

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-012

May 11, 1999

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1423

I. BACKGROUND

[para. 1] On January 8, 1997, the Applicants made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") for:

a) Any information pertaining to the process and information used to change the CTRL (Commercial Tourism and Recreational Leasing Process) to the ATRL (Alberta Tourism and Recreational Leasing Process) as was stated in the news release No: 95-127 dated Thursday October 19, 1995;

b) A copy of the Sunpine Forest Products A.O.P. (Annual Operating Plan); and

c) A copy of the approved Detailed Forest Management Plan for the Clearwater Tay River Area FMA #9200030.

[para. 2] On January 23, 1997, the Public Body sent the Applicants a fee estimate for this request that totaled \$1,378.90.

[para. 3] In this letter, the Public Body told the Applicants that the Applicants may choose to accept this fee estimate and pay 50% of this

fee in advance or request a fee waiver. The Public Body also attached a list of criteria that the Public Body would consider in deciding whether to grant a public interest fee waiver under section 87(4)(b).

[para. 4] On February 24, 1997, the Applicants wrote to the Public Body requesting that the Public Body review the amount of the fee estimate.

[para. 5] On February 27, 1997, the Public Body wrote to the Applicants to explain the fee calculation. The Public Body also told the Applicants that they would be able to reduce the cost of their request by narrowing their request, viewing the records as opposed to copying them or, in the alternative, seeking a fee waiver.

[para. 6] On March 17, 1997, the Applicants wrote to the Public Body to inform the Public Body that they intended to view the records but that they would provide their own photocopy machine. They also stated that they would prefer to view the records in the Rocky Mountain House Provincial Building.

[para. 7] On March 26, 1997, the Public Body wrote to the Applicants to inform the Applicants that if they wanted to view the records, the Applicants would still have to pay some fees in advance. Furthermore, the Public Body told the Applicants that they should view the records in Edmonton, as this was where the records were located.

[para. 8] The Applicants did not respond to the March 26, 1997 letter but, instead, requested I review whether the Public Body breached its duty to assist and other matters relating to a different access request.

[para. 9] On November 27, 1997, I conducted an oral inquiry and issued Order 97-019. In that order I held that I had no jurisdiction to deal with the duty to assist issue as the Applicants had neither requested a fee waiver, nor paid the required fees.

[para. 10] On December 18, 1997, the Applicants wrote to my Office requesting a full fee waiver. They stated that they would like a fee waiver issued due to their “previous circumstances” in dealing with the Public Body and, in particular, the “actions” of three Public Body employees that were “contrary to sections 9, 6, and 15 of the F.O.I.P.P. Act”.

[para. 11] On December 19, 1997, this Office forwarded the Applicants’ December 18, 1997 fee waiver request to the Public Body.

[para. 12] On January 15, 1998, the Applicants wrote to the Public Body reiterating their request for a fee waiver based on the reasons they gave in their December 18, 1997 letter.

[para. 13] On January 19, 1998, this Office sent a letter to the Applicants on behalf of the Public Body, asking the Applicants to provide more information as to why they were requesting a fee waiver.

[para. 14] On January 28, 1998, the Applicants wrote to this Office stating they had no comments to make beyond those made at the November 27, 1997, inquiry, and in their December 18, 1997, and January 15, 1998, letters.

[para. 15] On March 24, 1998, the Public Body once again wrote to the Applicants asking for written reasons as to why they are unable to pay for the processing of the records, or to indicate how the waiver would be in the “public interest”.

[para. 16] No further information was forthcoming from the Applicants. Therefore, the Public Body decided the fee waiver issue based on the information it had received from the Applicants. On April 17, 1998, the Public Body informed the Applicants that it had decided not to grant the fee waiver.

[para. 17] On April 21, 1998, the Applicants requested I “review” their fee waiver request. Mediation was unsuccessful and the matter was set down for a written inquiry.

[para. 18] The parties submitted initial and rebuttal submissions to this Office. It should be noted that the Applicants state in their rebuttal submission that in addition to requesting a review of the Public Body’s decision not to grant a fee waiver, they would like the Commissioner to levy a fine against the Public Body under section 86.

II. RECORDS AT ISSUE

[para. 19] The records at issue consist of the 1997 Sunpine Forest Products Annual Operating Plan with approved amendments, the November 1996, Sunpine Forest Products Draft Management Plan, and other documents pertaining to the process and information used to change the Commercial Tourism and Recreational Leasing Process (CTRL) to the Alberta Tourism and Recreational Leasing Process (ATRL).

III. ISSUES

[para. 20] There are two issues in this inquiry:

- A. Did the Public Body exercise its discretion properly when it refused the Applicants' request for a fee waiver under section 87(4)?
- B. Do I have the authority to fine the Public Body under section 86(2)?

IV. DISCUSSION

Issue A: Did the Public Body exercise its discretion properly when it refused the Applicants' request for a fee waiver under section 87(4)?

[para. 21] Section 87(4) states:

(4) The head of a public body, or the Commissioner at the request of an applicant, may excuse the applicant from paying all or part of a fee if, in the opinion of the head or the Commissioner, as the case may be,

(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. 22] In Order 97-001, I stated that section 87(4) allows an applicant to either request a review of the public body's decision to refuse a fee waiver request or, alternatively, to request an independent decision from me regarding the fee waiver.

[para. 23] On April 21, 1998, the Applicants wrote to this Office requesting a review of the fee waiver. While it was clear from the wording of this letter that the Applicants wanted me to conduct an inquiry into the fee waiver issue, it was unclear whether the Applicants wanted me to review the Public Body's decision, or whether they wanted me to make an independent decision. On May 1, 1998, my Office wrote to the Applicants requesting clarification. The Applicants did not respond to this letter.

[para.24] On July 31, 1998, my Office once again wrote to the Applicants stating that the matter had been set down for inquiry and requested that the Applicants specify in their written submission whether they would like me to “review the decision made by Alberta Environmental Protection to not grant a fee waiver under section 87(4)” or “make an independent decision pursuant to section 87(4)”. This letter clearly stated the issue that would be addressed at each type of inquiry.

[para. 25] On January 11, 1999, the Applicants submitted their initial written submission to this Office. In this submission the Applicants clearly state that they “are requesting the Commissioner to reweiv [sic] the decision made by Alberta Environmental Protection...”. As such, I will proceed on this basis. This means that my mandate in this inquiry is to review whether the head of the Public Body reasonably formed an opinion under section 87(4) as to (i) whether the Applicants could not afford payment, (ii) whether for any other reason it was fair to excuse payment, or (iii) whether the record relates to a matter of public interest. In deciding this issue, I will be limited to reviewing the information and evidence that was before the Public Body at the time the Public Body made the decision to refuse the fee waiver request. I cannot review any new information and evidence that comes before me at the inquiry stage.

[para. 26] I also note that in Order 96-002, I stated that an applicant has the burden of proof in a fee waiver application because an applicant is in the best position to argue as to why a fee waiver should be granted. As such, the Applicants have the burden of proof in this inquiry.

(i) Did the Public Body reasonably form an opinion as to whether the Applicants could not afford payment of the fee waiver?

[para. 27] In Order 96-002, I stated that if an applicant requests a fee waiver on the basis of an inability to pay, the applicant should present the public body with information as to the applicant’s financial position. For example, if an applicant is on a fixed income, a pension, or a disability payment, the applicant should present this type of evidence to the public body for consideration.

[para. 28] In this inquiry, there is no evidence before me that the Applicants provided the Public Body any information regarding their ability to pay despite repeated requests by the Public Body for more information. As such, I find that Public Body reasonably formed an opinion that a fee waiver should not be granted on the basis of the Applicants’ inability to pay.

(ii) Did the Public Body reasonably form an opinion as to whether, for any other reason, it would be fair to excuse the fee waiver payment?

[para. 29] In the Applicants' submission, the Applicants state that it would be fair to excuse payment because the Public Body failed to inform them, within a reasonable period of time, of their right to submit an access request under the Act. In the Applicants' submission, the Applicants also refer to their December 18, 1997 letter to the Public Body wherein they requested a fee waiver due to their "previous circumstances" in dealing with the Public Body and, in particular, the "actions" of three Public Body employees that were "contrary to sections 9, 6 and 15".

[para. 30] Conversely, the Public Body states that it would not be fair to excuse payment.

[para. 31] The Public Body states that it did not fail in its duty to assist under section 9. The Public Body states that in responding to the request, the Public Body attempted to reduce the costs of the request and processed the fee waiver, despite the Applicants having sent the fee waiver request to my Office, and despite the Applicants' failure to respond to the Public Body's request for further information.

[para. 32] In addition, the Public Body states that it did not breach section 6. Section 6 gives an applicant the right to access records, but only if the required fees are paid. In this case, the Public Body refused to give the Applicants access to the records because the fees had neither been paid nor waived.

[para. 33] Lastly, the Public Body states it did not breach section 15. Section 15 requires a public body to withhold information from an applicant if the disclosure would be harmful to a third party's business interests. In this inquiry, the Public Body states it is not withholding information because the disclosure of records will harm a third party's business interests. Rather, the records have been withheld because the fees have neither been paid nor waived.

[para. 34] After reviewing all the submissions, I find that the Public Body's decision should be upheld.

[para. 35] As previously mentioned, my mandate in this inquiry is to review whether the Public Body exercised its discretion properly when it refused the fee waiver request. Therefore, I am limited to reviewing the evidence and information that was before the Public Body at the time the Public Body made the decision. This means that although I have

reviewed the Applicants' submission, I cannot base my decision on any new evidence or information that is included in the Applicants' submission.

[para. 36] After reviewing the evidence that the Applicants presented to the Public Body at the time the Public Body made its decision not to grant a fee waiver, it is my opinion that the Public Body reasonably formed its opinion that it would not be fair to excuse payment under section 87(4)(a). The Applicants gave the Public Body very little information regarding their reasons for a fee waiver despite repeated requests by the Public Body for more information. Most of the Applicants' arguments are found in two letters, dated December 18, 1997 and January 28, 1998. As previously mentioned, in the December 18, 1997 letter, the Applicants only make a brief reference to their "previous circumstances" in dealing with the Public Body, and in particular, the "actions of three Public Body employees that were "contrary to sections 9, 6, 15". In the January 28, 1998 letter, the Applicants only state that they are relying on the comments they made at the November 27, 1997 inquiry. Furthermore, although the Applicants state in their written submission that they had numerous verbal and written contacts with the Public Body regarding this issue, there is no evidence before me that they provided any additional information to the Public Body.

(iii) Did the Public Body reasonably form an opinion as to whether the records relate to a matter of public interest?

[para. 37] In Order 96-002, I set out two principles and a non-exhaustive list of 13 criteria for determining whether a record relates to a matter of public interest under section 87(4)(b).

[para. 38] The two principles are:

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

[para. 39] The 13 criteria are:

1. Is the applicant motivated by commercial or other private interests?
2. Will members of the public, other than the applicant benefit from disclosure? (This does not create a numbers game, however.)

3. Will the records contribute to the public understanding of an issue (that is, will they contribute to open and transparent government)?
4. Will disclosure add to public research on the operation of Government?
5. Has access been given to similar records at no cost?
6. Have there been persistent efforts by the applicant or others to obtain the records?
7. Would the records contribute to debate on or resolution of events of public interest?
8. Would the records be useful in clarifying public understanding of issues where Government has itself established that public understanding?
9. Do the records relate to a conflict between the applicant and the Government?
10. Should the public body have anticipated the need of the public to have the record?
11. How responsive has the public body been to the applicant's request? For example, were some records made available at no cost or did the public body help the applicant find other less expensive sources of information or did the public body help the applicant narrow the request so as to reduce costs?
12. Would the waiver of the fee shift an unreasonable burden of the cost from the applicant to the public body, such that there would be a significant interference with the operations of the public body, including other programs of the public body?
13. What is the probability that the applicant will disseminate the contents of the record?

[para. 40] The records consist of an Annual Operating Plan, a Draft Management Plan and other documents pertaining to the process and information used to change the Commercial Tourism and Recreational Leasing Process (CTRL) to the Alberta Tourism and Recreational Leasing Process (ATRL). After carefully reviewing these records, the submissions of both parties, and the above two principles and 13 criteria, I am unable

to find anything in these records which, in my opinion, relates to a matter of public interest.

[para. 41] Furthermore, in Order 96-002, I said that the “public” can encompass a narrow or broad group of people, and “interest” can range from individual curiosity to a collective interest or benefit. I said that “public interest” consists of balancing the weights afforded “narrow” v. “broad” range of people on the one hand, and “curiosity” v. “benefit” on the other. The broader the group of people and the greater the benefit, the greater the “public interest”.

[para. 42] While I do not dispute that the Applicants may derive some individual benefit from the records, after taking into account the arguments and evidence that were before the Public Body at the time the Public Body made its decision, I am not convinced that a sufficiently broad group of people will benefit from this information such that the records could be said to relate to a matter of public interest under section 87(4)(b). In my opinion, the Public Body reasonably formed its opinion that the records did not relate to a matter of public interest.

iv. Conclusion

[para. 43] The Public Body exercised its discretion properly when it refused the Applicants’ fee waiver request. As previously mentioned, the applicant has the burden of proof in a fee waiver application. In this inquiry, the Applicants have not met the burden of proof. I therefore confirm the fee in the Public Body’s fee estimate.

Issue B: Do I have the authority to fine the Public Body under section 86(2)?

[para. 44] The Applicants requested I levy a fine against the Public Body under section 86 for the Public Body’s alleged failure to assist the Applicants.

[para. 45] Section 86 states:

86(1) A person must not wilfully

(a) collect use or disclose personal information in violation of Part 2,

(b) make a false statement to, or mislead or attempt to mislead, the Commissioner or another person in the

performance of the duties, powers or functions of the Commissioner or other person under this Act,

(c) obstruct the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act,

(d) fail to comply with an order made by the Commissioner under section 68 or by an adjudicator under section 76(2), or

(e) destroy any records subject to this Act with the intent to evade a request for access to the records.

(2) A person who violates subsection (1) is guilty of an offence and liable to a fine of not more than \$10,000.

[para. 46] I would like to make two comments in regard to the Applicants' request.

[para. 47] First, section 86(2) imposes a fine on a person if the person wilfully does one of the things listed in subsections 86(1)(a) to (e). However, these subsections do not impose a fine for a public body's failure to assist an applicant.

[para. 48] Second, even if section 86(2) imposed a fine on a person for a failure to assist, I would not have the power to levy such a fine. My power to make an order is found in section 68. This section gives me the power to issue a number of different orders including the power to require a public body to perform a duty imposed by this Act or regulations. However, section 68 does not give me the power to levy a fine under section 86(2). Levying a fine under section 86(2) is a matter for the courts.

V. ORDER

[para. 49] For the reasons stated in this Order I find that the Public Body exercised its discretion properly when it refused the Applicants' fee waiver request under section 87(4). Therefore, under section 68(3)(c), I confirm the \$1,378.90 fee in the Public Body's fee estimate.

Robert C. Clark
Information and Privacy Commissioner