

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-020

August 7, 2007

ALBERTA FINANCE

Case File Number 3674

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

Summary: The Applicant, a staff writer with The Edmonton Journal, made an access request to Alberta Finance under the *Freedom of Information and Protection of Privacy Act*. The access request was for information related to any security issues or errors which were made in regard to the \$400 resource rebate payments issued by the Alberta Government.

Alberta Finance estimated the fees for service to be \$767.50. Upon receipt of the fee estimate, the Applicant requested a waiver of the fees pursuant to section 93 on the basis that the records related to a matter of public interest. Alberta Finance did not grant the fee waiver.

The Adjudicator held that the requested records related to a matter of public interest and fell within section 93(4)(b) of the Act. The Adjudicator ordered the fee to be reduced to zero.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72(3)(c), 93.

Orders Cited: AB: 96-002, 2000-008, 2000-011, 2001-023, F2005-022, F2006-032, Adjudication Order #2.

I. BACKGROUND

[para 1] On February 28, 2006, Alberta Finance (the “Public Body”) received an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) from the Applicant, a staff writer at The Edmonton Journal. The Applicant requested access to records related to any security issues or errors which were made in regard to the \$400 resource rebate payments issued by the Alberta Government. The Applicant subsequently clarified that she would like access to records which pertain to the precautions taken to ensure cheques were issued to the appropriate persons at the correct addresses, the methods implemented to ensure secure distribution, the steps taken to prevent cheques from being stolen from mailboxes and the security breaches or loss after the cheques were delivered. The Applicant also stated that she would like access to records that document any errors, including information regarding cheques which were issued to persons who have not lived in Alberta or cheques which were issued to deceased persons.

[para 2] The access request was for information from December 1, 2005 to February 24, 2006.

[para 3] On March 16, 2006, the Public Body responded to the request by providing the Applicant with a fee estimate of \$767.50.

[para 4] On April 5, 2006, the Public Body received a letter from the Applicant requesting a fee waiver pursuant to section 93 of the Act. The Applicant requested the fee waiver on the basis that the records relate to a matter of public interest.

[para 5] The Public Body did not grant the fee waiver.

[para 6] On May 9, 2006 the Applicant requested a review of the Public Body’s decision. The matter was set down for a written inquiry.

[para 7] The Public Body and the Applicant each submitted an initial and a rebuttal submission.

II. PRELIMINARY ISSUE: Do I have the authority to address a new fee waiver request on grounds that were first raised in the Applicant’s rebuttal?

[para 8] In the Applicant’s rebuttal, the Applicant requests that I order the Public Body to refund the Applicant’s initial \$25 application fee on the basis that it would be

fair to refund the fee under section 93(4)(a) of the Act. The Applicant cites a number of reasons as to why she believes it would be fair to refund the initial application fee.

[para 9] In Orders 96-002, 2000-008 and 2000-011, this Office held that an Applicant cannot apply directly to the Commissioner for a fee waiver. Those Orders held that an Applicant must first obtain a decision from the head of the public body before requesting an inquiry by the Commissioner.

[para 10] In this inquiry, the Applicant first made a request for a refund of the initial application fee in her rebuttal submission. The Applicant did not request the refund of the initial application fee at the time that she requested a waiver of the service fees. As such, the Public Body has not made a decision whether to refund the \$25 application fee on the grounds of fairness and I have no jurisdiction to address the new fee waiver request which was made by the Applicant.

III. ISSUE

[para 11] The issue in this inquiry is as follows: Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?

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

[para 12] Section 93(4)(b) states that a public body may excuse an applicant from paying a fee if the record relates to a matter of public interest. Section 93(4)(b) reads:

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,

...

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

[para 13] In Order 2001-023, the former Commissioner held that an applicant and a public body share the burden of proof under this section. In that Order the former Commissioner said:

... Section 87(4)(b) [now section 93(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) [now section 93(4)(b)].

[para 14] In Order 96-002, the former Commissioner also 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. 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 seeking records should pay. In Adjudication Order #2, Justice McMahon added “accountable” to the first principle, revising it to read “to foster open, transparent and accountable government.”

[para 15] In Order F2006-032, Adjudicator Gauk revised the 13 criteria to create clearer and more discrete categories. The revised public interest criteria referred to by Adjudicator Gauk are as follows:

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?

[para 16] Neither party specifically referred to the criteria in the revised format. However, Order F2006-032 was issued before this inquiry and, as such, was available to the parties prior to this inquiry. As such, in coming to my determination I have applied

the revised criteria. I have, nevertheless, taken into account the arguments of the parties in so far as they would apply to the new format.

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?

[para 17] In Order F2006-032, Adjudicator Gauk held that a relevant consideration under this criterion is whether individuals, other than the applicant, have sought or expressed an interest in the records. In addition, Adjudicator Gauk held that another relevant consideration under this criterion is whether there are other indicators that the public has or would have an interest in the records.

[para 18] I find that the first consideration under this criterion is not fulfilled. The Applicant did not provide any evidence that other individuals have sought or expressed an interest in the records. In the Public Body's submission, the Public Body confirms that the Applicant is the only individual to have submitted a FOIP request for records related to the resource rebate program.

[para 19] However, after a review of the records and the submissions, I find that there are other indicators that the public has, or would have, an interest in the records. In coming to my conclusion, I took into account the uniqueness of the program, the dollars involved in the program and the alleged errors that occurred. According to the Applicant's submission, the Resource Rebate program involved \$1.4 billion dollars of Alberta taxpayers' money and resulted in a number of errors. These errors included issuing cheques to people who have not lived in Alberta. According to the Applicant, in January 2007, the Canada Revenue Agency (CRA) reported that as many as 500 non-Albertans had yet to return cheques that were sent to them in error. Although the Public Body countered the Applicant's argument by stating that only a "limited number" of individuals who received cheques in error came forward publicly, the Public Body did not dispute the Applicant's assertions regarding the dollars involved in the program, the alleged errors or the number of cheques that have yet to be returned.

[para 20] The Public Body also argues that it is difficult to understand how the public would benefit from the information at issue, given that "all salient material" regarding this issue has already been disclosed to the public through numerous media releases. The Public Body states that the public's need for information was met by the Alberta Government news releases, the Alberta Finance and CRA websites and by the toll free lines which were established for the public.

[para 21] I have reviewed the information sources which were included in the Public Body's submission. The information provided in those sources focused on who was eligible for the payments, how to apply and what steps Albertans should take if they did not receive their cheques. Those information sources did not address the information that was requested by the Applicant. Those information sources did not address security issues and errors related to the resource rebate program.

[para 22] In the Public Body's submission, the Public Body also refers to the fact that the CRA was involved in the administration of the resource rebates. The Public Body states that it was the CRA that had the legal authority and mandate to maintain its tax roll, determine eligibility and recover any errant cheques from ineligible recipients. The Public Body states that if the CRA issued resource rebate cheques to ineligible individuals, their audit processes would be relied on to identify the error and their statutory powers would be sufficient to recover any monies owing to the Province of Alberta.

[para 23] It is clear that the CRA was involved in the administration of this program. However, this does not directly impact on my decision under this criterion. The Applicant requested information responsive to the access request that was in the Public Body's custody and control. In determining whether a fee waiver fulfills this criterion, it does not matter whether the information involves the activities of another entity such as the CRA. The question that I have to determine under this criterion is whether the information, in or of itself, would contribute to public understanding of a matter at issue that is of concern to the public or a sector of the public.

para 24] After taking into account all of the relevant factors, I find that the records would contribute to the public understanding of a matter or issue that is of concern to the public or a sector of the public. I find that this criterion weighs in favour of a finding that the records relate to a matter of public interest.

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?

[para 25] In Order F2006-032, Adjudicator Gauk held that a relevant consideration under this criterion is whether the records relate to a conflict between the Applicant and the Government. In addition, Adjudicator Gauk held another relevant consideration is whether it is likely that the applicant will disseminate the contents of the records.

[para 26] The Applicant submits that the records do not relate to a conflict between the Applicant and the Government and that she will not gain financially from the request. The Applicant also states that she intends to disseminate the contents of the records by publishing the information in The Edmonton Journal. The Applicant states that The Edmonton Journal sells approximately 135,000 papers every day and attracts thousands of visitors to their web site daily. The Applicant states that The Edmonton Journal's news stories are also often picked up by the Canwest chain and distributed across Alberta and Canada.

[para 27] The Public Body concedes that the matter does not relate to a conflict between the Applicant and the government. However, that Public Body states that the role of a reporter is to increase the readership/ viewership of their employer and, by doing so, advance their own personal career. The Public Body also states that the Applicant has not clearly indicated whether she will disseminate the contents of the records. In the

Applicant's request for a fee waiver, the Applicant stated that she would "likely" disseminate the contents of the records. In the Applicant's submissions to this Office, the Applicant later stated that she will publish the contents of the records. The Public Body further states that I should only take into account the Applicant's earlier statement, as that statement was the only information available to the Public Body at the time it made the decision to refuse the fee waiver.

[para 28] After a review of the records and submissions, I find that the records do not relate to a conflict between the Applicant and the Government. In addition, I do not find that the Applicant's primary purpose in making the request was to advance her own private interest. In Adjudication Order #2, Justice T.F. McMahon addressed a similar argument regarding the commercial interests of a print media applicant:

Alberta Justice also argues that this request is about selling advertising and "whether the applicant can turn a profit". That argument characterizes a free and independent press at its basest level. The media, in my view, has a higher role to play. Absent proof of overriding self-interest, I decline to reduce respected print media to this level, or to dismiss its attempts to bring accountability to government management of public funds, as merely an effort to sell advertising.

[para 29] In Order F2005-022, Adjudicator Bell elaborated on Justice McMahon's comments and emphasized the role media play in furthering the public good. He, however, cautioned that each request for a fee waiver on the basis of public interest must be addressed on the specific facts of the case. Public interest and not public curiosity should be the standard with which media should approach fee waiver requests.

[para 30] I also accept the Applicant's submission that it is her intention to publish the information in the records. Although it appears that the Applicant's resolve to publish the information has strengthened since the fee waiver request was first made, I accept that at the present time her intention is as stated. In addition, pursuant to the reasons found in Orders 2000-008 and 2000-011, I find that the Act permits me to make a "fresh decision". This means that, in coming to my determination, I may consider all information and evidence before me at the date of inquiry, including information and evidence that was not available to the Public Body at the time of its decision regarding the fee waiver.

[para 31] After taking into account all of the relevant factors under this criterion, I find that the Applicant, in making the access request, was motivated by a concern on behalf of the public, or a sector of the public. I find that this criterion weighs in favour of a finding that the records relate to a matter of public interest.

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

[para 32] In Order F2006-032, Adjudicator Gauk held that the following three considerations are relevant to this criterion:

- 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 has been called into question?

[para 33] After a review of the records and the submissions before me, I do not find that the first consideration is fulfilled. I do not find that the records contain information that show how the Government of Alberta or a public body reached or will reach a decision. The information at issue in this inquiry does not focus on how a decision regarding the resource rebates was made or will be made, but rather on the security breaches and errors that were made in the process of carrying out that program.

[para 34] However, I find that the other two considerations under this criterion are fulfilled. I find that the disclosure of the records is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny. I also find that the records shed light on an activity of the Government of Alberta or a public body that has been called into question. As previously mentioned, according to the Applicant's submission, which was not disputed by the Public Body, the resource rebate program involved over one billion dollars and resulted in a number of errors including the issuance of cheques to people who had not lived in Alberta.

[para 35] I note that my decision should not be taken to mean that every error made by, or attributed to, a public body will result in the corresponding records fulfilling this criterion. However, in this case, the uniqueness of the program, the size of the dollars involved and the number and type of errors involved suggest that a disclosure is desirable for subjecting the activities of the Government of Alberta or the public body to scrutiny and will provide further information on an activity of the Government of Alberta or a public body that has been called into question.

[para 36] As previously mentioned, the Public Body states that the public's need for information was met by the Alberta Government news releases, the Alberta Finance and CRA websites and the toll free lines which were established. For the reasons previously mentioned, I do not find that those information sources provided sufficient openness, transparency and accountability regarding this issue.

[para 37] In summary, after taking into account all of the relevant considerations under this criterion, I find the records are about the functioning of the Government of Alberta and will contribute to an open, transparent and accountable government. I find

that this criterion weighs in favour of a finding that the records relate to a matter of public interest.

4. Conclusion

[para 38] After weighing all of the above criteria, I find that the requested records relate to a matter of public interest and fall within section 93(4)(b) of the Act. I have considered the extent to which the fee should be reduced. In the circumstances, I find that the fee should be reduced from \$767.50 to zero.

V. ORDER

[para 39] I make the following Order under section 72(3)(c) of the Act.

[para 40] I order the Public Body to reduce the fee for responding to the Applicant's access request from \$767.50 to zero. I order the Public Body to notify me within 50 days of receiving a copy of this Order that it has complied with its terms.

Lisa McAmmond
Adjudicator