

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2008-003

June 24, 2008

BARBARA SHEPTYCKI (REGISTERED PSYCHOLOGIST)

Case File Number P0295

Office URL: www.oipc.ab.ca

Summary: The Organization (a registered psychologist) provided the Applicant with an estimate for fees for compiling and copying the portions of her files relating to a custody assessment that she would be required to disclose pursuant to an earlier Order of this office (Order P2007- 002). On receiving the estimate, the Applicant wrote to the Office of the Information and Privacy Commissioner stating he was concerned with the fee estimate for various reasons, including that he was on a fixed income.

The Adjudicator found that the fee was reasonable in terms of the cost of the work to be done. There was insufficient evidence that the Applicant was unable to pay the amount of the estimated fee. Therefore, the Adjudicator held that the Applicant must pay the fee before the Organization is required to release the information to him.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 93 ; *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 32 and 36(2)(c).

Authorities Cited: AB: Order P2007-002; Order F2002-023; Order F2002-017; Order F2003-011; Order F2007-010; Order F2007-016.

Cases Cited: *Yule v. City of Saskatoon* (1955), 16 W.W.R 305 (Sask Q.B.); *Lee (Guardian ad litem of) v. Richmond Hospital Society (c.o.b. Richmond Hospital)* [2005] 7

W.W.R.451 (B.C.C.A.); *Levine v. Bartel* [1992] M.J. No. 153 (Man. Q.B.); *Blackadder, Green, Marion, Halinda & Wood v. Rossi* [1998] O.J. No. 5708 (Ont. Cr. Just)

I. BACKGROUND

[para 1] In Order P2007-002, I dealt with whether the Organization, a registered psychologist (“the Psychologist”), was required, under the *Personal Information Protection Act* (“PIPA” or “the Act”), to disclose her entire set of files respecting a court ordered custody assessment the Psychologist had conducted relating to the Applicant, his former spouse and their children. I upheld much of the Psychologist’s original response to the Applicant.

[para 2] However, there was a small amount of information, relative to which the Psychologist had not provided me with enough information as to the basis for her exercise of discretion (to withhold the information under section 24(2)(c) of the Act) for me to decide if the discretion had been exercised properly. I therefore directed the Psychologist to re-exercise her discretion under this section on the basis of the proper considerations.

[para 3] In her response to me the Psychologist indicated she had decided not to withhold the information under section 24(2)(c). She indicated her willingness to disclose all of the outstanding information, with the exception of parts of the information that consisted of psychological testing materials.

[para 4] With respect to the psychological testing materials, I had said in the earlier Order that the Psychologist would be entitled to withhold some of this information under section 24(2)(b) – “confidential information of a commercial nature”. I said that I do not have the expertise to make a decision as to which parts of these materials are such that the disclosure of the Applicant’s answers to the tests would compromise the future utility of the tests, so as to make the information “confidential information of a commercial nature”. Therefore, I said that if it were to become necessary, I would order the Psychologist to perform this assessment for the purposes of severing the materials appropriately. I also said that before the Psychologist would be required to undertake this exercise, the Applicant would have to pay a fee as required by section 32 of the Act. I therefore directed the Psychologist to provide the Applicant with a fee estimate. I said that I would retain jurisdiction in this matter to determine if the fee was reasonable.

[para 5] On October 2, 2007, the Psychologist provided a fee estimate to the Applicant totaling \$387.60. The fees were calculated as follows:

97 pages @ \$0.30/pg (records the Applicant did not have)	\$29.10
164 pages plus 31 pages copied for the purpose of “editing” = 195 pages @ \$0.30/pg (records the Applicant likely had or may not want)	\$58.50

time to search and prepare file – 2 hours @ \$150/hour \$300.00

[para 6] By way of letter to this Office dated November 4, 2007, the Applicant raised several concerns with the fee estimate provided by the Psychologist.

[para 7] The Applicant provided a submission, to which he attached a copy of court documents related to a court order requiring his former spouse to provide answers to undertakings given during litigation on related matters.

II. RECORDS AT ISSUE

[para 8] This is a complaint about a fee estimate and therefore, there are no records directly at issue.

III. ISSUE

[para 9] Should I confirm, reduce, or excuse the fee?

IV. DISCUSSION OF ISSUES

[para 10] In his letter to this office of November 4, 2007, the Applicant raised several concerns.

[para 11] First, he stated that he did not know if the Psychologist had fulfilled her obligations under Order P20007-002, since he had not seen the records.

[para 12] Second, he raised concerns with the fee estimate on the basis that he was on a fixed income.

[para 13] The Applicant also stated that his former spouse had been ordered to provide this information as part of their divorce proceedings but had not done so.

[para 14] Finally, the Applicant argued that the Psychologist had been fully compensated already, and therefore she should not charge a fee.

[para 15] I will comment first on the question raised by the Applicant as to whether the Psychologist had fulfilled her obligations under Order P2007-002. The Psychologist has provided a fee estimate, as I directed. Given that the Applicant has not paid this fee and has not reviewed the records, it is too early in the process for him to be asking whether the Psychologist has complied with the rest of the Order.

The legislation

[para 16] Under section 32 of the Act, organizations are permitted to charge fees to applicants who make access requests for their personal information under section 24 of the Act.

[para 17] Section 32 states:

32(1) An organization may charge an applicant who makes a request under section 24 a reasonable fee for access to the applicant's personal information or a record relating to the information.

...

(3) If an organization is intending to charge an applicant a fee for a service, the organization

(a) must give the applicant a written estimate of the total fee before providing the service, and

(b) may require the applicant to pay a deposit in the amount determined by the organization.

[para 18] In addition, section 36(2)(c) gives the Commissioner the ability to investigate and attempt to resolve complaints regarding fee estimates. This section states:

36 (2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that

...

(c) a fee estimated or required by an organization under this Act is inappropriate;

....

[para 19] Section 50 permits the Commissioner to conduct inquiries where complaints (made under section 46) are not settled by mediation or resolved. Section 52 permits the Commissioner to make orders on completion of an inquiry. If the matter relates to a fee, section 52(3)(c) permits the Commissioner to

(c) confirm, excuse or reduce a fee, or order a refund of a fee, in the appropriate circumstances;

[para 20] Section 32(1) of the Act permits an Organization to charge a fee that is “reasonable” whereas section 36(2) permits complaints that a fee is “inappropriate”. A

possible interpretation is that whether a fee is “reasonable” speaks to the amount of the fee relative to the work that is to be done, whereas a complaint that a fee is “inappropriate” may refer as well to other possible factors, possibly including the ability, or otherwise, to pay. Alternatively, “reasonable” in the context of section 36 could be taken as requiring organizations to consider not only what work is to be done, but also other relevant factors of which they have knowledge. The latter interpretation is lent support by section 28(4) of the Act, which contemplates that applicants may request organizations to excuse payment of fees. Whichever of these is the better analysis, as a practical matter, both aspects must be considered in the context of a review by this office. In my view, section 52(3)(c) requires me to ask both whether the amount is reasonable relative to the work to be done, and whether the circumstances brought to my attention are such that the fee should be excused or reduced (or refunded if already paid).

The work to be done

[para 21] I will look first at the amount of the fee relative to the work and other costs associated with providing access. The fee estimate in question appears to cover the copying costs for all the disclosable records, as well as the time required to compile them, including the time for making the assessment as to which parts of the psychological testing materials are disclosable.

[para 22] With regard to the photocopying charges, I note that the amount per page charged for photocopying by the Psychologist is somewhat higher than what is allowed by the schedule in the regulation under *Freedom of Information and Protection of Privacy Act* (“FOIP Act”) FOIP Act regulation (\$0.25). Despite this, I find \$0.30 per page sufficiently close to this standard amount to be reasonable.

[para 23] With regard to the amount charged for processing the Applicant’s access request, I note this exceeds considerably the hourly rates for dealing with documents allowed under the FOIP Act schedule. Despite this, I also find this part of the fee to be reasonable. The Psychologist provided a sound rationale for this amount. She stated that given the complexity of the file, she had to sort through it herself. The file consists of over 200 pages, and the amount reflects the actual time she has already spent preparing the file. Her professional fee is what she usually charges to act as a Registered Psychologist, and not to sort through documents to respond to an access request under the Act. However, as I indicated in the earlier Order, performing the part of the task relating to the psychological testing records – which is considerable - requires her professional expertise. As well, I note the Psychologist stated in her fee estimate that she did the work herself “due to the complexity of the file, time constraints and business operations considerations”. Given the issues involved and the size of her organization, it was reasonable that the Psychologist perform this task herself. In doing so, she was unable to use the time to act as a Registered Psychologist to earn \$150 an hour. As well, I note that the *Health Information Act* schedule provides that the time of a “health services provider” required to produce a copy of a record may be charged at \$45 per ¼ hour (to a maximum of 3 hours). This is a comparable rate to that charged by the Psychologist.

[para 24] This should not be construed as a general rule regarding access requests made of professionals under the Act. Not every access request will necessarily lead to the conclusion that it is reasonable to charge a professional hourly rate to respond. It will depend on the circumstances of each case, such as the complexity of the request and the availability of staff members to assist in adequately responding. Taking all factors into account, in this case I find it is reasonable for the Psychologist to perform the task herself, and therefore, the Psychologist's fee estimate is reasonable relative to the associated costs.

Is the fee appropriate or otherwise in the circumstances?

a. Is the Applicant's "fixed income" a factor to be considered?

[para 25] The Applicant's point about being on a fixed income may be a suggestion that it would be difficult for him to pay the fee.

[para 26] The Act does not expressly say whether the inability to pay is to be taken into account in addressing what is reasonable and appropriate.

[para 27] In contrast, section 93(4) of the *Freedom of Information and Protection of Privacy Act* ("FOIP 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,

[para 28] Additionally, fees that an organization can charge are set out in schedule 2 of the *Freedom of Information and Protection of Privacy Regulation*.

[para 29] Section 69 of the FOIP Act gives the Commissioner the power to conduct inquiries relative to decisions of public bodies, which includes decisions as to fees, and section 72(3)(c) provides that he may

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

[para 30] In my view, both statutes permit me to consider whether the fee was proper relative to the amount of work to be done, and both permit me to consider other circumstances to decide whether it is appropriate in the circumstances to reduce or excuse the fee.

[para 31] The question remains whether under PIPA, the fact an Applicant cannot afford to pay the fee is a circumstance to be taken into account. It is notable that FOIP expressly mentions this factor whereas PIPA does not. It is also notable that under the FOIP Act, it

is public funds that are being spent, whereas under PIPA, it is a private organization that must bear the cost. The latter point may be more significant where the organization is a small one, for example, where it consists of an individual proprietor.

[para 32] The ability or otherwise to pay is a factor that has been considered in determining the reasonableness of fees outside of the context of access and privacy legislation. For example, when dealing with the reasonableness of lawyers' fees or the assessment of special costs in some jurisdictions in Canada such as British Columbia, Manitoba and Ontario, courts have adopted the "Yule factors". These factors are derived from the case *Yule v. City of Saskatoon* (1955), 16 W.W.R 305 (Sask Q.B.), which was affirmed by the Saskatchewan Court of Appeal. One of the factors Justice Thomson considered in that case was the client's ability to pay. (See also *Lee (Guardian ad litem of) v. Richmond Hospital Society (c.o.b. Richmond Hospital)* [2005] 7 W.W.R.451 (B.C.C.A.); *Levine v. Bartel* [1992] M.J. No. 153 (Man. Q.B.); *Blackadder, Green, Marion, Halinda & Wood v. Rossi* [1998] O.J. No. 5708 (Ont. Ct. Just)).

[para 33] I note that it is also private financial interests that are impacted relative to lawyers' accounts, yet inability to pay was considered as a factor relative to the reasonableness of such accounts.

[para 34] I have touched upon the 'inability to pay' factor because the Applicant's submission might be taken to suggest that he is unable to do so. Despite this, it is not necessary for me to conclusively decide in this case whether this is a relevant factor. This is because, although the Applicant says he is on a fixed income, he does not say that he cannot afford to pay the fee, nor has he provided any evidence to that effect. Under the FOIP Act, the burden of proving inability to afford the fees rests with the applicant (see Orders F2002-017 [at para 30]; F2003-011 [at paras 17, 18]; F2007-010 [at para 11]; F2007-016 [at para 13]) Under the FOIP Act, before the fee is waived for that reason, the applicant must provide to the Public Body, or to the Commissioner, evidence of the applicant's inability to afford the fee. An example of such evidence can be found in Order F2002-023, in which the Applicant provided ample evidence of her financial status. What the Applicant means by saying he is on a fixed income is not clear. He has provided no evidence that this means he cannot afford the fee. Thus, whether or not PIPA allows me to take this factor into account, I cannot do so in this case.

b) Is the existence of a court order a factor to be considered?

[para 35] The Applicant also claims that there should be no fee charged as he should have been provided the records requested by his former spouse pursuant to a court order. As I stated in Order P2007-002, I have no jurisdiction over court orders. The Applicant's access request is governed by the Act, as is the Psychologist's subsequent response and fee estimate. Whether or not the Applicant should have received these documents from another person subject to another process, this has no bearing on the matter at hand.

c) Has the Psychologist already been paid to respond to the applicant's access request?

[para 36] Finally, the Applicant argues that the Psychologist was already paid for her services, and therefore she should not be charging a fee to respond to the access request. I assume that the Applicant is referring to the Psychologist being paid as a registered psychologist to perform the custody assessment. If this is in fact the case, I see no merit to this argument. The fee estimate was done in accordance with section 32 of the Act. The Psychologist's work in reviewing and preparing the file to respond to an access request is entirely distinct from her role in preparing the custody report. It cannot be said that she has already been paid for her services in responding to the access request because she was paid for her services as a registered psychologist to prepare the custody report.

Conclusion

[para 37] I find the amount of the fee estimate provided to the Applicant by the Psychologist dated October 2, 2007 is appropriate having regard to the work to be done and costs associated with providing access for the Applicant to the information to which he is entitled. There is insufficient evidence to support any contention that the Applicant cannot afford to pay the estimated fee, and there is no other basis for finding the fee is inappropriate.

V. ORDER

[para 38] I make this Order under section 52 of the Act.

[para 39] I hold that before the Psychologist is required to provide access to the outstanding information to which the Applicant is entitled, the Applicant must pay the estimated fee. As the letter of October 2, 2007 states, he may elect not to receive the records he already has, with a corresponding reduction in the photocopying charges.

Christina Gauk, Ph.D.
Director of Adjudication