

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2016-61

December 9, 2016

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number 000737

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to information from Alberta Justice and Solicitor General (the Public Body). The Public Body required an initial fee before processing the request. The Applicant requested a fee waiver which was denied by the Public Body. The Adjudicator determined the Applicant did not have the ability to pay the entire fee and reduced the amount of the initial fee.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 8, 72, 93

Authorities Cited: **AB:** Order 96-002, Order 2001-042

I. BACKGROUND

[para 1] The Applicant requested access to information from Alberta Justice and Solicitor General (the Public Body). Pursuant to provisions under the *Freedom of Information and Protection of Privacy Act* (the Act), on January 27, 2015, he requested the following information:

1. Annual budget of the AB Solicitor Generals [sic] office, from including year 2000 to present.

2. Breakdown of above budget for the above years.

3. Annual statistics of number of all court cases where the AB Solgen Office paid for prosecutors or defense lawyers civil and criminal at all levels of court, that resulted in rulings against the AB Government or non-convictions or where the AB paid out settlements on - and the annual costs of these losing court cases for the above years."

[para 2] On February 2, 2015 the Public Body acknowledged receipt of the request and informed the Applicant a \$25.00 initial fee would be required before processing would begin.

[para 3] On February 24, 2015 the Applicant made a request for a fee waiver. The Public Body denied his request for a waiver by letter dated March 26, 2016. They stated the following to the Applicant:

You did not provide any supporting documents to support your claim that you are "unable to pay" the \$25.00 initial fee. If you do have supporting documentation please forward it to our office within 30 days of this notice and we will re-examine your request for a fee waiver.

[para 4] In the same letter, the Public Body also informed the Applicant

The processing of your request will continue to be on hold and will recommence when we have received your \$25.00 initial fee. However, if we do not receive a response from you within 30 days of this communication, your request under the *FOIP Act* will be considered closed. A new request will be required to be submitted to access information in the future.

[para 5] The Public Body sent the Applicant a letter on May 4, 2015 and informed him that under section 8 of the Act, it considered the request abandoned and had closed its file. It should be noted the Public Body acknowledges it erroneously referred to section 8(1)(a) in its letter rather than section 8(1)(b).

[para 6] The Public Body acknowledges receipt of the Applicant's letter of May 13, 2015. In this letter, the Applicant attaches a printout of his Trust Account Statement and asks it be used to support his request for a fee waiver. The Applicant also requests that none of his files be "abandoned nor closed".

[para 7] The Public Body, having made the decision to close the file, refused to consider the information and informed the Applicant he needed to submit another request.

[para 8] The Applicant is a prisoner at the Edmonton or Calgary Remand Centres. He has been in this institution since 2013.

II. INFORMATION AT ISSUE

[para 9] As this is a request to consider a fee waiver, there is no information at issue.

III. ISSUE

[para 10] The Notice of Inquiry sets out the issue:

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

IV. DISCUSSION OF ISSUE

[para 11] Section 93(4) of the Act states:

93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,

(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or

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

[para 12] Order 96-002 established that a person requesting a fee waiver bears the burden of proof. Former Commissioner Clark stated that an applicant is in the best position to argue why the waiver is justified and must provide sufficient information to allow the head of a public body to make an informed and objective decision. Former Commissioner Work, in Order 2001-042 stated, at para. 19 that

...notwithstanding the Applicant's burden of proof, section 72(3)(c) [previously section 68(3)(c) provides me with the power to substitute my own decision on whether to waive all or part of a fee, after looking at all of the evidence and circumstances that existed when the Public Body denied a fee waiver and at the time of the inquiry.

[para 13] Section 72(3)(c) states:

72(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

*...
(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*

[para 14] Former Commissioner Clark stated, in Order 96-002,

First, with respect to whether the applicant can afford the payment, the applicant should present information as to his financial position, such as income and expenses. I will not comment on the extent to which this should be documented. If the applicant is on a fixed income, pension, disability payment and so on, that should be presented for consideration.

Second, as to other reasons it is fair to excuse, the applicant must give the head of the public body enough of an explanation to allow the head to make an informed and reasonable decision. The applicant must remember that the head of the public body is accountable for the use of public resources.

[para 15] In this case, the Applicant gave the head of the Public Body a copy of his Trust Account Statement from the remand centre. Further, he informed the Public Body he has no ability to earn income as he is incarcerated and has been since 2013. The Trust Account Statement shows a balance of \$323.24.

[para 16] The Public Body argues this information is insufficient to warrant a fee waiver. It submits the following:

While it is true inmates cannot earn an income while incarcerated, it is also true that they do not have any expenses. For example, housing, meals, medical care and basic hygiene items are all provided by the centre.

Further, family, friends, counsel etc. of inmates, have the ability to put money into that individual's trust account. The money in an inmate's trust account is there for his own personal use. For example, an inmate can purchase additional food and hygiene items.

[para 17] The Public Body, on review of the Applicant's Trust Account Statement made the following observations:

The Trust Account Statement demonstrates that the Applicant:

- had regular deposits to his trust account
- had sufficient funds (\$323.24) to afford to pay the initial fee associated with this request
- regularly had expenditures that were significantly larger than the \$25.00 initial fee.

[para 18] When I look at the Trust Account statement, I do not see any regular deposits into the Account over the year long period. I see two deposits, one in the amount of \$37.20 and another in the amount of \$7.80. There were a number of corrections for canteen items, but no other deposits. During that period, there were expenditures averaging \$20.00 a month for canteen items (as the Public Body has already indicated, that would be food and hygiene items).

[para 19] The Public Body erred in considering the ability of the Applicant's "family, friends, counsel etc." in assisting the Applicant to pay the fees. The Act refers to the Applicant's ability to pay, not the ability of others to assist him in paying.

[para 20] The Applicant, in his initial submissions, stated the following:

The initial fee along with the knowledge and possibility of significantly higher fees in the future, is a real psychological barrier to those who have zero yearly income, and thus an unfair obstacle to prisoners who want free access to information...

[para 21] The Public Body noted former Commissioner Clark, when considering a request for waiver of fees for all Members of the Legislative Assembly, stated in Order 96-002:

I do not have the jurisdiction under the Act to grant such a waiver. If I were to purport to do so, I would in effect be amending the Act and I have no jurisdiction to make legislation. The Legislature has made it a principle of the Act and a fact of life that there is an initial fee to be paid. The status, role or occupation of the applicant is but one factor which must be considered in each case.

[para 22] The Public Body submits the Act was written to include a user pay component. It submits "A change to this for a specific group, for example, exempting prisoners from paying fees, would require amendments to the legislation and/or regulation."

[para 23] I note, in Order 96-002, Commissioner Clark was not dealing with an inability to pay the fee.

[para 24] The Public Body indicates it was not obliged to consider the Trust Account Statement as it was received after the file was considered abandoned and closed. However, if it had considered it, it would have continued to deny the request for fee waiver as the statement "clearly demonstrates the Applicant can afford to pay the \$25.00 initial fee."

[para 25] I do not agree with the Public Body. The Trust Account Statement shows a balance of \$323.24. The Act allows for fee waivers where an Applicant cannot afford the fee. The Applicant has access to \$323.24. He has been incarcerated since 2013. He does not have the ability to earn an income. He does not have regular deposits in his Trust Account; rather there are withdrawals for food and hygiene items that average \$20.00 a month. I find the Applicant cannot afford the payment of the full amount of the initial fee.

[para 26] Finally, the Public Body states the following:

This Applicant is well aware of the access to information process. The Public Body has received a total of 57 requests from the Applicant, 16 of which have been received in 2016 alone. In order to manage this large volume, it is the Public Body's position that it must rely on the direction provided to the Applicant in its written correspondence. As noted above, the Applicant was given an opportunity to provide documentation to support his claim that he could not afford to pay, however, only did so after receiving notice that the file was closed.

[para 27] The Applicant is incarcerated while awaiting trial. Our office has been given two different remand centre addresses during the course of this inquiry. While the Applicant did not meet the deadlines to respond to the Public Body's letter, it is clear he wished to pursue his request for access to information. In the circumstances, I will consider his application to waive fees, rather than have the Applicant repeat the entire process.

[para 28] In a postscript to Order 96-002, former Commissioner Clark said the following:

I am borrowing the device of a Postscript from the Ontario Information and Privacy Commissioner to offer those who read this lengthy order a suggestion as to practice.

This is not in any way critical of the Applicant in this case. I think that if applicants who feel that they have a claim to be excused from payment on the basis of public interest pay the initial fee before seeking a waiver, the process will become easier for everyone.

By paying the initial fee a number of things happen, as Mr. Aston for Treasury stated. First, the public body has to locate the record. If there is no record, there may not be an issue. Second, if they find it, they will know what it is and whether or not it falls within the Act (section 4, for example, excludes certain records from the Act). Third, if it falls within the Act, they will look at it for exceptions to disclosure, identify any third parties, assess the amount of severing, if any, and prepare a fee estimate. By this time, the public body will be quite familiar with the record and in assisting the applicant to narrow or define his request, both the public body and the applicant should be better able to discuss public interest issues centering on that record.

Since the applicant will not yet have asked for any waiver of fees from the head of the public body or myself, the way will be clear to do so, including asking for a refund of the initial fee on public interest grounds.

[para 29] I am in agreement with this proposed practice. The former Commissioner was not dealing with an inability to pay fees but rather an exemption from fees on the basis the record "relates to a matter of public interest, including the environment or public safety", I consider the same principles apply in this case in that, if the Applicant pays the initial fee as I have determined, the Public Body must locate records, look at exceptions to disclosure, etc. and prepare a fee estimate.

[para 30] At that point, the Applicant will have more choices with respect to his request for access to information. He may narrow the scope of his request, he may abandon his request, he may request further assistance, in the form of a review, from this office. As the former Commissioner stated, "the way will be clear to do so".

[para 31] The Public Body has informed me the Applicant has made further requests for information. Presumably, they have insisted upon payment of the initial fee for those requests before embarking on the search for records.

[para 32] While I cannot order the Public Body to do anything with respect to the initial fee for those other cases, I am hoping the principles of sound management of public resources would compel the Public Body to follow the direction of this Order.

[para 33] I will order the Applicant to pay a nominal initial fee of \$1.00. This will compel the Public Body, upon receipt of the fee to embark on a search for records and provide the Applicant with an estimate of costs (if any, and considering my decision with respect to the Applicant's ability to pay).

V. ORDER

[para 34] I make this Order under section 72 of the Act.

[para 35] I am mindful of section 72(3)(c) which allows me to reduce a fee including if a time limit is not met. I reduce the initial fee for the Applicant's request for access to information to \$1.00.

[para 36] I order the Public Body to notify me and the Applicant in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Neena Ahluwalia Q.C.
Adjudicator