

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2007-023

January 10, 2008

CAPITAL HEALTH

Review Number F3793

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Summary: The Applicant requested a fee waiver for a continuing access request, which was denied by Capital Health ("Public Body") under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP"). The Applicant asked to be excused from paying the fee, saying the information is important to bring closure to outstanding concerns between the parties that are protracted and longstanding issues, pursuant to Order 2001-042.

The Adjudicator found that the Public Body reasonably formed the opinion that none of the three criteria apply that allow a public body to grant a fee waiver (inability to pay, fairness and public interest), properly exercised its discretion when deciding to refuse, and therefore, properly applied sections 93(4)(a) and 93(4)(b) of FOIP. She confirmed the Public Body's decision to deny the fee waiver and found that the Applicant should not be excused from paying all or part of the fee under section 93(4) of FOIP.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 71, 72, 72(3)(c), 93, 93(4), 93(4)(a) and 93(4)(b).

Orders Cited: AB: Orders F2007-020, F2007-010, F2007-004, F2006-032, F2006-027, F2006-001, F2005-022, F2005-006, F2004-026, F2003-011, OIPC External Adjudication Order #2 (May 24, 2002) Justice McMahon, 2001-042, 2001-023, 2000-008, 99-016, 97-001, 96-022 and 96-002.

I. BACKGROUND

[para 1] In a request dated June 15, 2006, the Applicant made a continuing access request to Capital Health ("Public Body") under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP"), as follows:

This is a continuing request for two years, pursuant to Section 9 of the *Freedom of Information and Protection of Privacy Act*. I request all records as defined by Section 1(q) of the Act relating to Capital Health Access to Information Request [file number], including all records related to reviews and/or court proceedings that may arise as a result of that request. Note that I am interested in all records, including communication with other departments and public bodies.

[para 2] On June 26, 2006, the Public Body received the Applicant's request. The Applicant paid the \$50.00 initial fee for the continuing request. The \$50.00 initial fee is *not* at issue at the Inquiry. On July 12, 2006, the Public Body granted the continuing request and provided a schedule for disclosing the records every six months, to include records from April 1, 2005 onwards. On July 13, 2006, the Applicant requested that the records be provided on a quarterly basis and she clarified the access request, as follows:

You are correct in stating that I am interested in records related to the processing of request [file number], your review file [file number] and the OIPC file #F3473 and that I am seeking "records related to the review of our access to information file." However, to be clear, my request is much broader: I am seeking access to all internal records, as defined by section 1(q) of the Act, related to the processing of the request, from initiation to July 2008. This includes - **but is not exclusive to** - all records relating to the initial processing of the request, records generated in mediation and records generated as part of any review, internal or external, as well as records generated by other public bodies and in the custody of Capital Health. I am unaware of any "investigation" into my access request, so that word is not applicable. However, if an investigation is eventually launched, the request would include any records available to me under the Act in relation to that investigation.

[para 3] In a letter dated July 20, 2006, the Public Body agreed to provide the records on a quarterly basis and provided a revised schedule. On July 21, 2006, the Public Body provided the Applicant with a fee estimate of \$367.00 for completion of the continuing request, which included searching for records, locating and retrieving records and producing copies. On July 28, 2006, the Applicant narrowed the request and the Public Body reduced the fee estimate to \$168.00, which is the fee that *is* at issue at the Inquiry.

[para 4] In a letter dated July 28, 2006, the Applicant paid the \$168.00, saying:

I have enclosed a cheque for \$168 so processing can continue on schedule. However, I believe Capital Health should wave [sic] the fee because the information requested is important to bring closure to issues and concerns that have been outstanding between the public body and the applicant for a long time, pursuant to IPC Order 2001-042.

[para 5] The Public Body interpreted the Applicant's letter as a request to waive the fee. In a letter dated August 10, 2006, the Public Body advised the Applicant that the request for a fee waiver was denied. The Applicant requested a review of the Public Body's decision, but the Applicant was not satisfied with the mediation authorized.

[para 6] The matter was set down for a written inquiry. The Information and Privacy Commissioner, Frank Work (the "Commissioner"), delegated me to hear the Inquiry. At the Inquiry, both parties submitted written initial submissions and the Applicant provided a written rebuttal submission, all of which were exchanged between the parties.

II. RECORDS/INFORMATION

[para 7] The matter before the Inquiry is whether the fee should be waived, so there are no records at issue in the usual sense. The Applicant describes the record that is the subject of the request for the fee waiver as, "documents that track the processing of an access to information request," and in particular, as:

The records at issue here are internal records related to the Public Body's processing of a separate request under the Act. That separate request is the subject of IPC Case [file number], in which the records at issue are electronic records related to the restaurant inspection program operated by the Public Body.

III. INQUIRY ISSUE

[para 8] The issue in the Notice of Inquiry is:

- ISSUE: Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of FOIP?

IV. DISCUSSION OF INQUIRY ISSUE

ISSUE: SHOULD THE APPLICANT BE EXCUSED FROM PAYING ALL OR PART OF A FEE, AS PROVIDED BY SECTION 93(4) OF FOIP?

Legislation

[para 9] Section 93(4) 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,

(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 10] In this Order, references to the sections of legislation are to be read as references to FOIP, unless otherwise indicated. Additionally in this Order, the references to “inability to pay” are to be read as where an applicant cannot afford to pay; references to “fairness” are to be read as where for any other reason it is fair to excuse payment and references to “public safety” are to be read as where the record relates to a matter of public interest, including the environment or public health or safety.

Criteria

[para 11] A public body is allowed to waive a fee when one or more of the following criteria are met:

- Where an applicant cannot afford to pay,
- Where for any other reason it is fair to excuse payment, or,
- Where the record relates to a matter of public interest, including the environment or public health or safety (Order 2001-042 (para 15), 2000-008 (para 21)).

Argument

[para 12] The Public Body takes the position that none of the fee waiver criteria in section 93(4) apply, and as none of the criteria were met that allow the Public Body to waive the fee, it was justified in refusing to excuse payment of the fee. When requesting the fee waiver, the Applicant did not specify which one of the criteria the request was intended to fall under, so the Public Body says that it addressed the request under all three criteria. In its initial written submission, the Public Body states:

At no time did the Applicant allege that she could not afford the fee or that there was some equitable or other reason to excuse payment of the fee. ... Capital Health submits that the Applicant should not be excused from paying the fee of \$168.00, given the circumstances and the principles of the Act. Capital Health’s opinion that the records in issue do not relate to a matter of public interest is a reasonable one.

[para 13] The Applicant requested the fee waiver, saying “the information is important to bring closure to issues and concerns that have been outstanding between the public body and the applicant for a long time, pursuant to IPC Order 2001-042.” In her written initial submission, the Applicant says that both section 93(4)(a) and section 93(4)(b) apply. For that reason, I will consider the Applicant’s request under all three of the criteria under section 93(4) of FOIP.

Burden of proof

[para 14] The burden of proof for issues arising under FOIP is set out in section 71. However, section 71 is silent about burden of proof for fee waivers under section 93(4). When FOIP is silent, the burden is to be decided on a case-by-case basis in light of which party raised the issue and which party is in the best position to address the matter at issue. Orders issued from this Office have established burden of proof for fee waivers under section 93(4) of FOIP.

[para 15] Where an applicant requests a fee waiver under section 93(4)(a) of FOIP, the applicant has the burden of proof. An applicant has the burden because the applicant raised the issue and is in the best position to know and to address matters pertaining to their own financial circumstances and the reasons they assert it is fair to excuse payment (Order F2007-010 (para 11)), F2003-011, 2001-042 (para 19), 2001-023 (para 3)).

[para 16] An applicant has the burden of proof for the criteria of inability to pay and fairness under section 93(4)(a) of FOIP, as follows:

As stated, I am of the view that it would be difficult, if not impossible, for the public body to put forward the grounds upon which an applicant seeks relief from the payment of fees. The applicant will be in the best position to argue why the applicant cannot afford the payment; why it is fair to excuse the applicant from payment; or why it is in the public interest to excuse payment. These are the grounds for excusing payment stipulated in section 87(4), and it is only on the basis of one of these that payment can be excused. Therefore, the burden of proof in section 87(4) [now 93(4)] must be borne by the applicant. This situation is distinct from those cases under section 67 where it is the public body which has precipitated the issue by making a decision not to give access. In that case, the public body knows why it has refused access and is called upon to justify the refusal (Order 96-002 (page 11)).

[para 17] The extent of the argument required from an applicant to discharge the burden of proof under section 93(4)(a) is:

First, with respect to whether the applicant can afford the payment, the applicant should present information as to his financial position, such as income and expenses. I will not comment on the extent to which this should be documented. If the applicant is on a fixed income, pension, disability payment and so on, that should be presented for consideration.

Second, as to other reasons it is fair to excuse, the applicant must give the head of the public body enough of an explanation to allow the head to make an informed and reasonable decision. The applicant must remember that the head of the public body is accountable for the use of public resources (Order 96-002 (page 14)).

[para 18] The parties share the burden of proof for the criteria of public interest under section 93(4)(b) of FOIP. The Public Body cites the following description of the shared burden:

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)] (Order 2001-023 (para 29)).

[para 19] The burden of proof to show that the record is a matter of public interest, with the consequence that the normal fee schedule is set aside, is a difficult burden to discharge. Justice McMahon, in OIPC External Adjudication Order #2 (May 24, 2002) stated:

I emphasize that the burden of proving a public interest in [sic] an onerous one. It will neither be frequently nor easily met. It has been met here in the unique circumstances of this case (para 73).

Exercise of discretion

[para 20] Section 93(4) of FOIP is a “may” or discretionary provision. This means that if, in the opinion of a public body, section 93(4) applies, a public body *may* waive the fee. However, even if section 93(4) applies, a public body has the choice of whether or not to grant or refuse the request for the fee waiver. In other words, a public body may still choose to grant a fee waiver even if one of the criteria under section 93(4) applies.

[para 21] The proper exercise of discretion means that on a case-by-case basis, the public body must consider the objects and purposes of FOIP and the specific provision and balance this with the applicant’s right to information (Order F2006-027 (paras 39, 52), Order F2007-004 (paras 18-21), Order F2004-026 (para 46)). When properly exercising its discretion a public body must give each applicant individual consideration and consider all relevant facts and circumstances and must not exercise its discretion for an improper or irrelevant purpose or improperly exercise its discretion in any way.

[para 22] A public body’s discretion must not be fettered, such as by arbitrarily or uniformly following a policy to deny fee waivers (Order 2006-001 (paras 14-17)). In order to properly apply section 93(4) of FOIP, a public body must not only reasonably form an opinion about whether the situation falls within section 93(4), but must also properly exercise its discretion when deciding whether to refuse a fee waiver in the particular circumstances (Order 2001-023 (para 29)).

Fresh decision

[para 23] When deciding whether a public body has properly refused to grant a fee waiver, the decision-maker must look at all of the circumstances, information and

evidence that exists at the time when the Public Body denied the fee waiver and also at the time of the inquiry (Order 2001-042 (para 19)). A decision-maker may consider all information and evidence at the inquiry, even if that information and evidence was not available to the public body at the time it made its fee waiver decision.

[para 24] Section 72 of FOIP does not merely authorize the decision-maker to confirm a public body's decision or to require a public body to reconsider its own decision. Section 72(3)(c) of FOIP gives decision-makers the authority to render their own decision about whether to waive all or part of the fee or to order a refund. Under section 72(3)(c), the decision-maker has the authority to hear the case "de novo" as a new proceeding and to make a "fresh decision" (Order F2007-020 (para 30), OIPC External Adjudication Order #2 (May 24, 2002) Justice McMahon (para 45), Order 2001-023 (para 32)).

[para 25] I must review a public body's decision on a case-by-case basis, and consider all of the information before me. Therefore, if I reach a different conclusion than a public body and find that a fee should be reduced or completely waived, I may make a "fresh decision" and substitute my own decision for the public body's decision. However, if I reach the conclusion that a public body properly applied section 93(4) when denying a fee waiver, I may confirm that decision.

New framework

[para 26] A new framework for the factors that may be relevant to consider and weigh, when determining fairness and public interest for fee waivers, was issued from the Office on March 2, 2007 in Order F2006-032 (paras 43-44). Although the substance of the new and old framework is similar, the new framework is organized in a more succinct fashion. I note that Order F2006-032 was issued about three months before the Public Body received the Notice of Inquiry on June 14, 2007.

[para 27] This Order reviews the Public Body's decision when it refused to grant the Applicant's request for a fee waiver. The Public Body communicated the refusal to the Applicant in its letter dated August 10, 2006. The Public Body's decision to refuse the fee waiver and the subsequent mediation was based on the old framework. The submissions of the parties at the Inquiry were based on the old framework.

[para 28] For all of these reasons, this Order will address the criteria for fee waivers under the old framework. For ease of reference, this Order provides both the old and the new framework in Appendices A and B.

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

[para 29] A public body "may" excuse an applicant from paying all or part of a fee if, in the opinion of the head, the applicant cannot afford the payment ("inability to

pay”) or if there are any other reasons that it is fair to excuse payment (“fairness”) (section 93(4)(a) of FOIP).

Inability to pay

[para 30] The Public Body says that, in its opinion, the criterion of inability to pay does not apply to allow a fee waiver in the circumstances of this case. The Applicant did not specify which of the three criteria applied to the request for the fee waiver that was made to the Public Body in the letter of July 28, 2006. The Applicant did not provide any information or evidence about the inability to pay either at the time of making the request or at the time of the Inquiry. Therefore in my view, the Applicant has not discharged the burden of proof to show inability to pay under section 93(4)(a) of FOIP (Order F2005-006 (para 18)).

[para 31] I find that the Public Body reasonably formed the opinion that in the circumstances of this case the criterion of inability to pay does not apply, properly exercised its discretion when refusing, and therefore, properly applied section 93(4)(a) of FOIP when refusing to grant the request for a fee waiver. For these reasons, I intend to confirm the decision of the Public Body and to find that the Applicant should not be excused from paying all or part of the fee on the basis of inability to pay under section 93(4)(a) of FOIP.

Fairness

[para 32] The Public Body says that, in its opinion, the criterion of fairness does not apply to allow a fee waiver in the circumstances of this case. In its written submission, the Public Body says that when requesting the fee to be excused the Applicant did not allege that there was some “equitable or other reason to excuse payment of the fee.” I have said that the Applicant did not specify which of the three criteria applied to the request for the fee waiver that was made to the Public Body in the letter of July 28, 2006.

[para 33] The reason that the Applicant gave to the Public Body for requesting the fee waiver was the “information requested is important to bring closure to issues and concerns that have been outstanding between the public body and the applicant for a long time, pursuant to IPC Order 2001-042”. This is the only information that the Applicant provided to the Public Body when requesting the fee waiver.

[para 34] At the Inquiry, the Applicant quoted from Order 2001-042, as follows:

In Order 2001-042 [Attachment 2], then Acting Information and Privacy Commissioner Frank Work ruled it would be fair to excuse payment under section 93(4)(a) in order to resolve protracted and longstanding issues between the Applicant and the Public Body.

However, after a careful review of all submissions and all arguments of all parties, I find that given the protracted and longstanding issues between the Public Body and the Applicant, I am going to grant a fee waiver under section

93(4)(a) [previously section 85(4)(a)]. It is my view that waiving the fee would assist the Applicant in bringing closure to the issues and concerns that have remained outstanding between the Public Body and the Applicant for nearly nine years (para 21).

[para 35] The Applicant argued that payment of the fee should be excused under the criteria of fairness as addressed in Order 2001-042, as follows:

Order 2001-042 considered a case that had been outstanding for nine years. In the case at hand, the records relate to the processing of an access request that took more than one year. ... It is the Applicant's position that a much shorter delay constitutes a "protracted and longstanding" issue where the records in question are related to an issue of considerable public interest, as they are in this case. The Applicant submits that a sixteen-month delay in accessing crucial public health records clearly constitutes a "protracted and longstanding" issue.

With this request, the Applicant wished to access information related to the long delay in the processing of a request for crucial public health information. The objective of this request was to support the pursuit of truth in the inquiry before this office in regard to these issues. Consequently, the Applicant submits that this is clearly a request aimed at resolving "protracted and longstanding" issues between the Public Body and the Applicant.

[para 36] In my view, the facts and circumstances of the case before me at the Inquiry are significantly different from Order 2001-042. For one thing, the time frame is completely different. Order 2001-042 involved a much longer time period, which was over nine years. The Applicant says that the request at issue took more than one year (although I also note a reference to 16 months).

[para 37] Order 2001-042 involved a request to the Calgary Police Service for records that pertained to a number of citizen complaints made by the applicant against several police officers. I do not accept the Applicant's argument that a much shorter delay in her situation, which she says pertains to public information, amounts to a "protracted and longstanding" issue compared to the information that was involved in Order 2001-042.

[para 38] The Applicant argues that the outstanding issues that exist between the parties as a result of the handling of a previous access request, means that I should grant a fee waiver for the current access request on the basis of fairness. However in my view, the handling of the Applicant's previous access request is different from the handling of the current access request. Whether the fee should be waived for the previous access request is not an issue that is before me at the Inquiry. I do not have jurisdiction at the Inquiry to address issues pertaining to the previous access request.

[para 39] Furthermore, the issues arising from the previous request are a separate and distinct matter that is the subject of a different inquiry before the Commissioner. The access request that pertains to the request for the fee waiver relating to the Inquiry is the request received by the Public Body on June 26, 2006. Additionally, there is no evidence before me to suggest that the fee should be waived on the basis of fairness

because the Public Body failed to fulfill its duty to assist in any way when responding to the current access request (Order 96-022 (para 23)).

[para 40] I accept the Public Body's submission that the Applicant has not shown that the fee should be waived on the basis of fairness under section 93(4)(a) of FOIP. The Applicant has not discharged the burden of proof to show that the fee should be waived on the basis of fairness or for any other reason. In my view, the finding in Order 2001-042 does not apply in the facts of this case to justify granting a fee waiver on the basis of fairness under section 93(4)(a) of FOIP.

[para 41] I find that the Public Body reasonably formed the opinion that in the circumstances of this case the criterion of fairness does not apply, properly exercised its discretion when refusing, and therefore, properly applied section 93(4)(a) of FOIP when refusing to grant the request for a fee waiver. For these reasons, I intend to confirm the decision of the Public Body and to find that the Applicant should not be excused from paying all or part of the fee on the basis of fairness under section 93(4)(a) of FOIP.

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

Public interest

[para 42] A public body "may" excuse an applicant from paying all or part of a fee if, in the opinion of the head, the record relates to a matter of public interest, including the environment or public health or safety ("public interest") (section 93(4)(b) of FOIP). The Public Body says that, in its opinion, the criterion of public interest does not apply to allow a fee waiver in the circumstances of this case. However, the Applicant says she should be excused from paying the fee because this is a matter of public interest.

[para 43] The meaning of "public interest," in the context of a fee waiver under section 93(4) of FOIP, has been explained as:

It is possible to have the term "public" apply to everyone ("the public good") and to anyone (John or Jane Public who are the objects of government programs and policies). Similarly "interest" can range between individual curiosity and the notion of interest as a benefit, as in a collective interest in something. The weight of public interest will depend on a balancing of the weights afforded "curiosity," "benefit" and "broad" versus "narrow" publics. Where an access request relates to a matter that is of "interest" in both the sense of curiosity and benefit and the relevant "public" is broad, the case for removing all obstacles to access is very strong. So a matter that is the subject of curiosity to the larger public and also relates to a benefit to the broad public would present a very strong case for the waiver of fees. A matter which is of curiosity to many but affects no general benefit would present a less compelling case. Similarly, a matter that affects a benefit but in which few citizens are interested may present a less compelling case. In the less compelling cases, the importance of respecting the integrity of the legislated fee structure could outweigh the public interest dimension (Order 96-002 (pages 15-16)).

[para 44] The determination of public interest was further described in a later Order, as follows:

In Order 96-002, I said that public interest is not black and white: it is always a matter of degree. There is always a balance to be struck. 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 2001-023 (para 17)).

Two principles

[para 45] The Public Body refers to Order 96-002, which sets out two overriding principles for public interest, which are:

1. The Act was intended to foster open and transparent government, subject to the limits contained in FOIP; and
2. The Act contains the principle that the user seeking records should pay (page 16).

[para 46] The Public Body also refers to the decision of Justice McMahon, who added accountability to the first principle (OIPC External Adjudication Order #2 (May 24, 2002) (para 26)). Subsequent Orders issued from this Office include accountability in the principles, so the first principle reads “to foster open, transparent and accountable government”.

13 criteria

[para 47] The Public Body refers to Order 96-002, which establishes the following 13 non-exhaustive criteria:

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 to find 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 (Order 96-002 (pages 16-17))?

[para 48] The former Commissioner described the criteria for public interest as follows:

I deliberately called these things "criteria" and not a "test". I do not think that there can be a specific test for "public interest". I agree with Treasury that the head of a public body, in exercising his discretion to waive fees, may apply such criteria as he sees fit. These are criteria I see as relevant and this list is not exhaustive (Order 96-002 (page 17)).

[para 49] The former Commissioner explained how the two principles and the 13 criteria are to be weighed when determining public interest:

As I tried to say at the beginning of this section, public interest is not black and white: it is a matter of degree. There is always a balance to be struck. Part of the balancing act involves the merits of the "user pay" principle and the use of the initial fee to screen requests on one side and the disclosure to the public on the other side. Part of the balancing act involves the burden of the cost of disclosure to the taxpayer on one side and open and transparent government on the other side. In a given case, it is possible that the weight of public interest considerations might not outweigh the public interest in favour of the \$25.00 initial fee, but might be such as to outweigh any further fees. That is to say, I do not think that a decision that there is not enough public interest to justify waiving the initial fee necessarily means that there is not enough public interest to justify waiving further fees. The decision of the Legislature in levying an initial fee has to be respected and given some weight, but the principle that money should not be a bar to access which is in the public interest must also be considered (Order 96-002 (page 17)).

Application of 13 criteria

[para 50] The list of 13 criteria is not mandatory, but rather is intended to provide a useful guide when determining whether a record is a matter of public interest. The 13 criteria are not an exhaustive list of every factor to be considered and some factors are not relevant to every situation. However, the 13 criteria provide a range of factors to assist a public body to give individual consideration to whether a particular situation amounts to a matter of public interest, in the context of a fee waiver under FOIP.

[para 51] The 13 criteria are essentially sub criteria, so for clarity this Order refers to the 13 criteria as “factors”. The following discussion summarizes the arguments of the parties, which is guided by the headings provided in the submissions of the parties as to which factor they were addressing. However, I have considered all of the argument and evidence in its totality when determining the matter of public interest. My findings are provided as to whether each factor weighs for or against, or alternatively, is a neutral factor, for excusing payment of the fee.

1. Is the Applicant motivated by commercial or other private interests?

[para 52] The records relating to the fee waiver are the tracking records that show the detailed steps of the Public Body’s processing of a previous access request made by the Applicant. The Applicant’s previous access request pertained to the Public Body’s public health restaurant inspection program. However, the previous records are not part of and are not relevant to the records involved in this fee waiver.

[para 53] The Public Body says there are some commercial and private interests in the record, as follows:

The Applicant is a journalist for the Edmonton Journal. Capital Health submits that while the Applicant’s sole intention may not be related to commercial or other private interest, this is a factor in the Applicant’s request which arises out of a previous request used to write an article for her employer.

[para 54] The Applicant mentions the blanket exemption for fees for the media for access to information requests in the United States, where the media are not treated as commercial applicants. However, this is not the law in Alberta. The question of whether a fee waiver is justified on the basis of public interest is to be determined on a case-by-case basis that depends on the sufficiency of the public interest.

[para 55] The Applicant states that she has “no commercial interest in the records”. However, the Applicant also says that her work as a journalist for a major daily newspaper should not weigh against granting the fee waiver due to the commercial aspect of publishing news. The Applicant says that the commercial interests of a print media applicant should not weigh against granting a fee waiver, as this issue has been addressed by Justice T.F. McMahon in Adjudication Order #2 (May 24, 2002), where he

“roundly rejected the argument and cites the Supreme Court of Canada to buttress his argument”.

[para 56] The Applicant quotes Justice McMahon, as follows:

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. The role of the press in reporting on court proceedings was addressed by the Supreme Court of Canada in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. The media role in relation to government management of public funds is no less important.

That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role ... It is only through the press that most individuals can really learn of what is transpiring in the courts. They as “listeners” or readers have a right to receive this information. Only then can they make an assessment of the institution (para 52).

[para 57] When weighing the commercial interest of the media, Justice McMahon stated:

As to the Globe and Mail, it is obviously a commercial enterprise but I do not take that to be a negative. Alberta Justice argues that fees discourage media “fishing trips.” While no doubt true, fees also discourage the pursuit of the truth. The proper balance is more likely to be found by determining what is genuinely in the public interest rather than by the levy of punishing fees (para 51).

[para 58] In support of the position that being a journalist should not weigh against granting a fee waiver on the basis of commercial interest, the Applicant refers to Orders F2007-020 and F2005-022, where fee waivers were granted to the media. Order F2007-020 granted a fee waiver to a staff writer at the Edmonton Journal for records pertaining to security issues or errors made in regard to the \$400 resource rebate payments issued by the Alberta Government.

[para 59] Order F2005-022 granted a fee waiver to a print media reporter who requested records surrounding the death of a young person where the young person fell down an elevator shaft in a courthouse while in the custody of a public body, where there had been a public inquiry. In Order F2005-022, the Adjudicator quoted Justice McMahon, and said:

It is not fair to say that the commercial value of newsworthy information is the only motivator of the working reporter. The extent to which putting the information into the hands of the media would be in the public interest, and at what price, must be assessed on the facts of the case (para 20).

[para 60] Order 97-001 found that any commercial interest of the news broadcaster, which was publicly subsidized, did not outweigh the primary motivation of informing the public. The records were incident and accident reports for elevators and escalators that were found to be a matter of public interest. The former Commissioner waived the fees for the broadcaster in that case, but cautioned:

My decision in this case should not be read as a “blanket” waiver of fees for the media. Each case for a fee waiver must be decided on its own facts. I do not accept the proposition that the media should always get a fee waiver because everything the media does relates to public interest. The standard must be whether the record relates to a matter of public interest; the standard is not public curiosity (para 111).

[para 61] Order 96-022, which was a request for hospital policies and regulations, makes the following comment about weighing commercial interest:

Consequently, the nature of the applicant (public interest group, media, Member of the Legislative Assembly) is not a direct consideration, although it may be a factor in whether the contents of the record will be disseminated and whether the applicant has a commercial motive. Similarly, the use to which the records will be put is only a public interest consideration to the extent that it may indicate whether the records will be disseminated. For example, I am not convinced that the mere fact that the records may be used in a lawsuit automatically means that the records relate to a matter of public interest and fees should therefore be waived (para 21).

[para 62] In summary, I consider the fact that the Applicant is a journalist in the role of informing the public to be a positive consideration that outweighs the existence of some degree of commercial interest. However, there is no evidence before me to show that the Applicant’s primary interest in the records that pertain to the request for the fee waiver relate to her role as a journalist.

[para 63] The Applicant states:

The records at issue here are documents that track the processing of an access to information request. The reason for accessing these records was to try to understand how the request was processed, what procedures the Public Body followed and why it took so long. Ultimately, the records were used at inquiry, in an attempt to hold the Public Body accountable for extensive delays in releasing crucial public health information that was clearly in the public interest. ...

Without access to records related to the processing of the request, the Applicant is at a distinct disadvantage at inquiry. This [sic] always true, but is particularly so when the Applicant alleges the Public Body unduly delayed processing the request or did not fulfill its duty to assist. The Applicant should not have to pay for access to basic information he or she needs to fully understand and effectively argue his or her case before the Commissioner.

[para 64] In my view, the main purpose of these particular records was to address the Applicant's own private interests that are at issue at a different inquiry. This consideration also relates to factor #9, as to whether the records relate to a conflict.

- This factor weighs against excusing payment of a fee.

2. Will members of the public, other than the Applicant, benefit from disclosure?

[para 65] The Public Body says that it is unlikely that disclosure of the records will benefit members of the public because the records relate to processing the Applicant's access request, request for review and copies of correspondence between the Applicant, the Public Body and OIPC. I accept the Public Body's submission that it is unlikely that the public will benefit from disclosure of the records, as the information is limited to tracking documents about the processing of the Applicant's access request.

- This factor weighs against excusing payment of a fee.

3. Will the records contribute to the public understanding of an issue (that is, contribute to open and transparent government)?

[para 66] The Public Body says the records would not contribute to the public understanding of an issue, because there is no public issue raised that would make use of the information. The Applicant disagrees, saying:

As noted in the original submission, the Applicant submits that full disclosure at inquiry is crucial to ascertain the truth about the Public Body's handling of the request, which is an absolute public interest. ... The Applicant submits that the tracking documents support the pursuit of truth at inquiry, which is clearly in the public interest. The records should be released at no charge upon request, or automatically as part of the disclosure process.

[para 67] There is no evidence before me to show that disclosure of the records, in and of themselves, would benefit members of the public.

- This factor weighs against excusing the payment of a fee.

4. Will disclosure add to public research on the operation of government?

[para 68] The Public Body says that it is difficult to determine how the information will be used, and therefore, it is not conclusive whether the record would add to public research about the operation of Government or the Public Body. There is no evidence before me to show that disclosure of the record would add to public research on the operation of government.

- This factor weighs against excusing payment of a fee.

5. Has access been given to similar records at no cost?

[para 69] No. The Public Body says the Applicant has not been given access to similar records at no cost.

- This factor is neutral in respect to excusing payment of a fee.

6. Have there been persistent efforts by the Applicant or others to obtain the records?

[para 70] No. The Public Body says the Applicant asked for the records once in an access request and was given the records. No one else has requested the records.

- This factor weighs against excusing payment of a fee.

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?

[para 71] No. The Public Body says there is minimal, if any, information of interest to the public in these records and the records would in no way contribute to any public debate or concern. There is no evidence before me to show that the records would be useful in clarifying the public understanding of issues where government has itself established the public understanding

- These two factors weigh against excusing payment of a fee.

9. Do the records relate to a conflict between the Applicant and the government?

[para 72] The Public Body says that the records relate to a previous access request made by the Applicant and there are issues between the parties that include a separate inquiry about the previous access request. The Applicant requested this fee waiver saying the information would “bring closure to issues and concerns that have been outstanding between the public body and the applicant for a long time, pursuant to IPC Order 2001-042”. Order 2001-042 pertains to “protracted and longstanding” issues between the parties.

[para 73] Previous Orders issued from the Office have addressed situations where a fee waiver was denied for factors that included a conflict between the applicant and the government. In Order 99-016, the applicant was suing an oil company, alleging that contaminants left by the oil company caused disease in his cattle. The applicant argued that the records pertained to the health and safety of the public and said that the lawsuit was incidental to the primary motivation of public health and safety.

[para 74] In Order 99-016, the records were found not to pertain to a matter of public interest, partially because there was an “overriding private interest” centering on liability, if the applicant could show that the oil company’s operations resulted in contamination of the cattle (para 28). In that case, the applicant admitted that the records were intended to be used by the applicant and by the applicant’s health and legal advisors and to determine further steps.

[para 75] In Order 2000-008, a fee waiver was denied partly because it was determined that the information requested was primarily for the personal use of the applicant in his conflict and ongoing dispute with the public body (paras 42-43). Similarly, the remainder of a fee was not waived in Order F2005-006, where the applicant sought records containing information for the applicant’s appeals before the Appeals Commission for Alberta Workers’ Compensation in which he was a claimant.

[para 76] In refusing to waive the remainder of the fee, the Adjudicator stated:

I do not agree with the Applicant that his request meets the public interest requirement of section 93(4)(b) of the Act. It is evident that he wants the documents to further his private interests. While government accountability might be enhanced, as he argues, there is no evidence to support a finding that the records relate to a matter of public interest (Order 2000-008 (17)).

- This factor weighs strongly against excusing payment of a fee.

10. Should the Public Body have anticipated the public need to have the record?

[para 77] The Public Body says there is minimal, if any, information of interest to the public in these records and the records would in no way contribute to any public debate or concern. As the record is the tracking documentation for a specific access request, I do not see how the Public Body could not have anticipated a public need to have the record.

- This factor weighs against excusing payment of a fee.

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 to find less expensive sources of information, or assist in narrowing the request so as to reduce costs?

[para 78] The Public Body says that it was “exceptionally responsive” to the Applicant’s request by providing the requested information and by communicating in a timely manner. The Applicant does not provide any argument or evidence to show that the Public Body failed to meet its duty to assist in any way for the current access request. The evidence provided at the Inquiry shows that the Public Body responded in a timely and helpful manner and provided assistance that resulted in the Applicant clarifying and narrowing the request and obtaining a reduction in the fee.

- This factor weighs against excusing payment of the fee.

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?

[para 79] The Public Body says that a fee waiver would “unduly transfer the cost of compliance with the Applicant’s request to a public funded body from a commercial enterprise whose business is selling newspapers.” The Public Body also says that the Applicant requested the records “for her own and her employer’s interest” and that although it does not object to disclosing the records, the records should not be provided to the Applicant at no cost.

[para 80] The Public Body did not specifically address the question of whether a fee waiver would be “significant interference with the operations of the Public Body”. However, in my view a fee waiver would *not* be a significant interference with the operations of the Public Body.

- This factor is neutral in respect to excusing payment of the fee.

13. What is the probability that the Applicant will disseminate the contents of the record?

[para 81] The Public Body says that it is not clear from the Applicant’s correspondence what use will be made of the records, and therefore, it is not known whether the contents of the record will be disseminated. The Applicant does not say in her submissions whether the contents of the record will be disseminated.

[para 82] In Order 97-001, the former Commissioner found that the factor of dissemination of the record weighed in favour of excusing payment, where:

The contents have already been disseminated in a news broadcast (total viewership estimated to be 1,040,000 people Canada-wide). The broadcast was viewed by about 100,000 Albertans (estimated) on Marketplace, and by about 60,000 Albertans (estimated) on the news broadcast (para 97).

[para 83] Order 97-001 appreciated that this and other factors might not be known by a public body at the time the decision is made about a fee waiver. The former Commissioner said:

I realize that I have the benefit of hindsight on this issue, in that the Public Body didn’t know for certain, when it released the records, that the Applicant would disseminate the contents. ... Inadvertently, the Applicant also touched on this issue when the Applicant said that it was difficult to demonstrate at the front end of an application what the end result will be as concerns the public interest. I would say that it is also difficult for a public body to know at

the front end of an application how the record relates to a matter of public interest. I empathize with the Public Body in this regard. ... The Public Body was not wrong in deciding to charge the fee. It did not have the benefit of the viewpoint I now have when making my independent decision (Order 97-001 (paras 100, 111-112)).

[para 84] There is no evidence before me to show that the Applicant will disseminate the contents of the record. In my view, the probability that the Applicant will disseminate the *contents of the record* is low because of the subject matter of the record, which is the tracking of one particular access request.

- This factor weighs against excusing payment of the fee.

Application of two principles

1. The Act was intended to foster open, transparent and accountable government, subject to the limits contained in FOIP.

[para 85] The Applicant says that the record will foster accountability of the Public Body, as follows:

Challenges such as these are important because they hold politicians and bureaucrats accountable for their administration of the access to information laws. The Applicant submits that the public has an extraordinarily strong interest in an effective and efficient access to information system. ...

Certainly the “ascertainment of truth” at inquiries before the Commissioner is in the public interest, as is the need to hold Public Bodies accountable for their administration of access to information requests. Consequently, the Applicant submits that this access request is in the public interest.

[para 86] I agree with the Applicant that FOIP provides for independent review of a public body’s decision by the Commissioner and that this is one means of ensuring oversight and accountability of public bodies and compliance with FOIP. However, just because government accountability might be enhanced, this consideration in and of itself, does not mean that there is evidence to reach a finding that the records relate to a matter of public interest (Order 2005-006 (para 17)).

[para 87] I do not accept that it follows that fees should be automatically waived for all records that are in the custody or under the control of public bodies that pertain to an individual seeking a review or remedy under FOIP. FOIP contains no such provision. This is clearly not the intention, as there is no such exception for payment in the fee schedule. This approach would effectively rewrite the fee schedule. I do not think this is what the Legislature intended.

[para 88] The logical extension of the Applicant’s argument is that there should be an automatic fee waiver for all documents required by every applicant who seeks

redress in the form of an inquiry against a public body under FOIP. This would go against the “user pay” principle.

- This principle weighs slightly in favour of excusing payment of the fee.

2. The Act contains the principle that the user seeking records should pay.

[para 89] The Public Body says that this principle has the greater weight in the circumstances of this case, in that taxpayers should not be paying for the Applicant’s fee to access a record that is primarily sought for private rather than public interest. Order 2000-008 said:

It is a simple fact that retrieval and copying of records costs the Public Body both human and material resources. The Public Body is funded by the taxes of Albertans. Are the records of significant importance that the cost should be passed on to all Albertans? After reviewing the records, my answer to this question is no (para 44).

[para 90] I accept the Public Body’s submission with respect to this overriding principle. In my view, the records are not of sufficient public interest to justify the cost being passed along to all Albertans.

- This principle weighs against excusing payment of the fee.

Summary (section 93(4)(b))

[para 91] In summary, after considering and weighing the 13 criteria and the two principles in order to determine whether the record relates to a matter of public interest, I find that the balance weighs against a finding that the records relate to a matter of public interest. Therefore, the factors also weigh against a finding that the payment of the fee should be excused on the basis of a matter of public interest under section 93(4)(b) of the Act. In my view, there is insufficient public interest to justify waiving the fee.

[para 92] I find that the interest in the records is “narrow” and there is no compelling case for excusing payment. There may be some marginal benefit or interest in the record, but there is no “broad” public interest. I find that, on balance in the circumstances of this case, respecting the integrity of the legislated fee structure outweighs the public interest dimension. The weighing of the two principles and the 13 criteria compels the conclusion that the matter is *not* one of public interest.

[para 93] For all of the above reasons, I find that the Public Body reasonably formed the opinion that in the circumstances of this case the criterion of public interest does not apply, properly exercised its discretion when refusing, and therefore, properly applied section 93(4)(b) of FOIP when refusing to grant the request for a fee waiver. For these reasons, I intend to confirm the decision of the Public Body and to find that the

Applicant should not be excused from paying all or part of the fee in the sum of \$168.00 on the basis of public interest under section 93(4)(b) of FOIP.

Conclusion (section 93(4))

[para 94] In conclusion, in my view the Applicant did not discharge her burden of proof to show an inability to pay or that it is fair to excuse payment under section 93(4)(a) of FOIP. After weighing all of the circumstances and evidence and argument of the parties and after balancing the criteria and principles and considering the evidence provided under the shared burden of proof, in my view, the record does not relate to a matter of public interest under section 93(4)(b) of FOIP.

[para 95] Therefore, none of the three criteria for granting a fee waiver under section 93(4) of FOIP are fulfilled. Consequently, I intend to confirm the Public Body's decision to deny the fee waiver and to find that the Applicant should not be excused from paying all or part of the fee, pursuant to section 93(4) of FOIP.

V. ORDER

[para 96] I make this Order under section 72(3)(c) of FOIP:

- I find that:
 - The Public Body reasonably formed the opinion that the criteria of inability to pay, fairness and public interest under section 93(4) of FOIP do not apply. The Public Body properly exercised its discretion when deciding to refuse the fee waiver under all of these three criteria under sections 93(4)(a) and 93(4)(b) of FOIP; and
 - Consequently, I find that the Public Body properly applied section 93(4) of FOIP when refusing to grant the fee waiver and that the Applicant should not be excused from paying all or part of the fee. In particular:
 - The Applicant has not discharged the burden of proof to show that she cannot afford the payment, and therefore, I confirm the Public Body's decision to refuse to excuse the Applicant from paying all or part of the fee on the basis of inability to pay, pursuant to section 93(4)(a) of FOIP;
 - The Applicant has not discharged the burden of proof to show that for any other reason it is fair to excuse payment, and therefore, I confirm the Public Body's decision to refuse to excuse the Applicant from paying all or part of the fee on the basis of fairness, pursuant to section 93(4)(a) of FOIP; and

- The shared burden of proof has not been discharged to show that there is sufficient public interest, and therefore, I confirm the Public Body's decision to refuse to excuse the Applicant from paying all or part of the fee as a matter of public interest, pursuant to section 93(4)(b) of FOIP.

Noela Inions, Q.C.
Adjudicator

VI. APPENDICES

Appendix A:

**Old Framework (Criteria) Factors for Fee Waivers – Public Interest (Section 93(4)(b) of FOIP)*

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 to find 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?

*(Order 96-002 (pages 16-17) March 21, 1996)

Appendix B:

**New Framework (Criteria): Factors for Fee Waivers – Public Interest (Section 93(4)(b) of FOIP)*

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?

New Framework (Criteria): Factors for Fee Waivers – Fairness (Section 93(4)(a) of FOIP)

1. If others have asked for similar records, have they been given at no cost?
2. Would the waiver of the fee significantly interfere with the operations of the public body, including other programs of the public body?
3. Are there other less expensive sources of the information?
4. Is the request as narrow as possible?
5. Has the public body helped the applicant to define his request?

*(Order F2006-032 (paras 43-44) March 2, 2007)