

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-43

October 30, 2013

ALBERTA EDUCATION

Case File Number F6082

Office URL: www.oipc.ab.ca

Summary: An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Education (the Public Body) for “all records as defined by Section 1(q) of the Act related to communications between staff, or the minister, and [a named individual].” The time frame for the request was October 17, 2011 to the date of the request. On November 3, 2011, the Public Body confirmed that the Applicant was seeking communications between the named individual and any Public Body staff, including Ministerial staff.

The Public Body provided a fee estimate of \$792.50 for the records. The Applicant paid the fee and picked up the responsive records. The Applicant then requested that the Public Body waive the fees associated with the request, under sections 93(4)(a) (inability to pay or other reasons for which it is fair to waive fees) and (b) (record relates to a matter of public interest). The Public Body informed the Applicant that it had determined that a fee waiver was not warranted under either provision. The Applicant sought a review of that decision by this office. The Applicant also requested a review of whether the Public Body met its duty to assist under section 10 of the Act.

The Applicant states that his request was based on a tip regarding inappropriate communications between the named individual and Public Body staff; the Applicant argued that had the records indicated inappropriate communications, as the tip suggested, those records would have been in the public interest. The Applicant also argued that the

actions of the Minister in responding to the Applicant's request resulted in circumstances in which it was fair to waive the fees associated with the request.

The Adjudicator determined that the Public Body had met its duty to assist the Applicant in responding to his request.

The Adjudicator found that the Applicant had not provided sufficient evidence to find that the fees for the records should be waived in the public interest.

The Adjudicator found that the actions of the Minister of the Public Body (at the time of the request) in responding to the access request – denouncing the Applicant in a public manner – could create a “chilling effect” that might undermine the right of access under the FOIP Act such that the public may not feel comfortable making access requests. For this reason, the Adjudicator ordered the Public Body to refund the fees paid by the Applicant, for reasons of fairness.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 55, 72, 93.

Authorities Cited: AB: Orders 96-002, 96-022, 97-006, F2006-032, F2007-023, F2007-029, F2009-017, F2009-034, F2009-039.

I. BACKGROUND

[para 1] On October 26, 2011, the Applicant (who seems to be acting in his role as a journalist for a media organization) made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Education (the Public Body) for “all records as defined by Section 1(q) of the Act related to communications between staff, or the minister, and [a named individual].” The time frame for the request was October 17, 2011 to the date of the request. On November 3, 2011, the Public Body contacted the Applicant via email (a copy was provided by the Public Body in its submission), asking for clarification regarding the following:

Q. Are you seeking all records related to communications between Ministerial Office staff only, or the Minister of Education and the [named individual], or

Q. Are you seeking all records related to communications between any Alberta Education ministry staff, or the Minister of Education, and [the named individual]?

[para 2] The Applicant responded “I mean both. Ministerial staff and ministry staff.”

[para 3] On November 28, 2011, The Public Body provided a fee estimate of \$792.50 for the records and requested a deposit. On December 5, 2011, the Applicant paid the deposit and informed the Public Body in a subsequent letter that he would request a fee waiver. On December 7, 2011, the Public Body informed the Applicant that the request had been processed and the remainder of the fees was due. The Applicant paid the

remainder of the fee on December 12, 2011, and the Public Body sent the responsive records that day. The Public Body noted in an email sent to the Applicant that day that a request for a fee waiver had not yet been received by the Public Body and that the Applicant could still make that request and “[w]hen a decision has been made with respect to that request, you may then ask the Information and Privacy Commissioner for a review of this fee.”

[para 4] By letter dated December 13, 2011, the Applicant requested that the Public Body waive the fees associated with the request, under sections 93(4)(a) and (b). The Public Body informed the Applicant by letter dated January 13, 2012, that it had determined that a fee waiver was not warranted under either provision. The Applicant sought a review of that decision by this office.

II. ISSUES

[para 5] The issues in this inquiry, as set out in the Notice of Inquiry, dated December 19, 2012, are:

- 1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?**
- 2. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act?**

III. DISCUSSION OF ISSUES

- 1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?**

[para 6] Section 10(1) of the Act states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 7] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7).

[para 8] There are two components of an adequate search:

- a) Every reasonable effort must be made to search for the actual record requested; and
- b) The applicant must be informed in a timely fashion about what has been done.

(Order F2009-017, at para. 53)

[para 9] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

(Order F2007-029, at para. 66)

[para 10] An employee of the Public Body's FOIP area described in an affidavit the steps taken to process the Applicant's request. The affiant states that upon receipt of the request, the Public Body confirmed with the Applicant that his request included all department employees. The FOIP area sent a memo to all FOIP division contacts to initiate the search for records. The Minister's executive assistant provided potentially responsive records to the FOIP area. The FOIP area contacted senior records and security employees to inquire about retrieving text messages. It also contacted the IT area to request a search of all Ministry employee email accounts. The search time for these emails is one hour.

[para 11] The affiant states that the branches and divisions took a total of 24.5 hours to conduct the searches.

[para 12] Although the Applicant indicates that the search may not have been thorough, I have no reason to believe that it was not. The Applicant's request related to every employee of the Public Body and the Public Body states that it sent the memo to all FOIP contacts in the Public Body to conduct the search.

[para 13] Elsewhere in his submissions, the Applicant argues that the search was overly thorough, in that the Public Body searched for records when it knew that none existed. The Applicant states that approximately two weeks after making his access request, the (then) Minister of the Public Body contacted the Applicant's supervisor (at the media organization) and informed her that the search was complete, resulting in 10 records. The Applicant states that the Public Body continued to search for records for another 20 days after that date. The Applicant argues that the Public Body (and the Minister) knew at the time of the Minister's phone call that there were no more

responsive records and any further search was a waste of time; he asserts that fees associated with the search that occurred after the phone call should be waived.

[para 14] The Applicant also states:

The Ministry knew early on in the search process that it had returned very limited records, some of which could have been withheld under the personal information exemptions under the Act. Despite this knowledge, the ministry failed to confirm with [the Applicant] whether those were the types of records he was requesting, and to inform him that his request was unlikely to yield anything of value if he were to proceed. Instead of informing [the Applicant] of what it had found, it had asked him whether he wanted to expand his search without explaining the reason it had required the clarification.

Had [the Applicant] been advised the only records found before the clarification had been sought were photos of the Minister's children, and an invitation to a Hallowe'en party, he likely would have realized his source had provided bad information, and either withdrawn the request or modified the search criteria. Instead, the Ministry misled [the Applicant] into thinking there was a likelihood of finding the type of documents he was reasonably seeking thereby incurring unnecessary fees.

[para 15] The dates provided to me by the Public Body in the affidavit show that the scope of the Applicant's request was confirmed more than once. The Public Body asked the Applicant to clarify the request via email on November 3, 2011. The Applicant confirmed the scope again via email on November 7, 2011. The Minister's executive assistant provided the Public Body's FOIP area with records on November 8, 2011. This timeline shows that the scope of the request was confirmed before the FOIP area had received records from the Minister's office. Therefore, I conclude that the Public Body clarified the request in order to properly determine the scope of the search, and not to mislead the Applicant.

[para 16] It is unclear to me why the Applicant believes that the records located in the Minister's office should have alerted the FOIP area that no more responsive records would be found elsewhere in the Public Body. The Applicant states that the Public Body should have told him, after the Minister's executive assistant provided the records to the FOIP area, what records had been located so far. The Public Body states in response that

there was nothing unusual about this request to suggest that the Public Body ought to have verified with the Applicant that the records located were the records he hoped to find. Furthermore, the Public Body submits that section 10(1) does not require a public body to request clarification of a request when the request is, on its face, very clear.

[para 17] I agree with the Public Body on this point. The Public Body confirmed the request several times with the Applicant. The Applicant does not seem to have indicated to the Public Body what he had hoped to get in response to the request. In my view, there is no clear reason for the Public Body to have stopped the search for records after some

records from a particular area of the Public Body had been located, in order to clarify the request again.

[para 18] With respect to the phone call from the Minister to the Applicant's supervisor, the Public Body states that it is unable to verify the exact conversation that took place; however, it suggests that because the search of the Minister's office was completed by November 8, 2011 (a little more than a week after the Applicant's request was made), it may have been *this* search to which the Minister was referring. The Applicant seems to argue that the Minister knew that no further records would be located and therefore the Public Body more generally (or the FOIP area) should also have known that no further records would be located, and should have ended the search.

[para 19] The Public Body cannot explain with certainty why the Minister thought the search was complete before it actually was; however, it has offered a plausible explanation. I accept the timeline of events regarding the search that the Public Body provided in its affidavit. It seems to me that the Applicant requested (and reiterated several times) that he wanted the search to include all employees of the Public Body; therefore, regardless of the Minister's opinion as to the likelihood of responsive records, the Public Body was obliged to continue its search beyond the Minister's office.

[para 20] The Applicant also states that the records provided to him are not responsive to his request. I disagree. Given the breadth of the Applicant's request, the records described to me in the Public Body's submission are responsive, even if they do not contain the information the Applicant had been seeking.

[para 21] I am satisfied that the Public Body fulfilled its duty to assist the Applicant, as required under section 10(1).

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

[para 22] Section 93 of the Act states in part:

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.

...

(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.

...

Do the records relate to a matter of public interest?

[para 23] In Order 96-002, former Commissioner Clark stated two general principles that apply in determining whether to grant a fee waiver in the public interest (at p. 16):

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

[para 24] In Order F2006-032 the Adjudicator set out a non-exhaustive list of criteria for determining whether to grant a fee waiver in the public interest (these criteria are a revised version of thirteen criteria set out in Order 96-002):

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?

(Order 2006-032, at para. 43)

[para 25] In Order F2009-034 the adjudicator summarized the “public interest” issue as follows:

As noted by the Public Body, 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). 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).

(Order F2009-034, at para. 73)

[para 26] The Public Body provided a description of each of the responsive records located in response to the Applicant's request. 17 pages of records were located; of these, two records relate to dinner invitations, three relate to a security pass form, four contain family photos, and one is an inquiry regarding the Minister's schedule.

Will the records contribute to the public understanding of a matter or issue that is of concern to the public?

[para 27] The Public Body states that the responsive records "all seem to be concerned with the Minister's personal life and family matters." It argues that these records do not reveal a matter that would be of public interest and have not been requested by anyone else.

[para 28] As I discuss further below, the Applicant has not provided evidence me that a matter or issue of concern exists in the Public Body or likely exists, that would be of interest to the public.

Is the applicant motivated by private or public interests?

[para 29] The Public Body acknowledges that the Applicant intended to publish any information that would be of public interest and that "it is the Applicant's job to inform the public and there may be a segment of the public that is curious about the Public Body's relationship with various members of the public." The Public Body admits that this weighs in favour of a fee waiver, "but not heavily."

[para 30] The Applicant argues that he "is a journalist with a long history of breaking news stories of public interest after receiving records through the access to information regime... [He] is not in the habit of going on 'fishing expeditions' or filing frivolous requests. The present was no different." In response, the Public Body cites Order 96-022, in which former Commissioner Clark stated:

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.

(at para. 21)

[para 31] The Applicant's role as a journalist is relevant to the consideration of the likelihood that the requested information would be disseminated. I accept that the

Applicant's intent was to disseminate information that had come to light regarding the allegations. However, the identity of the Applicant does not, by itself, indicate that there is a public interest in the requested records, nor does his experience with making access requests under the FOIP Act. The decision as to whether a fee waiver ought to be granted based on public interest must be considered on a case-by-case basis; the value of past access requests is not a relevant factor.

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

[para 32] An applicant must present convincing evidence or arguments that a concern exists or likely exists (Order F2006-032, at para. 26). In this case, the Applicant states that he had a reliable source that told him records exist that would bring actions of the Minister or Public Body into question. He states

[t]he information request was based on a tip I received from a credible source who had provided me with verifiable information in the past... I have more detailed information from this tip that I do not wish to divulge because I have an obligation to protect my source. But you will note the very limited time frame of my request. It may be that my source was incorrect about the time frame, but in subsequent conversations, the source is adamant that the record exists, or should exist.

[para 33] The Public Body argues that the records are not about the functioning of government, nor are they useful in subjecting Public Body activities to public scrutiny.

[para 34] The Applicant argues that the question of whether fees should be waived in the public interest should not be based on whether the records themselves reveal information that may be of public interest. He argues that this "places an unfair burden on journalists, and others, who may be acting in the public interest" and that it "would stifle future requests because there would be no assurance for journalists and media outlets – especially in the current cash-strapped media reality – that they could recoup fees if their request did not turn up documents that the Public Body or FOI Commissioner deemed to be in the public interest." The Applicant refers to this as a Catch-22:

Pay or you don't get to see the documents. But if you pay, and the documents you receive are not in the public interest, you're out of luck. It creates an expensive crapshoot that places applicants in an unfair, and financially untenable situation that will stifle freedom of information requests and severely limit journalistic research in the public interest.

[para 35] The Applicant also asks whether the question of a fee waiver in the public interest would be answered differently if he had made the fee waiver request *before* the records had been located and provided to him. The Applicant states that in several previous requests made to public bodies, fees had been waived even when the request had produced no records "because the public body acknowledged the records were in the

public interest *before* the request was processed. It follows that those public bodies were acknowledging that the *request itself* was in the public interest.”

[para 36] In my view, had the Applicant made the request for a fee waiver before the records had been located – i.e. before the responsive records were available for consideration – he would have nevertheless have had to provide sufficient evidence to show that there was an issue or concern, or a significant likelihood of an issue or concern, that was of public interest.

[para 37] The Applicant’s assertions as to his confidential source of questionable actions on the part of the Minister or Public Body are insufficient to persuade me that an issue or concern exists or likely existed relative to the Public Body.

[para 38] I disagree with the Applicant that the fee waiver provisions create a “catch-22” for applicants. As noted above, the basic principle of the Act is that users must pay. There are exceptions to this rule, such as when the requested records relate to a matter of public interest. The Applicant seems to argue that he should not have to pay for any part of a request for the sole reason that he hoped or expected to receive records that would have been in the public interest, had they existed.

[para 39] Even without considering the content of the records, the Applicant’s request – records relating to correspondence between Public Body employees and a named individual – does not, by itself, indicate a matter that would be of public interest. Further, the Applicant has not provided me with reasons (beyond mere assertions) to expect that the records might have related to a matter of public interest. I understand that the Applicant may feel that he must protect his source and therefore may be limited in what he can reveal in his arguments; however, I cannot find that the request relates to a matter of public interest based on the minimal arguments presented by the Applicant.

[para 40] Regarding the revised criteria reproduced above, the second criterion weighs in favour of waiving fees in the public interest; however, the Applicant has not satisfied the first or third criteria. Therefore I agree with the Public Body that the balance of the factors weighs against finding that a fee waiver in the public interest is justified.

Are there any other reasons it is fair to excuse payment?

[para 41] The Applicant has argued that the fees for his request should be waived on the grounds of fairness. Section 93(4)(a) permits a fee waiver in situations where the applicant cannot pay or where there is any other reason it is fair to excuse payment (the Applicant has not argued an inability to pay in this case).

[para 42] The adjudicator in Order F2009-039 surveyed past orders of this office regarding other circumstances in which it is appropriate to waive fees. She stated:

Previous orders of this office have considered the following circumstances appropriate for granting a fee waiver:

- In Order F2007-016, the Adjudicator determined that it was appropriate to waive fees because the Applicant, who had limited financial resources, had taken steps to narrow her request, had requested her personal information, and had unsuccessfully attempted to obtain the information she sought in other ways.
- In Order 2001-042, the Commissioner decided that it would be appropriate to excuse an applicant from paying fees as it would have the effect of ending protracted and longstanding issues between the public body and the applicant.
- In Order F2006-001, the Adjudicator determined that a combination of an applicant's circumstances, and the unfairness and improper exercise of discretion on behalf of the public body in that case made the circumstances appropriate for granting a fee waiver.
- In Order F2003-023, the Adjudicator determined that it was appropriate to grant a fee waiver as the public body in that case had lost the information requested by an applicant.
- Order F2007-020 held that the delay in processing the applicant's access request was a circumstance that weighed in favor of granting a fee waiver.
- Order 99-027 notes that "misconduct in responding to an applicant" could be a reason to waive fees on the ground of fairness.

(Order F2009-039, at para. 52)

[para 43] The Applicant cites the factors outlined in Order F2007-023 for determining whether a fee waiver is warranted for reasons of fairness. In that order the adjudicator listed the following criteria (in Appendix B):

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?

[para 44] The Applicant argues that the first and third factors are not relevant in the circumstances. He states that the Public Body is in a better position to argue that the waiver would significantly interfere with its operations, although the Applicant notes that the relatively small amount of the fee would not likely have a deleterious effect on the Public Body's \$6.5 billion budget.

[para 45] The Public Body states that the steps involved in processing the Applicant's request included the participation of a number of branches in the Public Body, including the Minister's office, the IT and operations area, and the Legislative Services area; and a thorough search of all Public Body email and file services. The total search time was 24.5

hours. The Public Body argues that this constituted an interference with its operations “which at the very least, was not insignificant, and which involved time, manpower and an interruption of daily operations.”

[para 46] The Public Body also states, as a factor weighing against a fee waiver for reasons of fairness, that it attempted to work with the Applicant to narrow his request. The Applicant argues that his request was sufficiently narrow because it only requested information from a short time frame (less than two weeks).

[para 47] The Applicant argues that the Public Body failed in its duty to assist him under section 10(1), and this weighs in favour of a fee waiver. I have found that the Public Body conducted an adequate search and responded to the Applicant appropriately under section 10(1). Therefore I find that this is not a ground that supports the Applicant’s fee waiver request.

[para 48] Lastly, the Applicant raises concerns about the conduct of the Public Body in responding to his request; specifically, the Applicant asks why the Minister was informed of his – the Applicant’s – identity, and he takes issue with the conduct of the Minister.

[para 49] The Public Body states that

as a matter of standard practice, the identity of every applicant related to a FOIP request is kept confidential and is disclosed only to those within the Public Body who have a legitimate need to know. It is not presently known how the Applicant’s identity was discovered by the Minister, and the Public Body is not aware of any emails, memorandums or other forms of communication which revealed the identity of the Applicant in relation to his access request.

[para 50] Presumably, since the Public Body’s FOIP area is not aware of how the Minister came to know the Applicant’s identity, the Minister was not told as part of the processing of the request. Certainly the Minister would need to know *of* the request, as it encompassed his own communications; however, there does not seem to be any reason for the Minister to have been told the identity of the Applicant. If this information was communicated by the FOIP area, this communication was inappropriate.

[para 51] Further, an affidavit sworn by the Applicant’s supervisor states that the Minister made disparaging statements in a phone call with her about the Applicant and characterized his request in a similarly derogatory manner. This also is an inappropriate response to an access request.

[para 52] The Applicant’s supervisor also stated in her affidavit that “shortly after” the call from the Minister, she received a phone call from a named individual belonging to a media organization who purported to be the boss of the individual named in the Applicant’s request. The Applicant alleges that his identity as the requestor was disclosed by the Public Body to this caller. The Public Body has not addressed this allegation. Although I have no reason to disbelieve the affiant’s statement on this point, I do not

have evidence that it was someone in the Public Body who told the third party media organization about the Applicant's request.

[para 53] The Applicant has also provided me with a screenshot of a "conversation" that took place in January 2012 on a social media site (Twitter) between accounts that appear to belong to the Applicant and the Minister (another, unknown, user was involved in the conversation as well). While I do not know for certain that the Twitter account that appears to belong to the Minister *is*, in fact, the Minister's account, the Public Body has not denied the allegations made by the Applicant, or challenged the evidence. I conclude, on a balance of probabilities, that the account that appears to belong to the Minister *does* belong to the Minister and that therefore the Minister discussed the Applicant's access request on Twitter.

[para 54] One of the statements (tweets) from the Minister's account names the Applicant and states "You FOIPPed my personal correspondence with kids' pictures." Although the Applicant's request captured this information due to its breadth (discussed above), this statement suggests the request had a motive of interfering in the Minister's personal life that it did not have in fact.

[para 55] The Applicant insists that he was not seeking personal communications or pictures of the Minister or his family. He argues that the Public Body could have withheld the pictures under the Act (the Public Body states that some of the records were outside the scope of the Act, per section 4(1)(o), but that discretion was exercised and the records were provided outside of the Act). The Applicant seems to be arguing that the records he is alleged to have sought (pictures of the Minister's children) are outside of the scope of the FOIP Act and so could not have been part of his request.

[para 56] Regardless of whether the Applicant intended to or could include personal records of the Minister in his access request, and regardless of the Minister's intent in calling the Applicant's supervisor and making the comment on Twitter, the phone call and Twitter posting may be viewed as being disparaging toward the Applicant, both to his supervisor and to the public.

[para 57] Moreover, a Twitter conversation takes place in an entirely public realm. The Minister's implicit condemnation of the request could have had a "chilling effect" not only on the Applicant, but on any other person who viewed the conversation. It is plausible that a fear of similar public reprisal could make individuals reluctant to make access requests. In other words, this type of public denouncement of an applicant could have a deleterious effect on the access-to-information process.

[para 58] The FOIP Act gives applicants a right of access to information in the custody or control of public bodies, subject to the limited exceptions in the Act. The Act does not limit the type of request that can be made, nor does it place a value on a request. Public bodies have a duty to assist every applicant and every request under section 10 (subject to section 55, which enables the Commissioner to authorize a public body to disregard an access request).

[para 59] It is therefore not acceptable to denigrate an applicant for making a request, even if the public body believes the request to be inappropriate. The FOIP Act permits the Commissioner to authorize a public body to disregard a request made under the Act if the request is frivolous or vexatious (section 55(1)(b)). Had the Public Body or Minister regarded the Applicant's request as inappropriate insofar as it was frivolous or vexatious, the Public Body could have applied to the Commissioner for authorization to disregard the request. Comments made to third parties that could harm an applicant's reputation or serve to intimidate an applicant undermine the right of access provided by the FOIP Act. This is especially egregious where those comments are made publicly, as they may act as a deterrent to others to exercise their right of access under the Act.

[para 60] Given the possible negative impact the Minister's actions could have had on the Applicant and the administration of the FOIP Act more generally, it is my view that it is appropriate in the circumstances for the Public Body to waive the fees paid by the Applicant. I say this despite the fact that I found the Public Body's response to the Applicant to have been otherwise diligent and appropriate under the Act.

IV. ORDER

[para 61] I make this Order under section 72 of the Act.

[para 62] I find that the Public Body met its duty to assist the Applicant.

[para 63] I order the Public Body to refund the fees paid by the Applicant.

[para 64] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator