ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

F2021-22

June 21, 2021

CITY OF SPRUCE GROVE

Case File Number 006603

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the City of Spruce Grove (the Public Body) for records relating to contracts from 2010-2017, specifically, information about the amounts paid for tenders and sole source contracts with the date awarded and winning supplier, as well as the total money paid to every supplier.

The Public Body provided the Applicant with a fee estimate of $5,525.00 and requested a deposit of $2762.50 in order to continue processing the request. The Applicant requested a fee waiver on the grounds of public interest. The Public Body denied the Applicant's fee waiver request.

The Applicant requested that this Office review the Public Body's response to his fee waiver request. Subsequently, the Applicant requested an inquiry.

The Adjudicator found that the request did not meet the test for a fee waiver in the public interest. Nor were there any factors that weighed in favour of a fee waiver on the grounds of fairness.

The Adjudicator accepted the Public Body's estimate for the amount of time required to search for, locate, and retrieve responsive records. The Adjudicator found that the Public Body could not charge the Applicant to compile information from existing records into a list as he requested, as it is not a fee public bodies can charge for under the FOIP Regulation. The Public Body also does not have a duty under the Act to create a new record as requested by the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72, 93, Freedom of Information and Protection of Privacy Regulation, Alberta Regulation 1896/2008, Schedule 2

Authorities Cited: AB: Orders 96-002, F2006-032, F2007-023, F2009-034, F2014-03, F2016-39

Cases Cited: *Alberta Energy Regulator v. Information and Privacy Commissioner and Jennie Russell,* Alberta Court of Queen's Bench oral decision, February 21, 2018 (Court File Number 1601 15874)

I. BACKGROUND

[para 1] The Applicant sells "specialty software and related services to municipalities and other institutional clients." He states that he attempted to sell a product to another municipality, Parkland County, but that municipality purchased a competitor's product through a sole-source contract.

[para 2] The Applicant believed that the municipality breached its obligations under the *New West Partnership Trade Agreement* (NWPTA). He initiated a dispute mechanism under the Agreement, which resulted in arbitration. The arbitrator concluded that the municipality had contravened the Agreement by sole-sourcing the procurement of software. The Applicant provided a copy of this decision.

[para 3] The Applicant suspected that other municipalities may be contravening the Agreement in a similar manner. The Applicant first contacted the Alberta Ombudsman and learned that office does not enforce the Agreement against municipalities.

[para 4] The Applicant sought to make public the procurement practices of municipalities, to reveal whether these practices comply with the Agreement. He made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) on April 25, 2017, to four municipalities, including the City of Spruce Grove (the Public Body) for the following:

> Total spend by supplier by year 2010—2017 April Every tender (name) or sole source (name), date awarded, winning supplier 2010—2017 April If it is a tender or sole source please indicate per record.

[para 5] This inquiry relates only to the request made to the Public Body.

[para 6] On April 28, 2017, the Public Body sent a letter requesting clarification. The questions asked by the Public Body (and the Applicant's responses provided the same day) are as follows:

- Would you like totals for every supplier (vendor) that the City of Spruce Grove has paid money to for the period 2010 to April2017?
    - Yes, with the exception of credit card purchases.

- Is there a specific supplier or group or even type of service or financial threshold you may be interested in?
    - All
- Are you seeking a list of the tenders and sole source contracts along with the date awarded and the winning supplier?
    - Yes
- Is there a value threshold you are seeking for the tenders and sole source contracts that you would like the City to use in its search, i.e. any tender or sole source contract over $x in value?
    - Above $0, hence a lease at $0 to a local community group is of no interest

[para 7] In its April 28 letter, the Public Body also advised the Applicant that the totals for every supplier that the Public Body has paid money to in 2010 to 2017 would involve "reviewing over 100,000 transactions per year and could become quite costly to you."

[para 8] On May 9, 2017, the Public Body provided the Applicant with a fee estimate of $5,525.00 and requested a deposit of $2762.50 in order to continue processing the request.

[para 9] The Applicant requested a fee waiver on the basis of public interest on June 8, 2017; the Public Body denied the Applicant's fee waiver request on June 26, 2017.

[para 10] The Applicant requested that this Office review the Public Body's response to his fee waiver request. Subsequently, on March 29, 2018, the Applicant requested an inquiry.

II. RECORDS AT ISSUE

[para 11] As the issue relates to a fee waiver, there are no records at issue.

III. ISSUES

[para 12] The issues in this inquiry, as set out in the Notice of Inquiry, dated February 4, 2021, are:

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

2. Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?

   This issue is added to enable the Commissioner to confirm fees under section 72(3)(c) of the Act should she decide that fees should not be waived.

IV. DISCUSSION OF ISSUES

Preliminary issue

[para 13] In its initial submission, the Applicant elected to rely on the arguments provided with its request for review, with respect to whether a fee waiver is appropriate. The only new arguments provided in the initial submission are regarding the amount of time it has taken for this inquiry to get underway, and the remedy he believes he is owed for that delay.

[para 14] The Applicant requested an inquiry on March 29, 2018. The Notice of Inquiry was issued in February 2021.

[para 15] Counsel retained by the Applicant to act on his behalf has argued that this amounts to an unreasonable delay and that its client has suffered prejudice as a result. He states that the purpose of the access request was to provide transparency in the Public Body's procurement process and that the information in the requested records is now "stale". He provides some remedies it believes are appropriate:

> It is difficult to craft an appropriate remedy for the Commission's unreasonable delay. One possibility is to rely on clause 72(3)(c) of the Act, which states that an order can "confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met." This is an additional reason to grant the fee waiver request made here. A delay of 1,400 days for an application that the Legislature intended to be resolved in 90 days is a very significant breach of a timeline. Reducing the fee to zero is reasonable in those circumstances.
>
> There is other relief that is appropriate. We believe that the Commissioner should compensate our client for the legal fees he was required to incur as a result of the delay. That [includes] correspondence on each delaying step and refreshing memories after years of delay. We believe that a modest award of $1,000 would be appropriate here. The Commission should pay those costs as it is the entity solely responsible for the unreasonable delay.

[para 16] Counsel acknowledges that the Commissioner has the broad discretion to extend the timelines for completing an inquiry, citing the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII). He argues that the length of the delay in this case "creates access to justice and fairness concerns."

[para 17] Section 72(3) sets out various orders the Commissioner may make against a public body. It states:

> *72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.*
>
> *...*
>
> *(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:*
>
> *(a) require that a duty imposed by this Act or the regulations be performed;*
>
> *(b) confirm or reduce the extension of a time limit under section 14;*

> *(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*
>
> *(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;*
>
> *(e) require a public body to stop collecting, using or disclosing personal information in contravention of Part 2;*
>
> *(f) require the head of a public body to destroy personal information collected in contravention of this Act.*

[para 18] These are orders the Commissioner (or her delegate) may make against a public body, where the public body has contravened the Act or otherwise failed to fulfill an obligation under the Act. Under section 72(3)(c), it may be appropriate to order a public body to reduce a fee or order a refund where *that* public body failed to meet a timeline.

[para 19] This Office did not assess a fee to the Applicant that could be reduced or refunded; the Public Body did. The Applicant's counsel has not argued that the Public Body in this case failed to meet a timeline. Rather, the argument is that this Office failed to meet a timeline.

[para 20] I acknowledge that section 72(3)(c) contains some ambiguity insofar as it refers to "a" timeline not being met. However, where more than one interpretation of a provision is possible, the chosen option must conform with the modern approach to statutory interpretation. That approach is as follows:

> . . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para. 21 and *R. v. Sharpe*, 2001 SCC 2 at para. 33, each quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), p. 87)).

[para 21] Interpreting section 72(3)(c) to authorize the Commissioner to order a public body to refund a fee charged by the public body for the reason that the Commissioner – but not the public body – missed a timeline seems the least logical of the possible interpretations. The clearer interpretation is that the Commissioner can order a public body to reduce or refund a fee where the *public body* failed to meet a timeline.

[para 22] Therefore, even if this Office failed to meet a timeline (which the Applicant's counsel has acknowledged it did not), section 72(3)(c) does not offer an appropriate remedy.

[para 23] With respect to the "other relief" the Applicant's counsel suggests may be appropriate, this Office does not award damages against itself for delays in its process.

[para 24] The Applicant requested a fee waiver upon receipt of the Public Body's fee estimate. This means that the Public Body has not completed is processing of the request and the Applicant has not yet received any responsive records. The fee waiver needn't be requested upon receipt of the estimate; many applicants choose to pay the assessed fees if they have been denied a fee waiver, so that they receive the requested records while they wait. In other words, an

applicant can pursue a review of the fee waiver decision even if they have paid the fees. That said, the fees assessed by the Public Body in this case are significant and the Applicant may not have been in a position to pay for the records without a waiver of the fees.

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

[para 25] 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 26] The Commissioner's jurisdiction to review decisions regarding fee waivers was described in Order F2007-023 (at paras. 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 27] 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? (At para. 43)

[para 28] In Order F2009-034 the adjudicator summarized the "public interest" issue as follows (at para. 73):

> 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).

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 29] The factors listed in Order F2006-032 as relevant are:

- 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?

[para 30] In its decision provided to the Applicant regarding the fee waiver, the Public Body states that it has no indication that anyone other than the Applicant has shown an interest in the requested records.

[para 31] In his request for review, the Applicant states that

> He also realized that a fair and predictable market relies on municipalities complying with the law. It is therefore essential that the procurement practices of Alberta municipalities be known to the parties that could be aggrieved by any breaches of the Agreement. That includes those members of the public that engage in business with Alberta municipalities.

[para 32] The Applicant points to the arbitration decision, in which another municipality was found to have contravened the NWPTA. He states there is a clear public interest in seeing public bodies comply with their legal obligations, and "that interest is strongest in the portion of public that engages in business with municipalities" (request for review, at page 3). The Applicant states that he has worked with many municipalities and "has reason to believe that Parkland County's practice of sole source contracts for large procurements is not uncommon" (request for review, at page 3).

[para 33] The Applicant argues that everyone conducting business with municipalities has an interest in ensuring that municipalities comply with the NWPTA and other legal duties.

[para 34] The Applicant's argument seems to be that the public has an interest in ensuring that the Public Body (and municipalities more generally) is fulfilling its obligations under the NWPTA, and other procurement rules. The Applicant might be understood as essentially offering to provide an audit of the Public Body's procurement practices, in return for the public footing the bill for the responsive records.

[para 35] In my view this argument could be made for almost any request for records that relate to government programs, and is therefore too vague or general to meet the test for a fee waiver in the public interest. I agree that records (or lists) of all of the Public Body's public tenders and sole source contracts over a seven year period would contribute to the public understanding of money spent on sole source contracts by the Public Body over that time period. However, the Applicant has not provided sufficient support to find that the requested records relate to a matter of public concern.

[para 36] The Applicant has pointed to a singular instance in which a different public body (Parkland County) was found to have contravened the NWPTA; this is the only evidence the Applicant has presented to indicate that there is a matter or issue of concern regarding this Public Body's procurement process.

[para 37] I do not disagree that, in general, the public could benefit from independent oversight of public bodies' administration of their programs, including procurement processes. If that were the test for a fee waiver in the public interest, the standard would not be particularly high before fees were waived. However, merely finding that there might be some benefit to the public is not the test for determining whether a fee waiver on the grounds of public interest is warranted.

[para 38] The Applicant has not provided sufficient support to find that there is a matter or issue that the public would be concerned about if it knew about it. This factor weighs against a fee waiver.

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 39] The factors listed in Order F2006-032 as relevant are:

- 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?

[para 40] In its June 2017 response to the Applicant, the Public Body stated that the request "also identifies that the applicant 'as a small business … relies on orderly commerce' which suggests that the applicant is motivated at least in part by a commercial interest or 'curiosity', as opposed to the public interest. The request for the records was specifically motivated by a conflict between PMH and another Alberta municipality."

[para 41] In his request for review, the Applicant argues (at page 4):

> Adjudicator Cunningham held, at paragraph 25 of Order F2014-03 that "the issue of whether an applicant intends to disseminate information is not in itself a factor weighing for or against disclosure." That Order is attached at Tab 14. The issue is more properly if the interest in the records is private or public. Dissemination does not, in itself, make the interest public. My client is interested in assuring others in the market that there is compliance with the Agreement, or not. That may involve disseminating the documents, but it is difficult to say without seeing the documents.

[para 42] In Order F2014-03, the adjudicator determined that a member of the official opposition was seeking records in order to hold the government to account in the Legislature. She stated (at paras. 24-25):

> The Applicant is not in a position to state categorically whether the records will be disclosed publicly or not, given that he has not yet been given access to the records he requested regarding the creation of the CTRC and its mandate. However, at the very least, the records will be made available to the Wildrose Party for its use in debate in its capacity as Alberta's official opposition.
>
> In my view, the issue of whether an applicant intends to disseminate information is not in itself a factor weighing for or against disclosure, but is a question that it may be necessary (but not always) to ask when determining whether disclosure would serve a private or public interest, and the evidence regarding the requestor's intent in obtaining the information is ambiguous or unclear. For example, if a requestor seeks to obtain information for personal gain, the requestor may intend to keep the information for his or her benefit; however, a requestor who seeks information for public benefit may have the intent of making the information publicly available in some way if it serves a public benefit.

[para 43] I agree with this analysis; the primary issue this factor is aimed at is whether there is a private or public interest in the responsive records. In this case, there is no reason to expect that the Applicant would keep the information to himself, if he found an indication that the Public Body's procurement practices fail to meet its legal requirements.

[para 44] However, the Applicant indicates that the information would be disseminated only if a problem were identified, and he has not provided sufficient evidence to conclude that any problems might exist.

[para 45] Given this, I find that this factor weighs in favour of a waiver but has only nominal weight in the circumstances.

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

[para 46] The factors listed in Order F2006-032 as relevant are:

- 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 47] In its request for a fee waiver made to the Public Body (dated June 8, 2017), the Applicant states:

> The records are not likely to satisfy the first factor, though they may. The procurement information may show a trend in which goods and services are tendered, and which are not. That may show a decision making tendency in Spruce Grove. While this factor does not strongly favour the public interest the other two clearly do.
>
> Public scrutiny is the main concern of the request. My client would like to see compliance with the North West Partnership Trade Agreement and determine the degree to which Spruce Grove is in compliance. It is clearly in the public interest that municipalities comply with legally binding trade obligations and the records are the only way to see if there is compliance.
>
> The final factor for this criteria is the main reason the records are sought. The procurement practices of Alberta municipalities are not transparent and open. This makes it very difficult for interested parties to know when proper procurement may have been sidestepped. Parkland County has been found to be in breach of the Agreement, showing that the practice exists, and the procurement practice of Spruce Grove is fairly being questioned through this request. There may be no issue in Spruce Grove, but until the records are released, we simply do not know.

[para 48] In its June 2017 response to the Applicant, the Public Body stated:

> The applicant acknowledges that the records likely will not contain information regarding how the City reached or will reach a decision. The question of whether procurement records would subject a public body's activities to scrutiny was considered in Orders F2004-002 and F2007-010, and answered in the negative. Significantly, in the present case, there is no evidence or indication we are aware of that the City's procurement practices "have been called into question'; the primary basis identified for PMH's request relates to an unrelated municipality rather than any alleged infractions by the City. These criteria do not appear to weight in favour of granting a fee exemption.

[para 49] In his request for review, the Applicant states:

> The City denies that providing their procurement records supports the open government principle. They note that the breach of the Agreement was by Parkland County and that no allegations of wrongdoing have been made against the City's practices.
>
> However, the Arbiter's finding with respect to Parkland County was the first to find an Alberta municipality in breach of the Agreement. There was nothing in that case to indicate that the practice of Parkland County was exceptional. The requests made by my client were to similarly sized municipalities that are most likely to have similar issues.
>
> The list of procurements by sole source and value will provide a clear picture of the City's practice. It may show that the City is compliant with the Agreement, but there is a valid reason to believe that there are problems. Alberta municipalities do not operate in a vacuum. My client operates in many municipalities and states that procurement practices are similar in similarly sized municipalities, with more sophisticated systems in larger cities. A breach of the Agreement in Parkland County is an indication that there may be a breach in the City.
>
> It is also concerning that the City cannot provide a list of procurements that are near or over the $75,000 threshold in the Agreement without many hours of work. Compliance with the Agreement requires careful attention to procurements near that threshold. The fact that the City cannot provide the documents to my client in an efficient manner is itself an indication that there may be a lack of compliance with the Agreement.

[para 50] As discussed above, the Applicant has pointed to the finding that another municipality contravened the terms of the NWPTA in one instance, as support for believing that this Public Body may also have contravened the NWPTA and/or other legal obligations in its procurement process. He reasons for believing that the arbitrator's decision regarding Parkland County indicates possible problems with the Public Body's process are that the two municipalities are of similar sizes and that, in the Applicant's experience, their procurement practices are similar. I find this too tenuous to conclude that an activity of the Public Body has been called into question.

[para 51] The Applicant also argues that the amount of time the Public Body has said it needs to locate responsive records indicates that the Public Body does not pay careful attention to its procurements. However, the Applicant's request is fairly broad and encompasses several years worth of contracts; the efficiency of the Public Body's process for locating responsive records does not reasonably indicate that it is negligent with respect to following its legal obligations in its procurement processes.

[para 52] I find that this factor does not weigh in favour of a fee waiver.

Conclusion regarding the fee waiver in the public interest

[para 53] I have found that the second factor of the test for fee waivers in the public interest weighs in favour of the waiver, but only to a minor extent.

[para 54] The Applicant has failed to show that there is a matter of public concern, or a need to shed light on an activity of the Public Body that the requested records relate to. Therefore, whether or not the Applicant intends to disseminate the information in the requested records, there is no reason to conclude that the public has any interest in that information. Therefore, I conclude that the requested records do not meet the test to waive fees in the public interest.

Is a fee waiver warranted on grounds of fairness?

[para 55] The Public Body and Applicant both addressed the factors set out in Order F2006-032, to determine whether a fee waiver is warranted on the ground of fairness. Those factors are:

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 56] The Public Body states that it is unaware of any similar request for records (factor #1), or whether there are less expensive sources of the information (factor #3). It states that processing the Applicant's request would require an estimated 200 hours of work, which would significantly interfere with the Public Body's operations (factor #2).

[para 57] The Public Body also notes that the request spans a seven-year period and includes all of the Public Body' suppliers, all tenders and all sole source contracts without qualification (factor #4). It is therefore a broad request. The Public Body states that it clarified the request with the Applicant, who declined to narrow the scope (factor #5).

[para 58] The Applicant agrees that others have not sought similar records. Regarding interference with the Public Body's operations, the Applicant questions why the Public Body does not have a tracking system for such tenders and contracts.

[para 59] The Applicant is also not aware of any less expensive sources for the requested information. He agrees that its request is broad, but that the Public Body did not provide any suggestions as to how it could be narrowed.

[para 60] I understand that the Applicant's request is broad by design, and it is difficult to see how he could obtain the information he is seeking with a narrower request. However, that the request cannot easily be narrowed does not weigh in favour of a fee waiver on the grounds of

fairness. The remaining factors set out in Order F2006-032 also do not indicate that fairness dictates that the fees should be waived. While the factors set out in Order F2006-032 are not exhaustive, I do not see any other factors relevant to the Applicant's request that indicate the fees should be waived on the grounds of fairness.

36. Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?

[para 61] The fee estimate provided to the Applicant by the Public Body on May 9, 2017, listed the following estimated fees:

> To generate the report for the Total spend by supplier by year: 2010—2017 April
> 21 hours @ $6251 ¼ hour = $525
>
> To search for, retrieve and produce the report for "Every tender (name) or sole source (name), date awarded, winning supplier 2010— 2017 April. If it is a tender or sole source please indicate per record"
> 200 hours (across 19 business units) @ $6251 % hour = $5,000

[para 62] By letters dated April 20, 2021 and May 7, 2021, I asked the Public Body for additional information regarding its fee estimate. Specifically, I asked the Public Body to explain what it means by 'generating the report'. I said (May 2021 letter):

> The Public Body's chart, provided in its April 26 letter, indicates that the responsive records are tenders and sole source documents; if these are the responsive records, why is it necessary to generate a report? What allowable fee listed in the Regulation permits the Public Body to charge to generate this report? If this relates to an allowable fee, please provide additional details about the time estimated to generate this report.

[para 63] I also asked the Public Body how it estimated 500 hours to search for and locate records. I said (May 2021 letter):

> This is a significant amount of time. Other than to note that different departments have their own information management practices, and that it estimated 67 hours per department, the Public Body has not explained how it came to such a large number. Specifically how did the Public Body estimate an average of 67 hours per department? How many people per department will be required to participate in the search? The chart provided in the April 26 submission indicates that a preliminary search indicated possibly 4264 pages of records – who conducted this preliminary search and how long did it take?

[para 64] Regarding what it means by 'generating the report', the Public Body responded (May 19, 2021 submission):

> The estimate is based on searching an immature records system across the whole organization, and to be able to respond thoroughly to the robust scope of the request. A report was generated to look at what could potentially be in scope. Upon review of the report, it was found that the titles of the records may or may not be in scope. In order to identify what was responsive, a very

> thorough review into the each of the records would be required. "Generating the report" means the reports we would need to produce additionally (cross-referenced with financial reports) to review all the records to ensure they are in scope. We would then be required to create additional reports to generate these lists that the applicant is requesting.

[para 65] I also asked the Public Body what allowable fee listed in the Regulation permits the Public Body to charge to generate this report. The Public Body responded (May 19 submission):

> In the Regulation Schedule 2, the quotation was based on:
>
> - Time estimated to search locate the records and retrieve the records;
> - Time and cost required to prepare the records for disclosure.
> - Time and cost to produce a listing for the applicant.
> - The cost of copying the records.
> - The cost of shipping the records.

[para 66] Section 93(1) of the Act permits a public body to charge an applicant fees for processing an access request, as set out in the FOIP Regulation. Section 11(4) permits a public body to charge fees in accordance with Schedule 2 of the Regulation. Schedule 2 of the Regulation sets out the activities that a public body may charge for, as well as the maximum amounts that may be charged for those activities. The list is exhaustive and includes:

- For searching for, locating and retrieving a record;
- For producing a record from an electronic record:
    - Computer processing and related charges
    - Computer programming
- For producing a paper copy of a record
- For producing a copy of a record by duplication of the specified media (microfiche, disks, tapes, slides)
- For producing a photographic copy printed on photographic paper from a negative, slide or digital image;
- For producing a copy of a records by any process or in any medium or format not otherwise listed;
- For preparing and handling a record for disclosure;
- For supervising the examination of a record;
- For shipping a record or a copy of a record.

[para 67] The question I had asked the Public Body was what item in the list in Schedule 2 permits the Public Body to charge for generating a list for the Applicant. The Public Body did not identify what item it was relying on for that charge.

[para 68] It seems clear from the Public Body's submission that the list requested by the Applicant does not exist; therefore, a *copy* cannot be made. The only charge in Schedule 2 relating to producing a record that does *not* relate to producing a *copy* of a record is the second item: producing a record from an electronic record.

[para 69] In Order F2016-39, the adjudicator discussed what type of activities are encompassed by the phrase 'producing a record from an electronic record.' She said (at paras. 26-28):

> 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.*
>
> 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.
>
> 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 70] This Order was upheld on judicial review (*Alberta Energy Regulator v. Information and Privacy Commissioner and Jennie Russell,* Alberta Court of Queen's Bench oral decision, February 21, 2018 (Court File Number 1601 15874)).

[para 71] I agree with this analysis in the above quotation. From the Public Body's submission, I conclude that it is not creating the list requested by the Applicant by way of computer processing or programming. Rather, it is manually entering data obtained from existing records to create a new record, whether by typing information from existing records into a new document or copying/pasting the same. This is not an activity contained in the list of activities in Schedule 2, for which fees can be charged.

[para 72] The adjudicator in Order F2016-39 referred to a public body's duty to create a record under section 10(2). Section 10 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.

[para 73] 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 74] The adjudicator in Order F2016-39 reviewed past Orders of this Office regarding the obligations created by section 10(2) and concluded (at paras. 24-25):

> 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. <u>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)</u>. I accordingly conclude that the section does not apply in respect of the microbiological data held by the Public Body. [my emphasis]
>
> 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 75] Again, I agree with this analysis. In this case, the Public Body seems to be creating a list as requested by the Applicant by manually manipulating data from existing records to create a new record. There is no indication that the Public Body is describing the creation of a record from an electronic record, using only hardware, software and technical expertise.

[para 76] From the submissions before me, I conclude that the Public Body is not obliged to create the list as requested by the Applicant under section 10(2) of the Act. This is not to say that the Public Body is barred from creating a list as requested by the Applicant. It may do so, but it is not obliged to under the Act; it also cannot charge for the list under the Act.

[para 77] If the Public Body decides not to create the list as requested by the Applicant (because it is not obliged to do so), the Public Body should communicate with the Applicant to determine the best course of action to respond to his access request. I reiterate the adjudicator's conclusion in Order F2016-39, cited above (at para. 28):

> 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 78] In this case, it is not clear whether the Public Body has records that contain the information sought by the Applicant (for example, whether the tenders, contracts, etc. themselves would be responsive). If the Public Body elects not to create the list as the Applicant requested, it should inform the Applicant of the types of records it has and determine whether the Applicant is seeking access to those records. If he is, the Public Body can then process the request accordingly, including issuing a new fee estimate in accordance with the amended request.

[para 79] Given this finding that the Public Body is not obliged to create a list for the Applicant if that list does not already exist and/or if it cannot be created using just hardware, software and technical expertise, it may be that the remainder of the fee estimate at issue in this inquiry is no longer relevant. However, if the Applicant continues with an amended request, the Public Body's calculation of the time taken to search for and locate records may still be relevant.

[para 80] The Public Body has also referred to "generating the report" as part of its search for records. It states that it includes reports it has or will create "to review all the records to ensure they are in scope". The Public Body has referred to a need to cross-reference these reports with

financial reports. The Applicant's request is broad in scope; it seems that the Public Body has generated reports or lists in order to keep track of responsive records. I agree that this falls within the scope of searching for and locating records.

[para 81] Regarding the hours estimated to search for, locate and retrieve records, the Public Body states that

> Due to the large scope of the request, records coordinators in each area were requested to review their records to complete a preliminary report of potentially responsive records. To further complete this request, each document will need to be reviewed to see if it meets the parameters of the request. The average given in the April 26 letter is an average number based on the number of areas impacted, volume of records, and department activities within each area. The estimations were further done in consultation with each area.

[para 82] In other words, it seems that the Public Body arrived at 500 hours to search for, locate and retrieve records based on a preliminary assessment conducted by each relevant area within the Public Body. While 500 hours is a large amount of time, the Public Body notified the Applicant when clarifying his request, that there would be approximately 100,000 transactions for each of the seven years specified in the access request, which would be costly to the Applicant.

[para 83] The Applicant has questioned why the Public Body does not have a tracking system for the type of records he has requested. While a tracking system may have decreased the amount of time required to search for, locate and retrieve responsive records, I cannot judge the Public Body's fee estimate based on technology it does not have.

[para 84] The Public Body has taken steps to provide a reasonable best-guess as to the time it will require to gather responsive records. I accept its fee estimate for this cost.

Conclusions regarding the fee estimate

[para 85] Given my finding that the Public Body is not obliged to create the list requested by the Applicant, and even if it elects to do so, it cannot charge for the time taken to create the list under the FOIP Act, the Public Body's response to the Applicant and fee estimate will need to be revisited. I will order the Public Body to respond again to the Applicant's request.

[para 86] If the Public Body chooses to create the list requested by the Applicant, it must exclude the time taken to create the list from the fee calculations.

[para 87] If the Public Body chooses not to create the list and respond only as *required* under the Act, the Public Body must contact the Applicant to determine what records in the custody or control of the Public Body (including any records that can be created using just hardware, software and technical expertise as contemplated under section 10(2)) he may be seeking. The Public Body must then amend its fee estimate as appropriate.

[para 88] I will retain jurisdiction in this matter; if the Applicant is dissatisfied with the Public Body's new response and/or fee estimate, he may request a review and I will schedule an inquiry into the new response.

V. ORDER

[para 89] I make this Order under section 72 of the Act.

[para 90] I uphold the Public Body's decision to deny a fee waiver.

[para 91] I find that the Public Body included activities in its fee estimate that it is not permitted to charge for under Schedule 2 of the Regulation. I order the Public Body to respond to the Applicant again, per the instructions set out at paragraphs 85-87 of this Order.

[para 92] 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 it.

_____
Amanda Swanek
Adjudicator