

**ALBERTA**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**ORDER F2003-011**

June 12, 2003

**ALBERTA DEPARTMENT OF ENERGY**

Review Numbers 2568 and 2570

Office URL: <http://www.oipc.ab.ca>

**Summary:** The Applicant filed two access requests with the Department of Energy for records related to: i) the Power Purchase Arrangement auction and the development of the Arrangements (PPAs); and ii) dealings between the Department and Enron corporation. The Applicant sought a fee waiver for both requests, on the basis of an inability to pay or a public interest in the records. Commissioner Work granted a fee waiver on the basis of a public interest in the records relating to the PPAs, and reduced the fee estimate on the second access request, on the basis of the Department's argument that 33,000 of the records retrieved were not subject to the Act. Commissioner Work confirmed the adjusted fee estimate.

**Statutes Cited:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, sections 5, 72(3)(c), 93(4)(a-b); *Mines and Minerals Act*, R.S.A. 2000 c.M-17, section 50, *Natural Gas Marketing Act*, R.S.A. 2000 c. N-1, section 17.

**Orders Cited:** **AB:** Orders 96-002, 2001-015, 2001-023, 2001-036; Adjudication Order #2: *Hugh MacDonald, M.L.A. and Alberta Justice* (May 24, 2002) (Adjudicator McMahan, J.)

**I. BACKGROUND**

[para. 1.] This Order deals with two related fee waiver applications by the same Applicant, who is a Liberal Member of the Legislative Assembly.

## **Fee Waiver Application #1 (Review Number 2568)**

[para. 2.] The Applicant filed a request with the Department of Energy (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for these records:

Copies of all documents relating to the costs associated with the Power Purchase Arrangement auction and with developing the Power Purchase Arrangements, from January 1998 to June 20, 2002.

[para. 3.] The Public Body gave the Applicant a detailed fee estimate of \$3487.00, based on 9190 pages of records. The Applicant requested a fee waiver on the basis of an inability to pay or a public interest in the records. The Applicant’s argument on the inability to pay was this:

...the resources of the Official Opposition office are quite limited. The budget for the Opposition, which serves 3.1 million Albertans, pales in comparison to other representative bodies and does not allow for much discretionary spending after salaries and office costs are paid for. (Public Body submission, Tab 3)

[para. 4.] On the public interest basis, the Applicant argued:

...this request concerns a matter of public importance so great that it has continued to remain in the public consciousness for over two years now. Electricity deregulation is still debated as much now as it was two years ago, leading up to the Power Purchase Arrangement auction... One of the components of that debate has been the cost of deregulation including the PPA auction. To better inform the public debate on this issue, details of the development of the PPAs and the subsequent auction should be made public. (Public Body submission, Tab 3)

[para. 5.] After a query by the Public Body, the Applicant sent another letter expanding on his public interest arguments, using the 13 criteria to assess a public interest fee waiver application set out in Order 96-002. The Applicant’s major arguments were: he was motivated by his duties as the Official Opposition Energy Critic; he intended to share the information with the public “possibly directly and through the media”; the PPAs were a significant component of the transition to deregulation; the cost of deregulation is a component of the continuing public debate on deregulation; the issue is complex and public knowledge of deregulation and PPAs is weak, “as evidenced by both the confusion experienced by small consumers and even stakeholders.” As well, “the government itself has acknowledged a need to better address the public understanding of deregulation issues”. The need for the information ought to have been anticipated; and the request is quite specific. The Applicant claimed that similar requests in the past for records relating to matters of public interest resulted in fee waivers or reductions.

[para. 6.] The Public Body denied the request for a fee waiver, because of a “lack of evidence to support an inability to pay and insufficient evidence to support public interest in the records”. The Applicant requested a review of this decision.

## **Fee Waiver Application #2 (Review Number 2570)**

[para. 7.] The Public Body subsequently received a second access request from the Applicant for these records:

For the Period January 1, 1996 to June 24, 2002, records pertaining to Department of Energy and Enron Canada Power Corporation, Enron Canada Corporation and Enron North American Parent Corporation as follows

- correspondence including faxes, e-mails, letters
- records of telephone conversations
- memos
- post-it notes

[para. 8.] The Public Body provided a detailed fee estimate of \$15,287.54, based upon 38,646 pages of records.

[para. 9.] The Applicant then requested a fee waiver on the basis of an inability to pay or a public interest in the records. The Applicant presented the same general arguments set out earlier that the provincial Liberal Party would be unable to pay for the records. As for his public interest argument, the Applicant's point of departure was this: "...it is starting to come to light...that Enron's involvement in natural gas may have been manipulated for its benefit in the electricity industry." The Applicant's arguments included: "the purpose of this request for information is to provide for full disclosure of all dealings with the Alberta government of a company that has gone bankrupt from inappropriate business practices." The Applicant stated: "the role Enron has had in Alberta needs to be examined and debated to determine if their involvement in Alberta has any similarities to their activities in the United States". The Applicant submitted: "disclosure will also ensure that there is transparency and accountability...by ensuring that Albertans see the interaction between Enron and the Alberta government during the period when Alberta moved to a deregulated electricity industry and also made changes to the natural gas industry. The release of the documents may or may not result in a resolution of this issue, but...it will contribute greatly to the resources available on Enron's involvement in Alberta". Finally, "since the estimated cost of electricity deregulation in Alberta alone is as high as almost \$10 billion dollars, the cost of this request to the government is small".

[para. 10.] The Public Body denied the application for a fee waiver, on the basis of "insufficient evidence to support public interest in the records you have requested or justification of the burden of cost". The Applicant requested a review of this decision.

[para. 11.] At inquiry, the Public Body filed a submission and an *in camera* sample of records for each case. The Applicant did not file a submission.

## **II. PRELIMINARY ISSUE**

[para. 12.] The Public Body claims that 85% of the records (some 33,000 pages) relating to the second request (about 33,000 pages) are monthly reports and statistics pertaining to

natural gas royalties that are not subject to the Act, as the records fall within section 50 *Mines and Minerals Act*, or section 17 of the *Natural Gas Marketing Act*. These provisions each create a confidentiality scheme that is inconsistent with the general right of access created in the Act. These provisions are paramount to the Act. The Public Body's position is that by virtue of the application of these provisions, in combination with section 5 of the Act, I have no jurisdiction over the records, and they are not subject to the Act.

[para. 13.] In support of that argument, the Public Body provided me with a raw, unnumbered, unsevered sample of records *in camera*. There was no detailed information on how the Public Body arrived at its conclusion that 85% of the records it initially claimed were responsive are not actually responsive, because they are not subject to the Act.

[para. 14.] The facts of this case are distinguishable from Order 2001-036. There are two classes of records at issue (those admittedly subject to the Act and those alleged not to be). As well, the number of records is high, the evidence on the paramountcy issue is sketchy, and the Applicant may not proceed with his request after receiving this Order, which would make my decision on the paramountcy issue moot. Therefore, I will not decide this issue now. For the purpose of reviewing the calculation of the fee estimate, as part of my review of the fee waiver application, I will assume that the Public Body's argument on paramountcy is correct. However, this does not prevent the Applicant from bringing the issue to me about whether the Act applies. If requested, I will review the application of section 5 of the Act to the records if the Applicant decides to proceed with his request after receiving this Order.

### **III. ISSUES**

[para. 15.] There are two issues in this inquiry:

- A. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act, for case #2568 (Power Purchase Agreements)?
- B. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act, for case #2570 (Enron)?

### **IV. DISCUSSION OF THE ISSUES**

#### **Issue A. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act, for case #2568 (Power Purchase Agreements)?**

##### *i. The Law*

[para. 16.] The relevant provisions of section 93 of the Act state:

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

*ii. Discussion*

*a.) Inability to pay basis for fee waiver*

[para. 17.] In a fee waiver application, the burden of proof lies on the Applicant to establish an inability to pay, because the Applicant is in a better position to provide proof of his financial circumstances: Orders 96-002, 2001-015, 2001-023. In Order 2001-015, Commissioner Clark rejected the unsupported claim by the Applicant MLA that the Opposition Party had not budgeted for FOIP applications and had a reduced budget, hence an inability to pay. The Order finds that specific evidence of the financial state of the Party ought to have been provided in support of the fee waiver application. This principle was reiterated in Order 2001-023:

... in Order 96-002, I noted that a public body is not in a position to know whether an applicant can afford to pay a fee. An applicant who asks for a fee waiver must provide some financial information to the public body, such as information about annual income or expenses, so that the public body can make an informed decision about whether to waive a fee. ....

[para. 18.] The Applicant did not submit specific evidence of an inability to pay at the time of the fee waiver application, or at inquiry. Therefore, the Applicant has failed to make his case. I find that the Public Body properly refused to waive the fee on this basis.

*b.) Public interest basis for fee waiver*

[para. 19.] To summarize the relevant law on public interest-based fee waivers: there is no statutory test for determining the extent of a public interest in records for the purposes of the Act. The existence of a public interest in records can sometimes be measured against the subject to which the record pertains: Order 96-002. Many previous Orders have established that the extent of a public interest in records is not a black and white issue, but is instead a matter of degree. As stated in Order 2001-023:

Whether there is a public interest in records depends on balancing the weight that should be given to ‘curiosity’ versus ‘benefit’ when considering ‘interest,’ and ‘broad’ versus ‘narrow’ when considering ‘public.’ A request that relates to a matter of broad public benefit is more likely to be a matter of public interest. A request that arises from narrow personal curiosity is least likely to be a matter of public interest.

Order 96-002 established two overriding principles and 13 non-exhaustive criteria to help assess whether records relate to a matter of public interest in the context of a fee waiver. These 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 seeking records should pay. The 13 criteria identified in Order 96-002 are these:

1. Is the Applicant motivated by commercial or other private interests?
2. Will members of the public, other than the Applicant, benefit from disclosure?
3. Will the records contribute to the public understanding of an issue (that is, 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 the 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 public need to have the record?
11. How responsive has the public body been to the Applicant's request? Were some records made available at no cost, or did the public body help the Applicant find other less expensive sources of information, or assist in narrowing 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 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. 20.] In Adjudication Order #2: *Hugh MacDonald, M.L.A. and Alberta Justice* (May 24, 2002) (Adjudicator McMahon, J.), the Adjudicator suggested that the principle of open and transparent government, discussed above, included a consideration of accountability. I agree with him.

[para. 21.] Order 2001-23 makes the point that the burden of proving a public interest in the records does not lie exclusively upon an applicant:

.... Section 87(4)(b) does not ask that a particular party bear the burden of proving a public interest in the record. Rather, it requires the head of a public body to form a proper opinion about whether the record itself relates to a matter of public interest, and then decide whether to excuse the applicant from paying all or part of a fee. An applicant

could fail to independently establish a public interest in the records sought, but the head of a public body could nonetheless look to all of the relevant facts and circumstances, the principles and objects of the Act, and exercise his or her discretion to find a public interest in the records under section 87(4)(b).

[para. 22.] The Public Body admits that the Applicant is not motivated by commercial or private interests. The Public Body accepts that the Applicant is acting on behalf of the public and will likely disseminate the contents of the records. There is no conflict between him and the government. However, the Public Body does not concede the existence of a continuing public debate or interest in the matter. The Public Body submits:

[a]bsent public importance, combined with [the] significant amount of information already publicly available, it is not likely that the disclosures of the requested information would benefit the public contribute to the public understanding of an issue, add to public research on the operation of government, contribute to a debate on or resolution of events of public interest or promote the principles...of fostering open and transparent government. (Public Body submission, para. 35.)

[para. 23.] The Public Body argues that it is up to the Applicant to establish that there is a public interest in the matter, failing which his application amounts to a matter of mere curiosity. The Public Body says, but does not submit persuasive evidence, that it has disseminated information about the costs the government incurred to prepare for deregulation. It argues, weakly in my view, that it has already filed or disseminated information about deregulation, and “the degree of public importance attached to electricity deregulation ... may not necessarily attach equally to the developmental costs of the initiative.”

[para. 24.] I find that the Applicant is asking for these records in his capacity as a MLA. The probability that he will disseminate the contents of the records is high. I do not agree that the Applicant’s request is motivated by narrow curiosity. It reflects a broad interest in the process and the costs of electrical deregulation in Alberta. The auctioning of Power Purchase Arrangements was part of restructuring the electrical industry and moving towards deregulation. It is common knowledge that the debate about the true cost of deregulation continues, fueled by consumer and business concern over increased monthly power bills that have been part of the transition to a less-regulated environment. There is a strong likelihood that members of the public will benefit from this disclosure. The records will contribute to clarifying or establishing a public understanding of the issue, and public debate on the issue; and disclosure of the records will add to public research on the operation of government. Disclosure of the records will promote government openness, transparency and accountability. The waiver will not shift an unreasonable burden of cost from the Applicant to the Public Body.

[para. 25.] On balance, the evidence and arguments weigh in favour of a granting a fee waiver on the basis of a compelling public interest in the records. I will excuse the Applicant from paying a fee for obtaining records responsive to this request.

**Issue B. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) [previously section 87(4)] of the Act for Case #2570 (Enron)?**

*i.) Calculation of the Fee Estimate*

[para. 26.] The Public Body's calculation of the fee estimate included the costs of locating and retrieving the records; preparing the records for disclosure; duplicating the records to be disclosed; and shipping them. As the Public Body is of the view that 33,000 pages of records are not subject to the Act, the fee estimate should have been adjusted to reflect that 33,000 pages of records retrieved were not subject to the Act. Therefore, these pages would not need to be duplicated for the purposes of disclosure to the Applicant. The fee estimate for duplicating records is listed as 25 cents per page x 38,646 pages of records (\$9661.50). Following the Public Body's argument, the estimate for duplicating records ought to have been calculated at 25 cents per page x 5,646 pages of records (\$1411.50). Making this adjustment, the fee estimate would be reduced from \$15,287.54 to \$7037.54. The cost of copying was the only hard cost in the fee estimate. In this case, as it was unclear to what lengths the Public Body would need to go to retrieve and process the remaining records, I decided against reducing other components of the fee estimate.

*i. Inability to pay basis for fee waiver*

[para. 27.] The law on this issue is set out at paragraph 17 of this Order.

[para. 28.] The Public Body argues that an Applicant must provide sufficient information to allow the head of the public body to make an informed and objective decision. The burden is on the Applicant to provide evidence of an inability to pay. The Applicant presented no evidence supporting his argument that the Provincial Liberal Party was unable to pay for the records.

[para. 29.] The Applicant did not submit evidence of an inability to pay at the time of the fee waiver application, or at inquiry. Therefore, in my opinion, the Applicant has failed to make his case, and the Public Body properly refused to waive the fee on this basis.

*ii. Public interest basis for fee waiver*

[para. 30.] The law on this issue is set out at paragraphs 19 to 21 of this Order.

[para. 31.] The Public Body argues that Enron Canada Corp. ("Enron Canada") operated independently of its affiliates, including its United States parent corporation, during the time that Enron Canada was active in Alberta's electricity and natural gas markets. It submitted part of an affidavit of P. Robson Milnthorp, President, Chief Executive Officer and Managing Director of Enron Canada, in support of that argument. In the affidavit, Milnthorp deposes that his corporation operates independently of its affiliates, including

its parent corporation. He also deposed that Enron Canada was solvent in late November 2001, when its American indirect parent corporation was in financial distress.

[para. 32.] The Public Body argues that the Applicant has not established that public interest and concern extends to Enron's activities in Alberta's electricity and gas markets. The request is more simple individual curiosity than a broad matter of public interest, and the curiosity is speculative:

The Applicant does not want to obtain information that relates to a matter of public interest, but rather he wants to determine if a matter of public interest exists, that is, to determine if Enron's involvement in Alberta has any similarities to the company's activities in the United States. Given the significant differences between the Alberta and United States situations, ADO submits that this request amounts to an unrealistic and unfounded attempt at a citizen audit of government operations. (Public Body submission, para. 59)

[para. 33.] I find that the Applicant is asking for these records in his capacity as a MLA. The probability that he will disseminate the contents of the records is high. However, I agree that the Applicant's request is motivated by a narrow curiosity and there is insufficient public interest in the subject matter of the records. The Applicant's request is, as he admits, exploratory: it is intended to determine if a matter of public interest may exist. It does not reflect a broad interest in dealings between Enron and the Department. Members of the public would not benefit greatly from the disclosure. The records would not contribute to public debate on the issue or add much to public research on the operation of government. There was no evidence that others have tried to get this information. The waiver would shift an unreasonable burden of cost from the Applicant to the Public Body. Disclosure of the records in the circumstances would not make a significant contribution towards promoting transparency and accountability in government. On balance, the evidence and arguments do not weigh in favour of granting a fee waiver on the basis of a compelling public interest in the records. I will not excuse the Applicant from paying the adjusted fee.

## **V. ORDER**

[para. 34.] I make the following order under section 72(3)(c) of the Act.

[para. 35.] On Issue A, I find that there is a public interest in the records. I order the Public Body to waive the fees associated with the request and process the request at no cost.

[para. 36.] On Issue B, I find that the fee estimate was erroneously calculated, and ought to be reduced to \$7037.54. I deny the Applicant's request for a fee waiver on the basis of inability to pay or public interest in the records. I confirm the adjusted fee estimate.

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