant requested a fee waiver on the basis that the records related to the public interest. The Public Body denied the Applicant's request for a fee waiver and required her to pay $1218.50 for the services it had provided in processing her access request.

The Adjudicator determined that the Public Body had not properly calculated the fees for providing services, as it had included 40 hours at a rate of $27 per hour for manually entering data in order to create records for the Applicant. The Public Body also did not establish that $.25 per page reflected its actual costs for photocopying the records. The Adjudicator determined that the fees should have been calculated at $81.

The Adjudicator determined that the records relate to the functioning of a statutory entity responsible for regulating such things as oil and gas, energy, and surface rights in Alberta, and its distribution of public funds. She determined that the records requested by the Applicant related to a matter of public interest and that the Applicant had requested them in order to write an article for the purpose of promoting public debate and awareness regarding this matter.

The Adjudicator decided that the fees should be waived in the public interest and reduced the fees to zero.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 72, 93; Freedom of Information and Protection of Privacy Regulation Alberta Regulation186/2008 Fee Schedule

Authorities Cited: AB: Orders 2001-033, F2006-032, F2009-032, F2011-R-001, F2011-15, F2012-06, F2012-16, F2013-10, F2013-16, F2013-27, F2013-35, F2013-54

I. BACKGROUND

[para 1] A journalist for the Canadian Broadcasting Corporation (the Applicant), made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for all records in the custody or control of the Alberta Energy Regulator (the Public Body), relating to "broad industry initiatives" (BII). The Applicant explained that this request included:

> […] all records related to fees levied to fund any such initiatives, as well as all communications between the Alberta Energy Regulator (or the Energy Resources Conservation Board) and representatives of the Canadian Association of Petroleum Producers (CAPP), Small Explorers and Producers Association of Canada (SEPAC) and / or any other industry groups concerning these initiatives.

The Applicant requested a fee waiver on the basis that the subject matter of the records was in the public interest.

[para 2] The Public Body responded to the Applicant's access request. The Public Body required the Applicant to pay $44.75 for photocopying expenses at a rate of $.25 per page, and $1161.00 for "searching, retrieving, reproducing, and preparing records for disclosure". The Public Body denied the Applicant's request for a fee waiver.

[para 3] The Applicant requested review by the Commissioner of the Public Body's decision to deny its request for a fee waiver.

[para 4] The Commissioner authorized a mediator to investigate and attempt to settle the matter. Following this process, the Applicant requested an inquiry into the matter. The Commissioner agreed to conduct a written inquiry.

II. ISSUES

Issue A: Did the Public Body properly calculate the amount of fees payable in accordance with section 93 of the Act and Regulation?

Issue B: 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 ISSUES

Issue A: Did the Public Body properly calculate the amount of fees payable in accordance with section 93 of the Act and Regulation?

[para 5] Section 93 of the FOIP Act authorizes public bodies to charge fees. It states:

> *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.*
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> *(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.*

[para 6] Section 93(1) authorizes a public body to require the payment of fees as provided in the Freedom of Information and Protection of Privacy Regulation (the Regulation). However, section 93(6) prohibits a public body from requiring fees in excess

of the actual costs of the services for which it requires the payment of fees. The Fee Schedule in the Regulation sets out the services for which a public body may require fees to be paid and the maximum amounts that may be charged for providing these services.

[para 7] In Order F2011-015, I reviewed previous orders of this office regarding section 93 and said:

> I acknowledge that previous orders of this office, other than Order F2010-036, do not address the requirements of section 93(6) and appear to interpret the Regulation as authorizing public bodies to charge maximum amounts for services, regardless of the actual cost of providing the service. As discussed above, Order 99-011 is an example of such an order.
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> The Regulation is ancillary legislation and cannot have the effect of amending a provision of the FOIP Act, unless the authority to do so is contained in the FOIP Act. However, section 94(1)(o) of the FOIP Act limits the Lieutenant Governor in Council's regulation making authority to making regulations "respecting fees to be paid *under this Act* and providing for circumstances when fees may be waived in whole or in part." That the fees to be paid are those "under this Act" indicates that the legislature intended that the regulations respecting fees conform to the requirements of section 93 of the FOIP Act, rather than amend or negate those requirements.
>
> The FOIP Act does not define "actual costs" and, for that reason, it is not entirely clear what considerations a public body is to include in its calculation of actual costs. The Regulation establishes only maximum amounts that may be *charged* for performing specific services. That this is so is evident from the opening words of Schedule 2, which state that "the amounts of the fees set out in this Schedule are the maximum amounts that can be charged." Therefore, the figures in Schedule 2 are not in themselves "reasonable" estimates of actual costs, but maximum amounts that may be charged.
>
> In my view, using the maximums to arrive at an estimate of the costs of processing an access request, rather than amounts that the public body believes will approximate its actual costs, is unreasonable. I say this because this practice takes into account an irrelevant consideration, i.e. the statutory maximum that may be charged, and ignores relevant ones, i.e. a public body's costs.
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> […]
>
> In the case before me, the Public Body has stated that it will cost 25 cents per page to provide photocopies of the records requested by the Applicant, but the genesis of that number is simply the fact that this number is set out as a maximum in Schedule 2. The Public Body has not established in this case that it is reasonable to estimate its actual costs for photocopying to be 25 cents per page, as it has not provided any evidence of its usual costs for photocopying. Rather, from its submissions, I understand it to rely on the view that a public body may charge or estimate the maximums set out in Schedule 2 regardless of the actual costs incurred, or that it expects to incur.
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> […]
>
> In summary, I am unable to confirm that the rates the Public Body has chosen to charge for "searching for, locating or retrieving" records and "preparing and handling records" are reasonable, in the absence of evidence that these rates are likely to reflect actual costs of providing these services. In addition, I am unable to confirm that 25 cents per page is a reasonable estimate of its actual cost per page for photocopying. I will therefore order the Public Body to recalculate these costs by estimating the actual costs for providing these services.
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> [emphasis in original]

[para 8] In Orders F2012-06, F2012-16, F2013-10, F2013-27, and F2013-54, the Adjudicators followed the reasoning in Order F2011-015 and reduced the fees charged or estimated on the basis that the public bodies in those cases had not established that the fees reflected the public bodies' actual costs within the terms of section 93(6). In those orders, it was held that the schedule in the Regulation establishes the maximums that may be charged for services. However, if the actual costs to a public body are less than the statutory maximum, then the public body may not charge the statutory maximum.

[para 9] In addition to being restricted to charging amounts reflecting their actual costs of providing services, public bodies may only charge fees for providing services that a public body is authorized or required by the FOIP Act to provide. As an example, in Order F2013-35, the Adjudicator determined that fees could not be charged for obtaining a record responsive to an access request that was not in the custody or control of a public body. The public body in that case had obtained a record for the price of $550 from the contractor that had created, and had custody and control over, the record. The Applicant requested review of the fees, and the Adjudicator disallowed the $550 fee on the basis that the FOIP Act did not require or contemplate the Public Body's performing such a service or charging for it.

[para 10] I turn now to the question of whether the Public Body has demonstrated that it has properly calculated the fees for processing the Applicant's access request, bearing in mind that a public body may not charge for services not contemplated by the FOIP Act and must demonstrate that the fees reflect its actual costs for providing services.

[para 11] The Public Body states:

> The Applicant made an access request for all information in relation to the BII Initiatives for the years 2008 to 2014, inclusive. The AER's FOIP Coordinator had a number of email and letter exchanges with the Applicant to clarify the request and to advise the Applicant of the scope of records that were available, including advising her that the AER did not collect a BII Initiatives levy after 2013. The Applicant was also advised that for each of the levy years 2012 and 2013, the AER could easily generate a list of individual companies and the amount of their respective BII Initiatives levy, and provide that to the Applicant in accordance with section 10(2) of the Act; however, for the years 2008 to 2011, if the Applicant wanted individual company names and corresponding BII Initiatives levy amounts that would require several days of AER staff time to sort the information and separate those amounts from other data in the AER's database. The Applicant responded that she wanted the BII Initiatives levy information on a company-by-company basis for each of the years 2008 to 2013, not just for 2012 and 2013. Given the choice of narrowing the request in order to reduce or even avoid access fees, the Applicant instead decided to keep the request broad in nature even though she was informed that doing so would entail substantial additional work by AER staff. In the AER's submission, the "user pay" principle bears directly on this decision by the Applicant and indicates that a fee waiver ought not to be granted in this instance.
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> […]
>
> The AER requested payment of access fees that were calculated in accordance with the *Freedom of Information and Protection of Privacy Regulation*, AR 186/2008. All fees to search,

> retrieve, reproduce and prepare records for disclosure were charged at the prescribed rate of $6.75 per 1/4 hour. Most of these fees relate to the work of AER staff to locate responsive information for the years 2008 to 2011 in the AER's electronic database, and then to reproduce that information in the format requested by the Applicant (i.e., on a company-by-company basis for each of the years selected by the Applicant). Section 6 of Schedule 2 of the Regulation permits the AER to charge, as access fees, the actual cost to the AER of that work. The AER charged for that work at the same rate that is prescribed under the Regulation, and states that the actual cost to the AER of performing that work is, in any case, not less than the fees charged at the rate prescribed in the regulation (based on the average hourly cost to the AER of employing the Finance staff members who did the work). The AER also charged photocopying fees at the prescribed rate of $.25 per page.

[para 12] Once I reviewed its submission, I asked the Public Body to provide a breakdown of the fees it had charged the Applicant for searching, retrieving, reproducing, and preparing records for disclosure.

[para 13] The Public Body provided the following response to my question:

> After clarifying and confirming with the Applicant the full scope of the work involved for the AER to compile the requested information, the AER provided its fee estimate on May 15, 2014. Because of the AER database's limited capabilities prior to 2012, as explained above, the majority of the fees charged to the Applicant were to compile those pre-2012 records. The breakdown is as follows:
>
> i) 43 hours total was charged for searching, retrieving, reproducing and preparing records/pages for disclosure. Of those 43 hours, 40 hours was AER Finance personnel time to create records prior to 2012; one hour was other AER personnel time to compile the balance of the records requested by the Applicant; and the final two hours was AER FOIP personnel time to prepare the records for disclosure. AER Finance personnel advised the AER FOIP team that compiling the records would require over one week personnel time (based on a 40 hour work week) to compile the records. The actual time for AER personnel to do the work took more than one week, however, the AER conservatively estimated 40 hours and that is the time it ultimately used to charge fees;
>
> ii) Section 6 of Schedule 2 of the *Freedom of Information and Protection of Privacy Regulation* applies to the 40 hours of work by AER Finance personnel who created the records for the years prior to 2012, i.e., AER personnel produced records by entering data by hand from copies of the more than 500 levy invoices issued for each of the years 2008 - 201 l. The *Regulation* provides that the fee to be charged in this case is the actual cost to the public body. The 40 hours work to create the pre-2012 records from invoices was performed by one AER employee, and the AER assumed the cost to the AER of employing that staff member was not less than $27.00/hour.
>
> In order to provide this response, the AER has confirmed that assumption to be correct; that is to say, that the actual cost to the AER of employing the person who created the records is more than $27.00/hour; and
>
> iii) The other three hours charged to the Applicant were for compiling the balance of the responsive records (one hour) and preparing the records for disclosure (two hours). This work was done by AER personnel (including AER FOIP personnel), and it was charged at $27.00/hour in accordance with section 7 of Schedule 2 of the *Regulation.*
>
> • The copying charges in the fee estimate were for 230 pages at $.25/page. The final records compiled were 179 pages. The final invoice to the Applicant was adjusted accordingly for

> copying charges. The reduction from the fee estimate of the number of pages compiled did not affect the time expended by AER personnel to compile the records.

[para 14] In her letter of May 7, 2014 to the Applicant, the Public Body's FOIP Coordinator stated:

> For the years prior to 2012 (2008-2011), the AER can easily provide a rolled up number stating how many invoices were issued that year and the total of the BII levy amount for the corresponding year. However, that database (used prior to 2012) cannot easily provide individual company names (500+ for each year) and corresponding BII levy amounts. It would require several days of staff time to sort through each company's information and separate out the levy amounts as those amounts are imbedded in the company data. It is the AER's position that this does not fall under subsection 10(2) of the *Freedom of Information and Protection of Privacy Act.*

[para 15] On May 12, 2014, the Public Body wrote the Applicant, stating:

> Good morning [Applicant]. I confirm that you do not wish to receive copies of individual company invoices. To be clear, the AER can compile a list for 2012-2013 with individual company names and levy amounts, but cannot compile that same information for 2008-2011 without several days' staff time to search each company's invoices (500+) for each year), as explained in my letter dated May 7, 2014. For 2008-2011, the AER can compile a statement containing the number of invoices issued for each year and the total BII levy amount for each year. If you wish to receive individual company names and levy amount for 2008-2011, we will provide our fee estimate shortly. I also confirm that you are interested in communications re: discontinuance of the practice of applying CAPP/EPAC levies. I look forward to hearing from you with your advice on how you wish to proceed with BII information re: 2008-2011.

[para 16] From its submissions, and from the correspondence it sent to the Applicant, I understand that the Public Body agreed to create records of the requested information for the years 2008 – 2011 for the Applicant, by having its employees manually input data from invoices. While its position on May 7, 2014 was that section 10(2) of the FOIP Act did not require it to create records in this way, it subsequently indicated to the Applicant that it could do so in its email of May 12, 2014. Its position at the inquiry is that it may charge its actual costs for creating responsive records.

[para 17] I turn to the question of whether the Public Body can charge the Applicant for the time its employees spent manually entering data into its database in order to create responsive records.

[para 18] Past orders of this office have discussed the duty to assist and to create records.

[para 19] In Order F2009-032, the Director of Adjudication commented at paragraph 21 that the FOIP Act creates a right of access, but not a right to information in "newly created records".

[para 20] In Order 2001-033, former Commissioner Work commented that an applicant has no right to require that a public body create a record to answer the applicant's questions or that is in a form satisfactory to the applicant, unless the record

can be created from an electronic record within the terms of section 10(2) of the FOIP Act. However, if a public body has records in its custody or control that will serve to answer an applicant's questions, the FOIP Act requires it to provide such records to the Applicant, subject to the payment of fees.

[para 21] Section 6 creates a right of access. It states, in part:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

The right of access is limited to records in the custody or control of a public body. The FOIP Act does not create a right to obtain information that is not recorded in some form.

[para 22] Section 10 of the FOIP Act establishes a duty to assist applicants. It states:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*
>
> *(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.*

Section 10(1) requires a public body to make every reasonable effort to assist an applicant. Section 10(2) establishes that the duty to assist an applicant includes creating a record if a record can be created from one that is in electronic form using normal computer hardware and software and technical expertise, and if it would not interfere with the public body's operations to do so.

[para 23] Previous orders of this office have interpreted section 10(2) as applying when a record can be created by manipulating electronic data, as is the case when search parameters are entered into a database. In Order F2011-R-001, I interpreted section 10(2) in the following way:

> […] I believe the better interpretation of the phrase "create a record" in the context of section 10(2) is that it does not relate to or limit the duty of a public body under section 13 to produce copies of records that it has decided to disclose. Rather, it 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. However, even where this cannot be done because the limitations in section 10(2) do apply, this does not obviate the duty of the public body to provide

> copies of as much of the database or document as it is necessary to provide, in order to satisfy the request, subject to the "reasonableness" limitation and the payment of fees. [my emphasis]

[para 24] In Order F2013-16, the Adjudicator determined that section 10(2) does not require a public body to have its staff members manually type data elements into a record in order to satisfy the terms of an access request. He said:

> 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).
>
> 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. [my emphasis]

[para 25] The Adjudicator in Order F2013-16 distinguished between creating a record from a record in electronic form, and manually typing in data elements into a record where they did not previously exist, in order to create a record meeting an applicant's requirements. In my view, the Adjudicator's interpretation reflects the terms of section 10(2), in which a record is to be created using "normal computer hardware, software, and technical expertise". While directing staff members to enter data elements manually to create a record could involve using hardware and software and technical expertise, it also necessarily requires employing physical labour to introduce the external data element into a new document, which is an activity not encompassed by the terms "hardware, software, and technical expertise". Section 10(2) contemplates that a record with responsive data elements will be created *only* through the use of hardware, software, and technical expertise. If an external data element can be introduced using software, hardware, and technical expertise, then section 10(2) may require that a record including the external data element be created. However, if a record cannot be created using just hardware, software and technical expertise, then section 10(2) does not require the Public Body to create the record.

[para 26] The Fee Schedule in the Regulation reflects this interpretation. It states:

> *For producing a record from an electronic record:*
>
> *a) Computer processing and related charges – Actual cost to public body*

b) Computer programming – Actual cost to public body up to $20.00 per ¼ hr.

[para 27] The fee schedule does not include "data entry" or "word processing". Rather it permits fees for "computer processing" which is a term usually understood to refer to the series of actions performed *by a computer* to process data, and "computer programming" which encompasses such activities as creating software and applying technical expertise to enable computers to process data. Fees may be charged to recoup costs associated with purchasing hardware, software, or technical expertise or using these things in order to create a record from one that is in electronic form. However, the activity of manually entering data obtained from a record in order to create a new record, is not a service that is included in the fee schedule in the Regulation. While manual data entry may involve the use of both computer hardware and software, and some degree of expertise in using these, the manual element is a superadded one that is not encompassed by the provision. This is likely because the FOIP Act does not authorize or require a public body to provide this service. As discussed above, and in Order F2013-16, supra, section 10(2) is the only provision in the FOIP Act that requires a public body to create records; it does not encompass manually typing data elements into a record.

[para 28] Assuming no exceptions to disclosure apply, a public body must grant access to responsive records if it has responsive records in its custody or control. However a public body is under no duty to obtain records that are not in its custody or control or to create them according to a requestor's specifications (unless the record is in electronic form and it can manipulate the data elements in the record using its normal software, hardware, and technical expertise). If the Public Body had responded in accordance with its duties under the FOIP Act, it would have given access to all the records containing information responsive to the access request, thus permitting the Applicant organize the records and the information they contain in any way she considered satisfactory for meeting her purposes.

[para 29] I acknowledge that when the Public Body offered this service to the Applicant, it also indicated that it would provide a fee estimate to perform it. It may have assumed that the Applicant would discontinue her request for a fee waiver when she acknowledged the fee estimate. Even if this is the case, however, it does not give me jurisdiction to uphold the fee. My jurisdiction is limited to deciding whether fees are appropriately charged *under the legislation*. The Public Body has itself took the position at one stage in the process that it had no duty under the legislation to perform the service of manually creating records for the Applicant. I agree with this position. I have no ability to uphold a fee charged by the Public Body that does not fall within the terms of the provisions respecting fees set out in the FOIP Act and the Regulation.

[para 30] Of the forty-three hours of staff time for which the Public Body charged the Applicant, only three of those hours were spent conducting activities for which fees may be charged under the Regulation: two hours were spent preparing the records for disclosure, while one hour was spent locating responsive records. For the reasons above, I disallow the Public Body's inclusion in the fees of forty hours spent manually entering data elements in order to create records.

Of the fees that the Public Body is authorized under the Regulation to charge, has it established the fees it calculated represent its actual costs for providing services?

[para 31] The Public Body has not provided evidence to support the costs it charged for staff time and photocopying. While I accept that the hourly rate of the employees who searched for responsive records and prepared them was likely to be at least the statutory maximum, which is the rate the Public Body charged, there is no evidence before me that the $.25 per page it charged the Applicant for photocopying reflected its actual costs for providing this service.

[para 32] As discussed above, previous orders of this office have held that a public body may charge only its actual costs for providing services. Previous orders have also taken notice that $.25 per page is a rate that is likely to be in excess of a public body's actual costs for photocopying. In this case, the Public Body has not established that the costs to it for photocopying are properly reflected by the statutory maximum. I must therefore disallow its costs for photocopying, on the basis that it has submitted no evidence as to how it arrived at this fee.

Conclusion

[para 33] I have disallowed the majority of the fees the Public Body has charged, but for three hours spent locating and preparing records at a rate of $27 per hour. Based on the evidence before me I find that the fees are properly calculated at $81.

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

[para 34] Section 93(4) (reproduced above) authorizes the head of a public body to excuse an applicant from paying all or part of a fee, if, in the opinion of the head, the record relates to a matter of public interest.

[para 35] In Order F2006-032, the Director of Adjudicator set out a set of factors and questions to be considered when determining whether fees should be excused on the basis that a matter relates to the public interest. She said:

> The first set of criteria (numbers 1 to 3) is relevant to decide if a record "relates to a matter of public interest":
>
> 1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?
>
> The following may be relevant:
>
> - Have others besides the applicant sought or expressed an interest in the records?
> - Are there other indicators that the public has or would have an interest in the records?

2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public?

The following may be relevant:

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

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

The following may be relevant:

- Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
- Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
- Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?

The following additional factors may be relevant to decide if a waiver is warranted on grounds of fairness:

1. If others have asked for similar records, have they been given at no cost?
2. Would the waiver of the fee significantly interfere with the operations of the public body, including other programs of the public body?
3. Are there other less expensive sources of the information?
4. Is the request as narrow as possible?
5. Has the public body helped the applicant to define his request?

[para 36] The Public Body provided a background of the records in its initial submissions. It states:

> For years, the AER has issued an annual levy notice to each licensee of a facility or project that is regulated by the AER, in order to raise the funds that are used to finance the AER's operations. The legal authority for this funding model is currently provided in Division 5 of Part 1 of the *Responsible Energy Development Act*. For a period of time prior to 2014, the AER included on each levy notice a separate notice of an amount to be collected by the AER for "broad industry initiatives" (the "BII Initiatives) that were established by industry itself. This money was collected by the AER at industry's request and was passed directly to the industry umbrella organizations (i.e., CAPP and SEPAC) that set the BII Initiatives levy. The AER has been proactively transparent about the collection of the BII Initiatives levy. It issued public notice in the form of a bulletin that described the collection of both the AER levy and the levy to support the BII Initiatives.

[para 37] The Public Body submitted a document entitled "Bulletin 2012-11" which refers to the BII Initiatives. This document states:

> The Canadian Association of Petroleum Producers (CAPP) and the Small Explorers and Producers Association of Canada (SEPAC) have jointly requested that the ERCB's administration fee process be used to collect $4,540,000 to fund broad industry initiatives in 2012 (see attached CAPP/SEPAC letter). Consistent with prior years, the Board has agreed to this request and includes an additional charge for this purpose in the 2012 oil and gas well

> administration fee invoices, increasing the adjustment factor used for invoicing from 1.618717 to 1.708952. BII funds collected by the ERCB are passed through to CAPP and SEPAC.
>
> Payment of the BII is voluntary. Further, the 20% late payment penalty referenced in section 2 does not apply to unpaid BII amounts. The ERCB is not involved in and does not make any decisions regarding the manner in which BII funds are spent or to whom BII funds are disbursed. On request, the Board may provide information to CAPP and SEPAC regarding paid and unpaid BII amounts by operator.

[para 38] The Public Body also submitted a letter regarding the BII Initiatives that CAPP and SEPAC sent to operators who receive levies from the Public Body. This letter explained the initiatives in the following terms:

> **BII Governance**
>
> The parties requesting funding from the BII program submit proposals in Q4 to CAPP and SEPAC, providing accountability for prior funding and proposals for the upcoming year. A BII Panel comprised of SEPAC and CAPP Board Members plus the Presidents of CAPP and SEPAC meets annually to review submissions for funding. The BII Panel then makes funding recommendations to the Boards of CAPP and SEPAC. Once the projects and the funds are approved by the respective Boards, the request for funding is forwarded to the ERCB. The ERCB then collects the funds for CAPP and SEPAC via its annual well levy invoicing process.
>
> […]
>
> The BII well levy represents the amount required to provide the funds noted above. While the BII levy is voluntary, this funding has been firmly endorsed by the CAPP and SEPAC Boards. These projects benefit all of the non-oil sands industry in Alberta and we strongly encourage you to remit the BII portion of the well levy along with the required ERCB levy.
>
> Significant leverage is gained for your company's interests through the BII program. We appreciate your assistance in funding those projects that benefit the broader industry in Alberta and would like to thank you for you[r] continued support.

[para 39] I turn now to the question of whether the records relate 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 40] The Applicant argues:

> The records I sought relate directly to how the AER functions; more specifically, how it, and its predecessors, interacted with members of the industry they are / were tasked with regulating.
>
> The public has a right to know that, without its knowledge or consent, the ERCB and the AER effectively acted as the middlemen between oil and gas companies and industry groups in the collections of these fees. It is, at the very least, a perceived conflict of interest and the fact that the AER does not seem to realize this underscores the value of these records.
>
> […] Collecting money and transferring it to other entities is not a passive exercise. It does not happen spontaneously, without the consent of the parties involved. It requires planning and

> many decisions, including the decision to continue the practice for years even while the public body was being criticized for not being neutral.

[para 41] The Public Body states that the Applicant's request is the first request it has ever received regarding the BII Initiatives. It notes that the Applicant has not provided any evidence that other members of the public are interested in the fact that the AER (and previously the ERCB) collected funds from industry on behalf of CAPP and SEPAC.

[para 42] The Public Body's submissions do not completely address the first question, as the first question also asks whether the records would contribute to public understanding or debate of an issue of concern to the public, *if the public knew about it*. It is not enough to say that no one else has asked for the records. Rather, one must consider whether, assuming the public knew about the matter or issue in the records, the records would be of sufficient interest or concern to the public that it would wish to have the records to further its understanding or inform debate.

[para 43] In this case, the issues that the Applicant has raised with regard to the BII Initiatives are the following:

1. When it collected the levies it is statutorily obligated to collect, the AER (and before it, the ERCB) also collected money from producers and gave it to two industry associations, CAPP and SEPAC. The Applicant questions how the AER which is a statutory entity entrusted with making decisions affecting the public interest can be considered to be at arm's length from industry when it collected money on behalf of CAPP and SEPAC.

2. The Public Body made an active decision to collect money for, and pay money to, CAPP and SEPAC, two groups representing oil and gas producers. I believe the Applicant is questioning whether the Public Body was authorized to make the decision to collect money from producers and to then provide it to CAPP and SEPAC and whether making this decision affects its ability to fulfill its statutory duties.

3. Collecting money and giving it to CAPP and SEPAC provided a financial benefit to CAPP and SEPAC. The Applicant also argues that it may have legal consequences in cases where a producer disputes the amount to be paid to these organizations. For these reasons, the Applicant questions whether the Public Body spent public money as a result of its decision to collect private funds from producers and to distribute the funds to CAPP and SEPAC.

[para 44] In my view, these issues are substantiated by the evidence before me, and are of public interest, as they relate to the functioning of a statutory entity responsible for regulating such things as oil and gas, energy, and surface rights in Alberta, and the Public Body's distribution of funds. While the Public Body's bulletins are available online, and refer to its practice of collecting money from producers and then distributing this money to CAPP and SEPAC to further the BII Initiatives, such that the argument can be made that public already has some knowledge of the Public Body's practice, these bulletins do

not provide the analysis or detail the Applicant intends to provide, and requires the records in order to provide.

[para 45] In concluding that the records at issue would inform a matter that is or would be of interest or concern to the public, I do not need to decide that the Public Body's practice on which the records would shed light is necessarily one that all members of the public would regard as problematic in some way or as worthy of debate. It is enough that in a situation such as the present, which involves the practices of a public body, that there be a reasonable likelihood that some significant sector of the public would wish to know about the matter or debate the merits of the practices. I believe on the basis of the facts outlined, that there is such a likelihood in the present case.

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 46] The Applicant argues:

> As a journalist, but most especially as a journalist working for a publicly funded broadcaster, I have no commercial interest. I have an established track record of producing stories that are in the public interest, which has been widely acknowledged not just by the public but by media associations that recognize journalism in the public interest.
>
> […]
>
> The fact that an applicant has not yet disseminated the contents of the records is not a factor in determining whether this fee-waiver [criterion] applies. It does not negate my intent to disseminate this information, and any attempt by the public body or an adjudicator to impose a timeline for doing so would be both arbitrary and inherently unfair.

[para 47] The Public Body argues:

> In relation to the second question, the Commissioner has stated it is relevant if the records relate to a conflict between an applicant and Government or if it is likely that an applicant will disseminate the contents of the records. The AER is not aware of any conflict between it and the Applicant, or between the Applicant and the Government: the Applicant is a member of the news media and is looking for a story. Second, the AER is not aware of any conflict existing or arising from the fact that the AER formerly collected a levy, on industry's behalf, that was imposed by industry on its own members. As a reporter, the Applicant certainly has the ability to disseminate the information in the records provided by the AER. To this point, however, approaching two years since the records were provided by the AER to the Applicant, the AER is also not aware of the Applicant having disseminated the information in the records. The Applicant's request for a fee waiver in the public interest does not meet this aspect of the criteria.

[para 48] When an applicant is in conflict with government and the applicant requests the records in order to assist the applicant in relation to the conflict, the request could be said to serve the applicant's private interests, rather than the public interest. The Public Body is correct that this does not appear to be the case here and that the Applicant is a journalist seeking to publish a story.

[para 49] From her submissions, I understand that the Applicant is a journalist and that she intends to write an article about the BII Initiative and to discuss in that article, the issues discussed in relation to the first part of the test. To put it another way, she intends to bring this matter to the public's attention and to generate public debate by researching this issue and publishing an article regarding it.

[para 50] In my view, the Applicant has established that her purpose for obtaining the records is to contribute to public debate regarding a matter that is of public interest. I do not consider the fact that the Applicant has not yet published the article to detract from her stated purpose in obtaining the records. I accept that researching an article of this nature takes time and may require obtaining information from more than one source.

[para 51] I find that the Applicant has established that her motivation for obtaining the records is to further the public interest, within the terms of the second factor.

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

[para 52] The Public Body argues that records do not relate to a decision made by the AER and reasons that they do not meet the requirements of the third factor for this reason.

[para 53] As discussed above, I find that the records relate to the functioning of a statutory entity responsible for regulating such things as oil and gas, energy, and surface rights in Alberta. The records also relate to the question of whether the Public Body exercised its statutory authority appropriately when it made the decision to collect money from producers and to provide it to CAPP and SEPAC for the BII Initiatives. The requested records will serve to increase public awareness of the actions and decisions of the Public Body and to enable the public to determine whether the Public Body's role in relation to the BII Initiatives was appropriate. In this way, the records will contribute to open, transparent and accountable government for the purposes of the third factor.

4. Should the Applicant be excused from paying all or part of the fees?

[para 54] In Order F2013-10, the Adjudicator decided that the Applicant should be excused from paying half the costs of processing the access request. He said:

> I find that not all of the records requested by the Applicant relate to the matter of public interest established by him. I have explained that there is a public interest in knowing the details of the alleged misconduct of the former Superintendent, whether and when the Public Body became aware of it, and the manner in which the Public Body dealt with it. However, only a portion of the requested records, which I estimate to be 50%, will contain the foregoing information. I suspect that much of the requested correspondence, although it may be connected or tangential to the matters raised by the Applicant, will not really shed any light on the former Superintendent's alleged misconduct or the Public Body response to it. I suspect that there will be a lot of relatively mundane or insignificant correspondence.

[para 55] I agree with the Adjudicator's reasoning in Order F2013-10. In my view, it is necessary to consider whether all the records that have been requested would serve to shed light on the matter that has been found to be in the public interest when deciding the extent to which the fees should be excused. If only some of the records would shed light on the matter in question, then the fees should be excused only in relation to those records.

[para 56] In this case, the evidence establishes that the Applicant requested records that would shed light on the issues she has raised. The Public Body searched for and located those records. While the Public Body subsequently created records in a format preferable to the Applicant, that does not mean that each of the records it located and determined were responsive to the request would not shed light on the subject matter the Applicant has established is in the public interest.

[para 57] Another question relevant to the issue of whether fees should be reduced in whole or in part, is whether the information is already publicly available. If the same information, or similar information that could serve the Applicant's purposes, is already publicly available at a lesser cost, then it may not be justifiable to reduce the fees, even though the records address a matter of public interest. In this case, while there is some information in the public domain about the issue the Applicant has raised, the records contain information that is not in the public domain and will assist the Applicant to shed light on the issue.

Conclusion

[para 58] I have decided that a fee waiver should be granted in the public interest. I have decided to exercise my authority under section 72(3)(c) to reduce the fees charged by the Public Body to zero. My decision that the fees should be reduced to zero would be the same, even if I had not found that the fees were calculated in error.

IV. ORDER

[para 59] I make this order under section 72 of the Act.

[para 60] I order the Public Body to refund the Applicant all the fees it required her to pay in relation to this access request.

[para 61] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this order, that it has complied with the order.

_____

Teresa Cunningham
Adjudicator