

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2014-05**

January 29, 2014

**COUNTY OF VERMILION RIVER #24**

Case File Number F6057

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

**Summary:** The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the County of Vermilion River #24 (the Public Body) for information regarding the Public Body's procedural policies, a copy of a particular council motion, and several items relating to the Durness Drainage project.

The Public Body provided a fee estimate of \$2,773.25 which was subsequently reduced to \$1,464.75 after the Applicant decided to withdraw his request for some records and agreed to "purchase" other records.

The Applicant requested that the Public Body waive the fees, on the basis of public interest, but the Public Body refused to do so. The Applicant requested that the Commissioner review whether it is appropriate for the Public Body to estimate fees of \$1,464.75 and whether the fees should be waived because his access request involves a matter of public interest.

The Adjudicator found that the records do not relate to a matter of public interest such that a fee waiver would be warranted. The Adjudicator also determined that for the most part, the Public Body's calculations for the fee estimate were reasonable.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72, 93, 95; *Freedom of Information and Protection of Privacy Regulation*, Schedule 2, Alta Reg. 186/2008.

**Authorities Cited: AB:** Orders 96-002, F2006-032, F2007-023, F2009-034, F2011-015, F2012-09, F2013-10.

## **I. BACKGROUND**

[para 1] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to County of Vermilion River #24 (the Public Body) for information regarding the Public Body's procedural policies, a copy of a particular council motion, and several items relating to the Durness Drainage project (primarily relevant invoices).

[para 2] The Public Body provided a fee estimate of \$2,773.25 which was subsequently reduced to \$1,464.75 after the Applicant decided to withdraw his request for some records and agreed to "purchase" other records.

[para 3] The Applicant requested that the Public Body waive the fees, on the basis of public interest, but the Public Body refused to do so.

[para 4] The Applicant requested that the Commissioner review whether it is appropriate for the Public Body to estimate fees of \$1,464.75 and whether the fees should be waived because his access request involves a matter of public interest.

## **II. RECORDS AT ISSUE**

[para 5] As the issues relate to fees, there are no records at issue.

## **III. ISSUES**

[para 6] The issues in this inquiry, as set out in the Notice of Inquiry, dated July 9, 2013, are:

- 1. Should the Applicant be excused from paying all or part of a fee, on the basis that the requested records relate to a matter of public interest under section 93(4)(b) of the Act?**
- 2. If the Applicant should not be excused from paying all or part of a fee, did the Public Body properly estimate the amount of fees in accordance with section 93 and/or 95(b) of the Act, and the Regulation?**

## **IV. DISCUSSION OF ISSUES**

- 1. Should the Applicant be excused from paying all or part of a fee, on the basis that the requested records relate to a matter of public interest under section 93(4)(b) of the Act?**

[para 7] 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.*

...

[para 8] The Commissioner's jurisdiction to review decisions regarding fee waivers was described in Order F2007-023 (at paragraphs 23-25):

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.

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)).

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.

[para 9] 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?

[para 10] 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).

[para 11] I will consider each of the three factors separately.

*Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?*

[para 12] The Public Body argues that the Durness Drainage project “may be of interest to those living in the immediate basin area but physically covers a small land base within the County’s entire geography. Therefore the relevance of the “public interest” in this matter may be considered of a narrow focus.” The Public Body also states that it holds a meeting every year in the area in which the project is located, to provide individuals an opportunity to provide comments or express concerns. It says that “in

general, other than the applicant there has not been a public debate nor have there been unresolved questions from the public regarding the subject project.”

[para 13] The Public Body also provided copies of public notices advertised in local papers, which described the proposed project and invited affected individuals to provide a “statement of concern” to Alberta Environment. It stated that Alberta Environment received only one letter, which was from the Applicant. It further states that it has not received any other requests for information about the project, nor has it received other letters from Alberta Environment regarding further public submissions.

[para 14] Lastly, the Public Body states that it has published the summary costs of the Durness Drainage project. The Public Body has provided me with the published summary costs; they include a breakdown of costs for labour, equipment, and culverts/mulching, as well as the total cost. The Public Body argues that these summary costs are sufficient to satisfy the public interest, and that the detailed expenditures requested by the Applicant is not information in which the general public has an interest.

[para 15] The Applicant argues that the requested information is of public interest. He stated that

[d]rainage and resulting costs are a major concern and are a controversial issue in the County. Thousands of taxpayers; dollars, in the form of government grants and general taxes have apparently funded the Durness Drainage project. Ratepayers would find it very informative to have the decision making details and all financial costs of this **county owned project made public and published.** (emphasis in original)

[para 16] The Applicant also states that the Public Body is proposing new drainage bylaws and requesting public input, and that the requested information would be beneficial to help individuals provide useful comments.

[para 17] The Applicant argues that he knows other individuals who have wanted information, but that the Public Body does not keep records of verbal requests. He has also provided me with two non-consecutive pages of a decision from the Alberta Environmental Appeals Board as support for his argument that others are concerned with the drainage project. The Appeals Board decision seems to be concerning the effect of mediated settlements on the right of certain landowners to pursue a remedy under the Board’s process. The agreement appears to be the approval granted by Alberta Environment to a development company to construct a stormwater management facility near Lloydminster. It may be that the facility is part of the drainage project; however, I cannot infer that from the information provided by the Applicant.

[para 18] Regarding the Public Body’s advertisements of the project, he points out that the advertisements did not name the project and only gave the legal land description, which is meaningless to most people.

[para 19] The advertisements in the local papers describe the location of the project as “22-50-01 W4M, 23-50-01 W4M AND 24-50-01 W4M.” As the advertisement states that it is the County of Vermilion River making the application for the project, a person can assume that the project is located within that county, but I agree with the Applicant that the location description may not be meaningful to many people.

[para 20] However, the Public Body has stated that it also has held yearly meetings at which the public could have raised concerns about the project, but apparently did not. Further, individuals could have raised concerns in other forums (such as writing letters) but apparently have not. The Applicant indicates that he knows others who have concerns about the project; while this may be true, the Applicant has not provided me with evidence to conclude that there are individuals other than himself that have concerns about the project.

[para 21] Even if the project itself is a matter in which the public (even the limited public directly affected by the project) has an interest, the Applicant has not provided me with sufficient reasons to find that the information would contribute to the public understanding of the issue. He has not, for example, explained why the summary costs published by the Public Body are not sufficient to scrutinize the activities of the Public Body and that the more detailed records he requested, such as individual invoices, are necessary.

[para 22] The Applicant has also provided me with a copy of Bylaw 11-16, which indicates that the project is funded by tax dollars. I presume that the Applicant is arguing that information about the project is a matter of public interest because the public is essentially paying for the project. I do not find this argument particularly persuasive, given that the activities of public bodies in general involve the spending of tax dollars.

[para 23] I do not have sufficient evidence to conclude that records requested regarding the Durness Drainage project will contribute to the public understanding of a matter 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?*

[para 24] The Public Body argues that “the applicant holds a difference of opinion with the Public Body on how this project was funded... This is the applicant’s personal view and is not one that has been expressed to the Public Body by the general public.”

[para 25] The Applicant states that his request is not only in his interest. He states that he is an active member of the County of Vermilion River Taxpayers’ Association, which was formed in 2011. He states further that

The “Application to Form a Society” lists as one of their [the association’s] objectives to take action on matters of mutual interest related to the County of Vermilion River, such as (ii) offsite levies/ (iv) development of storm water

management facilities to promote and encourage other causes brought by other members. (emphasis in original)

[para 26] The Applicant seems to be arguing that he intends to share the information with the taxpayers' association. I accept that the Applicant would share the information in the requested records, rather than use it solely for his own private purposes. The Public Body indicates that other individuals are not interested in the requested information; that is a consideration under the first factor but less important here.

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

[para 27] The Public Body states that the requested records do not provide clarity regarding how the Public Body reached a decision to proceed with the project. It also states that the decisions of the County Council, including motions approving related tenders, grants and budgets, are recorded in the Council minutes and posted on the Public Body website.

[para 28] As discussed above, the Applicant has not provided me with reasons why the information already available regarding the Durness Drainage project is not sufficient to subject the Public Body to scrutiny, or why the additional information in the requested records will allow for greater scrutiny.

[para 29] The Applicant states in his request for inquiry that he could not locate certain Council motions on the Public Body's website. I note that in a letter from the Public Body to the Applicant dated October 10, 2012, included in the Public Body's submissions, the Public Body provided information regarding one of the requested motions and stated that other requested motions did not exist. I do not know if there are any further motions that the Applicant believes are responsive to his request and are not publicly available. In any event, the Applicant has not told me why any of the Council motions would shed light on an activity of the Public Body that has been called into question.

[para 30] I conclude that the Applicant has not met his burden to show how the requested records relate to a matter of public interest such that the fees should be waived.

**2. If the Applicant should not be excused from paying all or part of a fee, did the Public Body properly estimate the amount of fees in accordance with section 93 and/or 95(b) of the Act, and the Regulation?**

[para 31] With respect to the estimated fees, the Public Body stated in its initial submission that it assessed an estimated time to search for, locate, and retrieve each item of the Applicant's request. It states that Schedule 2 of the FOIP Regulation was used to assess the cost associated with each item. The Public Body provided me with a copy of the spreadsheet created to calculate the cost. The Public Body used \$0.25 per page for photocopying costs; however, the revised fee estimate does not include photocopying costs, as the Applicant has requested to view the files first, in order to determine what copies he might want.

[para 32] By letter dated November 25, 2013, I asked the Public Body to provide a breakdown of the revised estimate. It responded that it estimated 54.25 hours to search for, locate and retrieve the requested records, at \$6.75 per quarter hour (\$1464.75 total). It also stated that one item (record) had been provided to the Applicant “outside of this request”, reducing the fee estimate to \$1365.75 (50.25 hours of search time).

[para 33] In my letter, I asked the Public Body to provide an explanation for the stated amount of time allocated to search for and retrieve responsive records. The Public Body responded that the time was only an estimate as the search had not yet been conducted. By letters dated December 11, 2013, and December 19, 2013, I asked the Public Body to provide an explanation for how it came to the estimated time to search for and locate each relevant item in the Applicant’s request.

[para 34] With respect to the request for copies of certain Public Body policies (item 1), the Public Body stated that it would take 0.5 hours to search for and locate the policies, and to copy them onto a memory stick for the Applicant. It also stated “if transferring the electronic documents to a memory stick (electronic medium) is considered copying by your office then the estimate can be reduced by 10 minutes to a total of 20 minutes.” Previous orders of this office have stated that that labour costs cannot be incorporated into the fee for photocopying (see Order F2013-10 at paras. 79-86). In my view, copying records onto a memory stick is sufficiently similar to photocopying paper records such that the principle applies here as well. The Public Body can charge for the medium itself, according to Schedule 2, but cannot charge for the time it takes to produce a copy.

[para 35] Items 5(a), 5(c), 5(e), 5(f), 5(g), 5(h), 5(i), 5(j), and 5(k) all require a search of electronic general ledger accounts to identify relevant invoices, accounts payable and equipment and employee time allocated to a particular project. In its January 10, 2014 letter, the Public Body provided the steps required to set up a general ledger search and the time required for each step. It also stated that the general ledger is an accounts payable program that is not searchable by keyword. The Public Body ran a search for one of the requested items (item 5(a), which required a search for all consultant and engineer invoices attributed to a particular project) for one of the relevant years to determine the approximate time required. The first step includes setting up the search parameters and generating a report, which took 5 minutes. The second step includes scanning the report to identify relevant vendors and highlighting the relevant information. This took the Public Body 7 minutes to perform. The Public Body states that this search would be conducted for three different Public Body departments, and for each relevant year (8 years total). It calculated 12 minutes per year, per department for item 5(a). The Public Body’s fee estimate used 30 minutes per year to assess the fee for this item.

[para 36] The Public Body also states that the estimated time per year to search the general ledger for a requested item will vary depending on the item. It states for example that item 5(g) (which involves searching for supplier invoices for gates) would require



less search time because the invoices will be for one specific item. It estimated 0.25 hours to search the general ledger for records responsive to that item.

[para 37] I accept the Public Body's explanations for the time estimated per year to search its electronic general ledger and agree that they are reasonable.

[para 38] The Public Body also explained the time required to manually search for archived records (required for items 5(a), 5(c), 5(e), 5(f), 5(g), 5(h), 5(i), 5(j), and 5(k)). It states that archived accounts payable records consist of between 10-14 boxes of records per year. Searching for engineering firms and consultants for item 5(a) "would be more extensive as there are numerous firms providing service to the Public Body and more vendor invoices. In the matter of 5(g) there is a very specific product therefore a limited number of 'gate' vendors and fewer instances of vendor invoices." The Public Body estimated 0.75 hours per year for the manual search related to item 5(a) and 0.25 hours per year for item 5(g). I accept the Public Body's explanation regarding how it estimated the time required to manually search for such archived records.

[para 39] The Public Body also provided an explanation for the 1.25 hours per year estimated for the manual search relating to item 5(f) (equipment and manpower costs for upgrading RR 13 for the years 2004-2011 and installing of gates). It stated that it would require a search of daily staff time cards to determine the time worked on this specific project. It estimated that this would include time cards for 30-40 staff, multiplied by 21 (working) days a month; the result is approximately 7500 records per year. The Public Body also clarified that it erred in estimating 8 years for this particular item as it keeps time cards for only 3 years. Therefore the estimated time for this manual search would be 1.25 hours per year x 3 years (3.75 hours) and not 1.25 hours per year x 8 years (10 hours). I note that at \$27 per hour, the difference is \$168.75.

[para 40] The Applicant states that only two items in his request fell into the 8-year time frame. Having reviewed the Applicant's access request, I notice three of the items specifically state the time span as 2004 onwards (items 5(a), 5(e) and 5(g)). However, the other items do not specify a time span. The Applicant states that "all invoices regarding construction work were within less than 2 years of the date of the original request." I am not entirely clear what the Applicant means by this. However, I note that the Public Body's spreadsheet, which it used to calculate the estimated time to search for and locate responsive records, indicates two items of the request as having a 2004-2011 time span that was not specifically mentioned in the Applicant's request: 5(f) (all equipment and manpower costs involved in upgrading Range Road 13 south of Twn. Road 504 and the installation of the gates) and 5(g) (invoices indicating costs of the gates barricading Range Road 13). Perhaps what the Applicant meant was that these construction project (relating to Range Road 13) were undertaken within two years of his request, and that there is no need to look for records prior to 2009 (or thereabouts). I do not have information regarding the duration of these projects and so cannot determine how many years are relevant to the Public Body's search for responsive records. I recommend the Public Body clarify the scope of this part of the Applicant's request.

[para 41] The Public Body had stated in its December 17, 2013 letter, that in order to locate requested minutes from meetings involving County representatives and landowners on a certain project, four employees of the Public Body (the CAO, Development Officer, Engineering Technologist and the PW Superintendent) would each have to search for hand written or electronic notes as well as emails; the estimated time for this search was one hour per person. In my December 19, 2013 letter I asked the Public Body why there would not be a single version of the minutes of these meetings. The Public Body responded:

The Public Body records minutes of County Council and Committee meetings, public hearings, Intermunicipal meetings and some ad hoc meetings. The meetings referred to in the Applicant's request Page 3, Item (g) are likely to be informal meetings involving one or several representatives of the Public Body. Perhaps an accurate response to this request would have been to seek further clarification from the Applicant or respond that there were no responsive records. However, the Public Body interpreted the request to include notes that may have been taken during these informal meetings by representatives.

[para 42] The Public Body is in a better position than I am to know what type of meetings the Applicant is referring to in his request, and what type of minutes or notes would have been taken at those meetings. However, if the Public Body is in doubt as to what records the Applicant is seeking by reference to these meeting minutes, I recommend that the Public Body clarify this point with the Applicant. The Applicant should not be required to pay for four hours of search time at \$27 per hour for records he did not request. That said, I do not think that the Public Body necessarily erred by not interpreting the request narrowly (which would have resulted in the Public Body telling the Applicant that responsive records do not exist). I agree with the adjudicator in Order F2012-09, when she stated:

If a public body interprets a request for records too restrictively, or wrongly, the public body runs the risk of unilaterally narrowing the scope of the access request and failing in its duty to assist the Applicant, by failing to search for records falling within the scope of the access request. (at paragraph 53)

[para 43] Regarding the per-hour cost to search for and locate records, the Public Body charged the maximum allowed by Schedule 2 of the Regulation (\$27 per hour). The Public Body states that the search would have been conducted by administrative support staff. There are two levels of the salary grid for these positions. The Public Body calculated the per-hour cost by including the salary and benefit costs for each level; the lowest level cost is \$26.77 per hour, and the highest is \$34.97 per hour. The Public Body states that it does not have any administrative staff on the lowest level, and that searches conducted by managerial staff (for emails) would be at a considerably higher hourly rate. Given this information, I find that it is reasonable for the Public Body to charge the maximum hourly rate for searching for and locating records.

[para 44] The Applicant notes that the Public Body used the 2012 salary ranges in its calculations. He believes that the Public Body ought to have instead used 2011 salary

ranges. I agree that the Public Body should use the hourly rate of the staff as it was when the Public Body initially calculated the estimate. I do not know whether the 2011 and 2012 salary ranges differ. As the average hourly rate of administrative staff processing the request is 14% higher than the maximum amount that can be charged under Schedule 2, it seems unlikely that the average 2011 salaries would have been below the maximum amount chargeable.

[para 45] The Public Body states that photocopy costs were not included in the estimate, as the Applicant wants to view the records before he decides whether he would like copies. However, the Public Body's earlier fee estimate included a photocopy fee of \$0.25 per page; the Public Body stated in its submissions that the Applicant would only be charged actual costs for photocopying, and that it used the \$0.25 per page only for "ease of calculation." In Order F2011-015, the adjudicator discussed the use of maximum fees in Schedule 2 of the Regulation in calculating a fee estimate, where those maximums do not reflect the actual cost to the Public Body. She stated:

In my view, using the maximums to arrive at an estimate of the costs of processing an access request, rather than amounts that the public body believes will approximate its actual costs, is unreasonable. I say this because this practice takes into account an irrelevant consideration, i.e. the statutory maximum that may be charged, and ignores relevant ones, i.e. a public body's costs.

In situations in which the maximums are used as estimates, if the actual costs turn out to be significantly lower than the maximums, this discrepancy could have the effect of dissuading an applicant from going ahead with the access request, even though the applicant would have proceeded had the estimates calculated the approximate actual cost. Such a result would be contrary to the purpose of the legislature in enacting the FOIP Act, and contrary to the clear intent of section 93(6). (at paragraphs 45-46)

[para 46] In my November 25, 2013 letter, I asked the Public Body what its actual costs are to produce a photocopy. The Public Body calculated its actual costs for photocopies as follows:

Copier Service Charges	\$0.057
Amortization of Copier	\$0.026
Paper (per sheet)	\$0.008
Electricity (estimated)	<u>\$0.006</u>
<b>Actual cost per photocopy</b>	<b>\$0.097</b>

[para 47] This seems to be a reasonable charge for photocopies for the Public Body to use both in calculating its fee estimates and actual costs once a request has been processed.

## V. ORDER

[para 48] I make this Order under section 72 of the Act.

[para 49] I find that the Applicant should not be excused from paying the fee based on public interest. Therefore I confirm the Public Body's decision to refuse to grant the Applicant a fee waiver.

[para 50] I confirm that the Public Body's fee estimate is reasonable except for the time calculated to search for and locate item 1 (discussed in paragraph 34). However, I recommend that the Public Body confirm with the Applicant the scope of his request as discussed in paragraphs 40 and 42.

[para 51] I order the Public Body to recalculate the fees for searching for and locating item 1, as discussed in paragraph 34.

[para 52] I order the Public Body to provide a new estimate to the Applicant of the total fees based on the foregoing.

[para 53] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek  
Adjudicator