

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2010-011

November 25, 2010

### COUNTY OF VERMILION RIVER NO. 24

Case File Number F5257

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** Under the *Freedom of Information and Protection of Privacy Act*, the Applicants asked the County of Vermilion River No. 24 (the “Public Body”) for records relating to its refusal to grant them a building permit, and various other matters between the parties. The Applicants requested a fee waiver, but the Public Body refused to grant one under section 93(4) of the Act. The Applicants requested a review of that decision.

The Applicants argued that they were requesting their own personal information, so that only costs for producing the records could be charged by the Public Body under section 93(2). The Adjudicator found that no part of the access request fell within the category of a request for personal information.

The Adjudicator found that a fee waiver was not warranted on the basis that the requested records related to a matter of public interest. The Applicants were motivated by commercial and private interests, rather than a concern on behalf of the public; the requested records would not contribute to the understanding of a matter of sufficient public concern; and the records would not sufficiently contribute to open, transparent and accountable government. The Adjudicator also found that a fee waiver was not justified for any of the other reasons raised by the Applicants.

**Statutes and Regulation Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i), 1(n)(viii), 1(n)(ix), 9(1), 72, 72(3)(c), 93, 93(1), 93(2), 93(4), 93(4)(a) and 93(4)(b); *Municipal Government Act*, R.S.A. 2000,

c. M-26, ss. 201(2), 624 and 642(2); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, ss. 11(2)(b) and 13(1).

**Authorities Cited: AB:** Orders 96-002, 97-003, 2000-011, 2000-021, 2000-033, 2001-023, F2002-006, F2006-030, F2006-032, F2007-019, F2007-024, F2008-020 and F2008-028; External Adjudication Order No. 2 (2002).

## **I. BACKGROUND**

[para 1] Two landowners in the County of Vermilion River No. 24 operated a business from their property. In 2007, they relocated to a different property. The new property had an existing shop and had been used for industrial purposes. The two landowners applied for a 10-acre subdivision on their new property, were initially granted a 5-acre subdivision by the County, but were granted the 10-acre subdivision on appeal to the Subdivision and Development Appeal Board.

[para 2] The landowners then applied for a building permit to build a new office on the 10-acre subdivision. Although there was discretion to grant the permit under the land use bylaw in existence at the time, their application was denied by the County. Their appeal to the Subdivision and Development Appeal Board was unsuccessful, and they then sought leave to appeal to the Alberta Court of Appeal. The land use bylaw was subsequently amended to preclude building permits like the one requested by the landowners.

[para 3] In a letter dated January 25, 2010, the two landowners and their company (the “Applicants”) made an access request to the County of Vermilion River No. 24 (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The requested records may be summarized as follows:

- 1) all records of taxes paid on the Applicants’ new property since 1975;
- 2) the 1982 and 1983 land use bylaw, along with all amendments in those years and since that time;
- 3) records/notes kept by representatives of the Public Body in relation to the Applicants’ ground work application and permit, 10-acre subdivision request and permit, development permit application, subsequent appeals, re-designation request and denial, and a stop work order;
- 4) any and all permits signed by a former Development Officer of the Public Body in relation to the Applicants’ property;
- 5) records of phone calls, e-mails or faxes from the owners of land adjacent to the Applicants’ property, in relation to activity, objections and complaints regarding the development permit application, appeals and re-designation;

- 6) notes, findings, associated paperwork and records of costs pertaining to a traffic survey taken on the range road north of the Applicants' property;
- 7) notes, records and invoices regarding a primary gas line upgrade to the area and secondary line installation on the Applicants' property;
- 8) records of per diems paid to councilors meeting with anyone, including the Applicants, in relation to the ground work permit, subdivision, development permit application, re-designation request and stop work order;
- 9) records of various costs pertaining to the subdivision appeals;
- 10) records of invoices by, and payments to, law firms hired by the Public Body in relation to the matters involving the Applicants;
- 11) records of costs from all parties, including staff of the Public Body, associated with implementing the stop work order;
- 12) records of how many parcels of land zoned "agricultural" within the County of Vermilion River have had or have "rural industrial" as a discretionary use since 1982 and currently; and
- 13) records of how many parcels of land zoned "agricultural" within the County of Vermilion River have been or are being charged, apportioned or in whole, for "commercial use" since 1982 and currently.

[para 4] As contemplated by section 9(1) of the Act, the Applicants indicated that they were making a continuing request for some of the above records, meaning that they wanted those parts of their access request to continue to have effect for up to two years. In accordance with section 11(2)(b) of the *Freedom of Information and Protection of Privacy Regulation* (the "Regulation"), they included an initial fee of \$50.00 for the continuing request. They also indicated that they would pay for the photocopying of the requested information. However, they requested a fee waiver in respect of any other costs to process their access request, on the basis that "all information is public".

[para 5] By letter dated February 4, 2010, the Public Body refused to grant the Applicants a fee waiver under section 93(4) of the Act. It estimated that its fees for services would be \$736.00 to provide the existing information, and \$158.00 to provide the additional information over the next two years.

[para 6] On February 11, 2010, the Applicants requested a review by the Commissioner of the Public Body's decision not to grant a fee waiver. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicants requested an inquiry by correspondence dated April 8, 2010. A written inquiry was set down.

## II. RECORDS AT ISSUE

[para 7] As this inquiry involves a refusal to grant a fee waiver, rather than a decision to withhold information, there are no records at issue. For context, the information requested by the Applicants is set out above.

## III. ISSUE

[para 8] The Notice of Inquiry, dated August 16, 2010, set out the issue of whether the Applicants should be excused from paying all or part of a fee, as provided by section 93(4) of the Act.

## IV. DISCUSSION

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

[para 9] Section 93 of the Act reads, in part, as follows:

*93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*

*(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.*

*(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.*

*(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).*

*(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] Section 93(1) authorizes a public body to charge fees for its services in relation to processing and responding to an access request. However, under section 93(2), an applicant cannot be required to pay fees for services, except for the cost of

producing copies of the records, if the applicant is requesting his or her own personal information. In this case, the Applicants first argue that they have requested their personal information, so that no fees other than photocopying charges may be estimated by the Public Body. They alternatively argue that they are entitled to a fee waiver based on public interest, or else based on other reasons. I will review each of these arguments in turn.

## **1. Requests for an applicant's own personal information**

[para 11] In Order 97-003 (at paras. 262 to 266), the former Commissioner set out the following approach to determine whether an access request is for personal information so that no fees for services (other than to produce copies of the requested records) may be charged under what is now section 93(2) of the Act:

In my view, if a request can be characterized as a request for access to personal information, a public body may not charge a service fee for any document that contains an applicant's personal information. However, a public body may charge service fees in relation to the documents that do not contain the applicant's personal information, even if the documents are characterized as a request for access to personal information.

On the other hand, if documents are characterized as not being within the category of a request for personal information, the Public Body may charge services fees in relation to all those documents, even if they contain the applicant's personal information.

To decide whether the Public Body may charge fees under [what is now section 93(2)] of the Act, there must be "a request for the applicant's own personal information". To decide whether there has been a request for the applicant's own personal information, I propose the following approach...:

- (i) Consider the wording of the request.
- (ii) Characterize the request as to the categories of records the applicant is requesting.
- (iii) Decide whether the records fall within those categories.

If any part of the request can be characterized as a request for the applicant's own personal information, I then will decide whether each record (not page) found to be within that category "contains" the applicant's personal information, not whether each record in the category is "about" the applicant's personal information. As long as any part of the request falls within the category of a request for an applicant's own personal information, and a record within this category contains the applicant's personal information, a public body may not charge a service fee for that record.

It follows that I do not agree with the Public Body's contention that [what is now section 93(2)] of the Act applies only if "...the application, fairly interpreted,

pertains wholly or in all material respects to the applicant's personal information".

[para 12] In this inquiry, I am not in a position to apply part (iii) of the approach set out above, which is to decide whether records falling within the category of a request for personal information actually contain personal information. Unlike the former Commissioner, I do not have the records before me. However, in this case, I find it unnecessary to even go to part (iii) of the approach. On consideration of the wording of the Applicants' access request, I characterize all of the requested records as not being within the category of a request for personal information. The Public Body may therefore charge – barring a fee waiver – all fees for services in relation to all of the requested records, even if some of them contain the Applicants' personal information.

[para 13] Section 1(n) of the Act defines "personal information" as follows:

- 1(n) "personal information" means recorded information about an identifiable individual, including*
- (i) the individual's name, home or business address or home or business telephone number,*
  - (ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
  - (iii) the individual's age, sex, marital status or family status,*
  - (iv) an identifying number, symbol or other particular assigned to the individual,*
  - (v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
  - (vi) information about the individual's health and health care history, including information about a physical or mental disability,*
  - (vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
  - (viii) anyone else's opinions about the individual, and*
  - (ix) the individual's personal views or opinions, except if they are about someone else;*

[para 14] The access request in this case was made by two individual applicants and a company. In a letter to the Public Body dated February 11, 2010, the Applicants took the position that they had requested their personal information, as set out in sections

1(n)(i), 1(n)(viii) and 1(n)(ix). They argue that the requested information is about their home and business, and includes their and others' opinions about their home and business.

[para 15] While an individual's business address is his or her personal information under section 1(n)(i), information about a business itself is not personal information. It has been found that, given the types of information enumerated under section 1(n) when read in their entirety, "personal information" relates only to natural persons, not sole proprietorships, partnerships, unincorporated associations or corporations; had the legislature intended "identifiable individual" to include the foregoing entities, it could and would have used the appropriate language to make that clear (Order F2002-006 at para. 92).

[para 16] What makes the business address of an individual "about" him or her – apart from it being expressly enumerated as personal information – is that, for instance, the individual may be located or reached at that address, causing the information to have a personal dimension. Information about a business or company, or about an individual's business-related activities, on the other hand, normally has no personal dimension (Order F2008-028 at para. 55). Likewise, an opinion merely about a business or company is not an opinion about the individual who owns it or works there, within the meaning of section 1(n)(viii). On rare occasions, there may be circumstances that give a personal dimension to an individual's business-related activities, or cause information about his or her business to simultaneously be information about him or her, so as to render the information "personal information" under section 1(n). For instance, there may be allegations of impropriety or wrongdoing, or disclosure of the information may have an adverse effect on the individual (Order F2006-030 at paras. 12, 13 and 16; Order F2008-020 at para. 28). However, I see no such circumstances in this case.

[para 17] Given the foregoing, any of the information requested by the Applicants is not their personal information to the extent that the information is about, or relates to, their business or company. I will return below to information about the Applicants' home, opinions about them as individuals, and their own personal views and opinions.

[para 18] The list of records requested by the Applicants is not merely in relation to their business or company, as the records are also connected in some way to the individual Applicants. However, personal information is defined as information "about" an identifiable individual. It has been stated that the term "about" in the context of this phrase is a highly significant restrictive modifier, in that "about" an applicant is a much narrower idea than "related" to an applicant; information that is generated or collected in consequence of some action on the part of, or associated with, an applicant – and that is therefore connected to him or her in some way – is not necessarily "about" that applicant (Order F2007-019 at para. 20).

[para 19] In this inquiry, I find that that no part of the Applicants' access request falls within the category of a request for information "about" the individual Applicants so

as to be a request for their personal information. I will refer to the 13 items of information listed in their access request and summarized at the outset of this Order.

[para 20] Items 2 and 6 through 13 are not requests for the Applicants' personal information. The information requested in these items is, respectively, about the land use bylaw, the traffic survey, the gas line upgrade, the per diems, the costs, the invoices and payments, other costs, the parcels of land, and other parcels of land. The fact that the gas line upgrade involved a secondary line installation on the Applicants' property, the per diems are in respect of meetings regarding the Applicants' permit and development applications and even attended by them, and the costs, invoices and payments pertain to the Applicants' appeals and the stop work order, means only, at most, that some of the information relates to the Applicants. There is an insufficient connection to make any of the information "about" them.

[para 21] I find that item 1 of the access request is not a request for the Applicants' personal information, as it is a request for taxes paid on the Applicants' new property since 1975, which is mostly prior to their ownership of it. The fact that a person purchases property does not automatically make all past information about the property about them. Item 1 is properly characterized as a request for information about the property, as opposed to information about the Applicants. Having said this, I could possibly agree that the amount of taxes paid by the Applicants themselves on the property constitutes information about them, to the extent that the amount was charged to or paid by them personally, and the taxes are in relation to their home. However, this would only be a small amount of information among the records requested in item 1, which is insufficient to find that item 1 constitutes a request for the Applicants' personal information. As explained in Order 97-003 above, if records are characterized as not being within the category of a request for personal information, a public body may charge fees in relation to all responsive records, even if they contain an applicant's personal information.

[para 22] As for the remaining items 3, 4 and 5 of the Applicants' access request, I first note the following additional comments of the former Commissioner in Order 97-003 (at paras. 267 to 269):

Having considered the wording of the Applicant's request, I characterize that request as one in which the Applicant is seeking access to two categories of records:

- (i) records in files in the Applicant's name
- (ii) records in files referring to actions (made by the Public Body's officials generally, and agents and named individuals of the Public Body) impacting on the Applicant's interests

In my opinion, a request for records in files in the Applicant's name is a request for the Applicant's own personal information. Logically, a file in a person's name would likely, but not necessarily or always, contain that person's personal



information, which is why the person would ask for access to such a file in the first place.

However, a request for records in files referring to actions impacting on the Applicant's interests is not a request for the Applicant's personal information. [...]

[para 23] Unlike in the above matter, the Applicants in this case did not expressly request files in their own names, as is typical when applicants are requesting what they consider to be their own personal information. I acknowledge that it is possible that the information requested in items 3, 4 and 5 of the Applicants' access request is in a file in the Applicants' names, but this is not sufficient to make the items fall within the category of a request for the Applicants' personal information. I must review the nature and wording of the actual items requested.

[para 24] Item 3 was a request for records/notes kept by the Public Body in relation to the Applicants' various applications, requests, appeals, etc. Item 5 was a request for records of the reaction of other landowners to the applications, requests, appeals, etc. The nature of these requests is such that they are directed at the Public Body's processes, and are about the substance of the applications, requests, appeals, etc. The records relate to the Applicants but are not about them. Item 4 was a request for all permits signed by a former Development Officer in relation to the Applicants' property while they owned it, but my understanding of the facts, as set out later in this Order, is that these possibly signed permits did not actually get issued on further consideration by the Public Body. They therefore remain part of the background processes carried out by the Public Body in relation to the Applicants' permit and development applications, and are not information about them personally.

[para 25] Given the foregoing, items 3, 4, and 5 are properly characterized as requests for records about the actions of representatives of the Public Body and the actions of other landowners, which impact on the Applicants' interests but are not about the Applicants themselves. Consistent with the former Commissioner's comments reproduced above, the requests therefore do not fall within the category of a request for the Applicants' personal information. Additionally, the various applications, requests, appeals, etc. – as well as the permits apparently signed by the former Development Officer – were in relation to the Applicants' desire to move their pre-existing business to their new property, build an office for their company, and use the property for an industrial use. As explained earlier in this Order, information relating to the Applicants' business or company does not constitute their personal information.

[para 26] Finally, it is possible that some of the records requested in item 3 contain the Applicants' own views and opinions, as defined under section 1(n)(ix) of the Act, in that representatives of the Public Body may have included the Applicants' views and opinions in their records/notes. It is also possible that some of the records requested in item 5 contain other landowners' opinions about the Applicants, as individuals, under section 1(n)(viii). Again, however, this is insufficient to render item 3 or 5 a request for personal information. Both requests were directed at information about the applications,

requests, appeals, etc., as opposed to about the Applicants personally. Unless a fee waiver is warranted, the Public Body may therefore charge fees even if some of the responsive records contain the personal information of the Applicants.

## **2. Fee waiver based on public interest**

[para 27] Section 93(4)(b) of the Act contemplates a fee waiver if the records requested by an applicant relate to a matter of public interest. An applicant requesting a fee waiver on the basis of public interest must present sufficient information to show how the records relate to a matter of public interest (Order 96-002 at pp. 4 and 5 or paras. 14 and 15; Order 2000-011 at para. 27). At the same time, the public body must form a proper opinion as to whether the requested records relate to a matter of public interest, and exercise its discretion as to whether to grant a fee waiver, by reviewing all of the relevant facts and circumstances and considering the principles and objects of the Act (Order 2001-023 at para. 29).

[para 28] Order F2006-032 (at para. 43) set out a non-exhaustive list of three main criteria, followed by sub-criteria, to consider in determining whether an applicant should be excused from paying all or part of a fee on the basis of public interest. On my review of the criteria, and other circumstances raised in relation to public interest, I find that a fee waiver is not warranted, in this case, on the basis that the records relate to a matter of public interest.

[para 29] I will now explain, referring to each main criterion and its related sub-criteria, and placing the Applicants' submissions regarding public interest under the group that is most fitting.

*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?*

*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?*

[para 30] In support of their view that the requested records relate to a matter of public interest, the Applicants submitted a copy of a petition signed by other rate payers and residents of the County of Vermilion River, including almost all of the owners of land surrounding the Applicants' property. In the petition, the signatories request that the Applicants and their company receive a development / shop building permit. The Applicants argue that the petition establishes great public interest in knowing what is going on with municipal spending and progress in the community. The Applicants also provided a copy of the letter written by the two adjacent landowners who submitted the petition to the Public Body. These landowners write that there has been too much time and County money spent on one building permit, that the Applicants are entitled to use

their property commercially given the policy in existence at the time of their application, that opposition is primarily from the previous owner of the Applicants' property, and that public meetings have shown that most other landowners support the Applicants.

[para 31] Given the petition, the Applicants argue that a significant segment of the public is interested in the records. They add that there have been many letters written by the public to the Public Body, inquiring about its reasoning and expenditures in relation to the Applicants' matter. The Applicants say that the Public Body has spent half a million dollars in response to their permit and development applications, that it is still spending money, and that the public has a right to know how their tax dollars are being spent and why. The Applicants submit that citizens are entitled to the records in question in order to make informed decisions about who to vote for.

[para 32] The petition does not establish that others besides the Applicants are interested in the records. Rather, it establishes that others are interested in the outcome of the dispute between the Applicants and the Public Body, that they side with the Applicants, and possibly even that they believe that the Applicants are entitled to the records that they have requested. Public support for the Applicants' building permit and their cause against the Public Body is not the same as public interest in the actual records. Further, part of the Applicants' access request is for information about the land use bylaw, a traffic survey, a gas line upgrade, parcels of land designated as rural industrial, and parcels of land charged for commercial use. While I take it that other landowners are interested in the Applicants' particular situation, I do not find that they are interested in the foregoing matters, more generally. It is not sufficient for there to be some marginal benefit or interest in the record; there should be a compelling case for a finding of public interest (Order F2007-024 at para. 47). Here, I am not satisfied that a sector of the public is sufficiently interested in the records – whether those records are about the Applicants' situation or about the Public Body's general approach to land use and development – so as to find a compelling case for public interest.

[para 33] As for whether the records in question will contribute to public understanding, debate or resolution of a matter of concern to a sector of the public, I find that they will not sufficiently do this. The Applicants argue that the records relate to public spending and will assist voters. However, their access request was not for general records about spending by the Public Body, and the objective of the access request was not really to clarify matters for voters. The requested records are in relation to specific issues involving the Applicants. While members of the public may feel that too much money has been spent by the Public Body on the matter, and may want the matter resolved in a particular way, the matter remains essentially one between the Applicants and the Public Body, as opposed to a matter of more general concern to the public.

[para 34] In short, the Public Body's spending in a single case will not contribute to public understanding of its overall spending. Further, I have no evidence of any public debate or public desire for resolution of a concern, other than an indication that there have been public meetings regarding the merits of the Applicants' application for a building permit. Again, public support for a particular cause does not automatically

make records relating to that cause a matter of public interest. The requested records should be of significant importance in order for the cost of processing the access request to be passed on to taxpayers (Order 2000-011 at para. 52). Fee waivers on the basis of public interest are to be granted only when there is something about the records that clearly makes it important to bring them to the public's attention or into the public realm (Order F2006-032 at para. 39). I find no such clear or significant importance here.

[para 35] My consideration of the above criteria does not lead me to conclude that a fee waiver is warranted on the basis of public interest.

*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?*

*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?*

[para 36] The Applicants are clearly motivated by commercial and private interests, rather than by a concern on behalf of a sector of the public. They made various permit and development applications in order to conduct a business from their property, and the applications were denied or partly denied by the Public Body. The information that the Applicants have requested concern these denied applications and other matters in connection with their own land. The records relate directly to a conflict between the Applicants and the Public Body, particularly given the Applicants' appeals to the Subdivision and Development Appeal Board and their application for leave to appeal to the Court of Appeal. Even if the Applicants are likely to disseminate the contents of the records to others, I find that passing along the information to other citizens is not the Applicants' primary objective in obtaining the records. They primarily want to obtain the records to advance their dispute against the Public Body.

[para 37] The foregoing weighs very heavily against a fee waiver.

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

*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 38] The Applicants submitted information from a former Development Officer of the Public Body, who indicates that he initially accepted the Applicants' application

for a building permit, but was instructed by the County Administrator to take the application to County Council, something that he had never been required to do previously. The former Development Officer says that, although Council had never been involved in such a matter before, he was able to take the matter to Council on the basis of a bylaw permitting it to determine the effect of the permit application on the neighbourhood. The former Development Officer says that pressure from the Public Body to act contrary to his professional obligations and integrity caused him to resign. Elsewhere, the Applicants say that another permit and development officer of the Public Body was fired by the County Administrator over this matter.

[para 39] The Applicants argue that the County Administrator improperly interfered with their application for a building permit, and they effectively suggest that this requires public scrutiny. They submit that failure to allow the former Development Officer to make his decision independently contravened sections 201(2), 624 and 642(2) of the *Municipal Government Act*. These sections say that a council must not exercise a function assigned to a designated officer; that it must provide for a development authority to exercise development powers and that this authority may include a designated officer; and that the development authority has the discretion to grant a permit if one is possible. The Applicants further allege that decisions in relation to them were reached unfairly because members of County Council were on the permit and development committee, as well as on the Subdivision Development Appeal Board, which created a conflict of interest and was contrary to applicable bylaws.

[para 40] The Applicants have framed their submissions in a way that suggests that the records are about the processes and functions of the Public Body, and will contribute to open, transparent and accountable government. However, I find that the records do not sufficiently meet the above criteria. Although the Applicants point to the desirability of public scrutiny of the way that the Public Body has addressed their permit and development applications and reached its decisions, they really want to personally scrutinize the Public Body's activities in relation to their own private matter. It is clear that they themselves disagree with the way that the Public Body has dealt with them, but I am not satisfied that the activities of the Public Body have been sufficiently called into question by the public. In reference to the petition submitted by the Applicants, I again note that it shows that members of the public support the Applicants in their underlying dispute, but this does not mean that the public has, more generally, called into question the Public Body's resolution of permit and development applications.

[para 41] Given the foregoing, I find that the records will not contribute to open, transparent and accountable government in such a way that a fee waiver is justified.

[para 42] I conclude that the records requested by the Applicants do not relate to a matter of public interest under section 93(4)(b) of the Act, so as to warrant excusing the Applicants from paying all or part of a fee on that basis. To the extent that any of the records will contribute to public understanding of an issue, or contribute to open, transparent and accountable government, this is significantly outweighed by the fact that

the Applicants are motivated by commercial and private interests, as opposed to a concern on behalf of the public.

### **3. Other reasons for a fee waiver**

[para 43] Section 93(4)(a) of the Act contemplates a fee waiver if an applicant cannot afford payment, but the Applicants do not argue an inability to pay in this case.

[para 44] Section 93(4)(a) also contemplates a fee waiver if, for any other reason, it is fair to excuse payment. The Applicants say that they should not have to pay fees for something that is a matter of public record. They wrote in their initial access request that they were asking for a fee waiver because “all information is public”. In its response to them, the Public Body indicated that there would still be a cost for public information, even if provided outside the Act.

[para 45] Some of the information requested by the Applicants, such as copies of the land use bylaw and its amendments, and records of how many parcels of land are designated as rural industrial, may be “public” in the sense that the information is made available to anyone who requests it. However, the Public Body is nonetheless authorized to charge fees under the Act in order to provide access to the information, as there are associated costs contemplated under section 13(1) of the Regulation, such as costs to search for, locate and retrieve the records, to prepare and handle the records for disclosure, and to produce the copies. The fact that information is a matter of public record does not, in and of itself, justify a fee waiver.

[para 46] The Applicants may be thinking that other information that they requested is “public” in the sense that it is created, collected or held by a municipal government charged with carrying out public services and responsibilities to the public. However, by that definition, virtually every “public body” subject to the Act holds “public information”. If fee waivers were warranted on that basis, it would effectively render section 93(1), and the entire scheme for charging fees under the Act and Regulation, nugatory.

[para 47] The Applicants say that the requested records are critical to their personal affairs and business, and that they have spent a lot of time and money on their application for a building permit. They indicate that that they have suffered stress and financial loss as a result of the Public Body’s refusal to grant the building permit, especially after they had already been granted a ground work permit and 10-acre subdivision based on industrial use. In my view, this is not sufficient to warrant a fee waiver. Virtually every individual involved in a dispute with government spends time and money on the matter, experiences stress, or suffers financial loss. If any or all of these things were sufficient to justify a fee waiver, a great many fee waivers would be justified. Again, this is contrary to the scheme regarding payment of fees set out in the Act and Regulation. The legislation contains the principle that applicants should pay for access to information, and that fee waivers are the exception [Order 96-002 at p. 16 or para. 50; External Adjudication Order No. 2 (2002) at para. 26].

[para 48] The Applicants say that the Public Body has been found to be biased in three separate court judgments. They argue that the County Administrator improperly interfered with their permit and development applications. The County Administrator also happened to be the Public Body's FOIP Head who responded to the Applicants' access request, and they submit that she had a personal vendetta that led her to refuse to grant the fee waiver.

[para 49] A public body's rationale for exercising discretion in a particular way must be both demonstrable and reasonable; it cannot abuse its discretion by making an arbitrary or irrational decision. Order 2000-021 (at para. 51) set out five types of abuse of discretion as follows: 1) where a delegate exercises his or her authority with an improper intention in mind, which includes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations; 2) where a delegate acts on inadequate evidence or without considering relevant matters; 3) where the decision is unreasonable or discriminatory, creating an improper result; 4) where the delegate exercises his or her discretion on an erroneous view of the law; and 5) where a delegate fetters his or her discretion by rigidly adopting a policy which precludes a consideration of the individual merits of the case.

[para 50] In this case, the Applicants effectively argue that the Public Body's FOIP Head refused to grant a fee waiver due to an improper intention in mind, bad faith, and discrimination against them.

[para 51] When a public body is involved in a dispute with an applicant who has requested information from it, particularly when the dispute has been protracted or there is personal acrimony between a representative of the public body and the applicant, it is not surprising that the applicant might allege bias or conflict of interest if the public body refuses to grant a fee waiver. If an applicant believes that there has been bias or conflict of interest, the applicant is perfectly reasonable in requesting a review by the Commissioner of the public body's decision, as the Applicants have done here.

[para 52] Having said this, if the decision to refuse to grant a fee waiver becomes the subject of an inquiry, the Commissioner or his delegate may, under section 72(3)(c) of the Act, confirm or reduce a fee. This means that the Commissioner or his delegate may not only determine whether a public body properly exercised its discretion, but may also render a new decision (Order 2000-033 at para. 19). Therefore, it is not necessary for me to decide whether there was, in fact, a bias or conflict of interest on the part of the Public Body when it refused to grant the Applicants a fee waiver. Even if I were to hypothetically find that the Public Body's FOIP Head improperly exercised her discretion, I would have stepped in and rendered the same decision not to grant the Applicants a fee waiver, based on my review of the relevant considerations, as explained in this Order.

## **V. ORDER**

[para 53] I make this Order under section 72 of the Act.

[para 54] I find that the Applicants did not request their own personal information under section 93(2).

[para 55] I find, in the circumstances before me, that the Applicants should not be excused from paying all or part of a fee under section 93(4).

[para 56] Under section 72(3)(c), I confirm that the Public Body may require the Applicants to pay fees for services as provided for in the regulations.

Wade Riordan Raaflaub  
Adjudicator