

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-033

January 18, 2001

CALGARY REGIONAL HEALTH AUTHORITY

Review Number 1880

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Summary: The Calgary Regional Health Authority refused the Applicant's request to waive a fee pursuant to section 87(4) of the *Freedom of Information and Protection of Privacy Act*. The Assistant Commissioner found that the information requested relates to a matter of public interest under section 87(4)(b) and waived the fee. However, none of the information requested currently exists in a record. The Assistant Commissioner said that a decision about whether the Calgary Regional Health Authority had a duty to create the record requested pursuant to section 9(2) would necessitate hearing further from the parties. The Assistant Commissioner set this further issue down for inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, ss. 68(3)(c) and 87(4)(b).

Authorities Cited: AB: Order 96-002; Order 96-022; Order 97-001, Order 99-012, Order 99-015, Order 99-016, Order 99-024, Order 2000-008 and Order 2000-011.

I. BACKGROUND

[Para 1.] In a letter dated September 7, 1999, the Applicant made a request to the Public Body (the "Calgary Regional Health Authority") under the *Freedom of Information and Protection of Privacy Act* (the "Act")

relating to terminations of pregnancy for congenital anomalies conducted from 1991 to 1997.

[Para 2.] The initial request from the Applicant read as follows:

According to the attached document issued by the CRHA last spring, there were 51 pregnancy terminations for congenital anomalies in 1998. We would like to know:

1. What were the numbers of terminations of pregnancy for congenital anomalies for each year from 1991 to 1997?
2. What is the gestational age by week for those cases over 24 weeks for the years 1991 to 1998?
3. For each of the years from 1991 to 1998, what was the prenatal diagnosis for each of those cases, broken down by the categories listed, that is, the diagnoses for those under 20 weeks, 20 to 24 weeks and over 24 weeks?
4. For each year, 1991 to 1998, how many of these cases were born alive, how long did each live and what specific medical treatment did each receive (oxygen, hydration, etc.)?
5. For those same years, what was the confirmed congenital anomaly after termination in each case?
6. What was the cause of death listed on the death certificate for each of the babies born alive in each of those years?

[Para 3.] In a letter dated February 28, 2000, the Public Body provided the Applicant with a fee estimate in the sum of \$19,500 for the above request. This fee estimate was provided following clarification and narrowing of the issues between the parties.

[Para 4.] The Public Body does not have a record that meets the request of the Applicant. This information would have to be compiled from various sources. The Public Body estimated that it would require four months of time and extensive involvement of medical specialists to review the estimated 475 patient charts required to gather the information requested by the Applicant.

[Para 5.] The Public Body says that the fee estimate of \$19,500.00 is partly based upon the information that could be generated by its employees conducting computer searches as well as manual chart reviews. This part of the information requested could be generated by compiling information that is contained in patient charts and by conducting computer searches.

[Para 6.] The Public Body said the fee estimate of \$19,500.00 is also

partly based upon the information that could be only be generated by hiring physicians as experts including medical specialists such as geneticists and neonatologists.

[Para 7.] In a letter dated March 31, 2000, the Applicant requested a fee waiver from the Public Body on the basis of 'public interest'. In support of this request, the Applicant said it was 'in the public interest to know how the public's health tax dollars are being used so that informed discussion can take place in the public arena'.

[Para 8.] In a letter dated April 18, 2000, the Public Body advised the Applicant that it would not grant the fee waiver. The Public Body advised the Applicant that its first priority was the allocation of funds and resources for patient care activities and that this request would be more appropriate as a research proposal because of the extensive work and outside expertise that would be required to generate the information.

[Para 9.] In a letter dated April 18, 2000, the Applicant requested that the Commissioner review the Public Body's refusal to waive the fee. In a letter dated April 20, 2000, the Commissioner authorized mediation to attempt to settle the matter.

[Para 10.] The Applicant's final request was as follows:

1. What was the number of terminations of pregnancy for congenital anomalies for each year from 1996 to 1999?
2. What is the gestational age by week for those cases over 24 weeks for the years 1996 to 1999?
3. For each of the years from 1996 to 1999, what was the recorded prenatal diagnosis for all the weeks of gestation? These results will be grouped together by prenatal diagnosis.
4. For each year, 1996 to 1999, how many of these cases were born alive, how long did these cases live based upon a grouping of time, and what treatments did these cases receive on a grouping method?
5. For those same years, 1996-1999, what was the confirmed congenital anomaly?
6. For the years from 1996 to 1999, what percentage of terminations received autopsies?

[Para 11.] The final fee estimate provided by the Public Body was \$8,289.00. This estimate was based upon the Applicant's final request, which was narrowed to all genetic terminations for 18 weeks and over that were conducted from 1996 to 1999.

[Para 12.] The parties were unable to reach a resolution. The matter was set down for a written inquiry. The Applicant and the Public Body submitted written submissions.

[Para 13.] The Public Body submitted additional attachments for its Rebuttal Submission, which were received in my office on the date of this inquiry. As this information was received after the December 6, 2000 deadline, it was returned to the Public Body. This information does not form part of the written representations of the parties before me at this inquiry.

[Para 14.] This order will proceed on the basis of the Act as it existed after the amendments to the Act came into force on May 19, 1999.

II. RECORD AT ISSUE

[Para 15.] The record requested by the Applicant does not exist. The information requested would need to be generated by the Public Body from information obtained from patient charts and judgments made by physicians. The Public Body provided me with a sample of five patient charts to assist in understanding the issues before this inquiry.

III. ISSUES

[Para 16.] The issues before this inquiry are:

Issue A: Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(b) on the basis of whether the record relates to a matter of public interest?

Issue B: Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(a) on the basis that the Applicant cannot afford the payment?

Issue C: Should the Applicant be excused from paying all or part of the fee pursuant to section 87(4) of the Act?

IV. BURDEN OF PROOF

[Para 17.] The Applicant has the burden of proof to show that the Applicant is entitled to the fee waiver. Nevertheless, I will review the Public Body's exercise of discretion in refusing the Applicant's request for a fee waiver.

V. DISCUSSION OF THE ISSUES

A. Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(b) on the basis of whether the record relates to a matter of public interest?

1. General

[Para 18.] Section 87(4) of the Act says:

(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 19.] Orders 2000-008 and 2000-011 recently considered the effect of the amendments to the Act, and specifically whether the Commissioner is limited to reviewing the decision of the public body under section 87(4) or can render a new decision. In those orders it was held that pursuant to section 68(3)(c) of the Act, the Commissioner may determine whether the public body properly exercised its discretion and may also render a new decision.

[Para 20.] In its submission, the Applicant said that a fee waiver should be granted both on the basis of public interest and on the basis of inability to pay. None of the information the Applicant has requested exists in a specific record. The information requested would need to be generated. I will decide the fee waiver issue on the basis of the subject matter of the information requested, rather than on the basis of the existence of an actual record.

2. Application of Section 87(4)(b)

[Para 21.] There are many considerations that go into determining whether to waive fees on the basis of public interest. It is not enough to just say the information relates to a matter of public interest. An applicant must provide some evidence or argument regarding what the public interest is and how the public interest would be served by releasing the information to the applicant.

[Para 22.] The issue of fee waiver on matters relating to public interest has been considered in past orders. The cardinal decision was made in Order 96-002, where the Commissioner established two general principles and a list of thirteen non-exhaustive criteria to be considered

when determining whether a record relates to a matter of public interest under section 87(4)(b) of the Act.

[Para 23.] The principles and criteria established in Order 96-002 have been cited and applied in numerous orders, for example in Order 96-022, 97-001, 99-012, 99-015, 99-016, 99-024, 2000-008 and 2000-011. There is no need to repeat those discussions here.

[Para 24.] The two principles established in Order 96-002 that I have considered are:

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

[Para 25.] The thirteen criteria established in Order 96-002 will be considered in conjunction with the arguments made by the parties as follows:

1. *Is the applicant motivated by commercial or other private interests? I have taken notice of the Applicant's activities and I find these are not commercial activities.*
2. *Will members of the public, other than the applicant, benefit from disclosure? (This does not create a numbers game, however.) It is not clear to me whether or not there would be a benefit to members of the public other than the Applicant.*
3. *Will the records contribute to the public understanding of an issue (that is, will they contribute to open and transparent government)? I find that the information would contribute to public understanding of an issue.*
4. *Will disclosure add to public research on the operation of Government? While the information is specific to a particular issue, the kind of information sought could shed light on how genetic terminations are handled by health authorities.*
5. *Has access been given to similar records at no cost? I am not certain whether access has been given to similar information at no cost.*
6. *Have there been persistent efforts by the applicant or others to obtain the records? The Applicant has made persistent efforts to obtain the information.*

7. *Would the records contribute to debate on or resolution of events of public interest?* I doubt whether this debate is capable of resolution. Knowledge of how and when genetic terminations are performed would certainly contribute to a longstanding debate.

8. *Would the records be useful in clarifying understanding of issues where Government has itself established that public understanding?* I am not certain whether the information would be useful in this respect

9. *Do the records relate to a conflict between the applicant and the Government?* This criteria does not appear to be relevant in this case.

10. *Should the public body have anticipated the need of the public to have the record?* While I am sure the Public Body is well aware of the ongoing debate between “pro-life” and “pro-choice”, I am not sure that it could be expected to anticipate the interest in this aspect of the debate. On the other hand, the issue of genetic termination has been discussed by different groups and reported in the media.

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?* The Public Body has been helpful to the Applicant. The Public Body has taken a large amount of time and effort to deal with this request.

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 significant interference with the operations of the public body, including other programs of the public body?* This is the most difficult issue before me. I agree with the Public Body that generating this information could require considerable time and resources on the part of the Public Body as well as on the part of non-employees such as physicians. However, in view of the size and resources available to the Public Body, I do not find that the waiver of this fee would shift an unreasonable burden of the cost onto the Public Body. Remember that the issue of whether records containing the information actually have to be created, has not been decided.

13. *What is the probability that the applicant will disseminate the contents of the record?* I agree with the Applicant, that it would disseminate the content of the information.

[Para 26.] The Applicant says that public interest in the information is evident as many controversial ethical and professional issues exist. The Applicant says the information would contribute to a better understanding of related issues such as discrimination against disabled individuals, the merits of pre-natal testing and termination of pregnancy for lethal and serious genetic anomalies.

[Para 27.] The Applicant says that debate continues on issues such as whether genetic terminations should be made available for reasons of serious anomalies, as opposed to lethal anomalies such as Trisomy 18. The availability of genetic terminations for non-lethal disabilities such as Downs Syndrome, omphalocele, dwarfism and spina bifida remains a difficult and contentious issue for society as a whole.

[Para 28.] At one level, these decisions are the personal and individual decision of a woman and her physician. The Applicant makes the argument that this information is a matter of broad public interest and will benefit individuals making difficult personal decisions by making more factual information available.

[Para 29.] After considering all of the available information including the two principles and the thirteen criteria and the written representations of the parties, I find that if this record existed the record would relate to a matter of public interest. I find that the Public Body did not exercise its discretion properly when deciding that the record does not relate to a matter of public interest.

[Para 30.] However, it should also be kept in mind that an access request under the Act should not be a guise to compel a public body to conduct research on behalf of an applicant.

B. Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(a) on the basis that the Applicant cannot afford the payment?

[Para 31.] Given my finding under section 87(4)(b), it is not necessary for me to consider this issue under section 87(4)(a) of the Act.

C. Should the Applicant be excused from paying all or part of the fee pursuant to section 87(4) of the Act?

[Para 32.] I find that the entire fee should be waived for such responsive records as exist.

[Para 33.] This finding immediately raises the issue of whether the Public Body has a duty to create a record or records, which do not presently

exist. I have not addressed this additional issue of whether the Public Body has a duty pursuant to section 9(2) of the Act to create the record requested.

[Para 34.] I caution the parties that my finding is restricted to the fee waiver issue. My finding is that if this record existed, the record would relate to a matter of public interest. This finding does not address whether or not the Public Body has a duty to create records that do not presently exist.

[Para 35.] I am advising the parties that I am hereby setting this additional issue down for inquiry. I have included a Notice of Inquiry in the package to the parties containing this Order. Until I decide this issue, the Public Body is not required to create any records for or to provide any records to the Applicant.

VI. ORDER

[Para 36.] Existing records, which are responsive to this request for access, relate to a matter of public interest under section 87(4)(b). I excuse the Applicant from paying the fee for such records.

[Para 37.] I do not find it necessary to decide whether the Applicant should be excused from paying the fee under section 87(4)(a) (applicant cannot afford payment).

[Para 38.] Within 50 days of receiving a copy of this Order, I should receive the written submissions of the parties on the matter of whether the Public Body is required to create records responsive to this request.

Frank Work, Q.C.
Assistant Information and Privacy Commissioner