

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-54

September 27, 2018

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Numbers 002118 and 002919

Office URL: www.oipc.ab.ca

Summary: The Applicant made two access requests to Alberta Justice and Solicitor General (the Public Body), and requested a fee waiver pursuant to section 93(4) of the *Freedom of Information and Protection of Privacy Act*. The Public Body denied the fee waiver, but reduced the initial fee for each access request to \$1.00 following the direction of Order F2016-61. The Applicant requested that the Public Body consider the total number of access requests he had before the Public Body and reduce his fees to zero.

After the closure of submissions in the inquiry, the Applicant paid the initial fees to the Public Body. The Public Body asked the Commissioner to close the inquiry for being moot; however, the Commissioner determined the matter was not moot and continued the inquiry.

Requests for fee waivers under section 93(4) must be considered on a case by case basis. The Public Body was not required to consider the total number of access requests the Applicant had made to it in determining whether the Applicant should be excused from paying all or part of the initial fee for his access requests. The Public Body properly exercised its discretion in reducing the initial fee to \$1.00 for each of the two access requests at issue in this inquiry.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 72, and 93(4).

Authorities Cited: AB: Orders 96-002, 99-005 and F2016-61.

Cases Cited: *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.), [1989] 1 S.C.R. 342; and *Grimble v. Edmonton (City)* (1996), 181 A.R. 150 (C.A.).

I. BACKGROUND

[para 1] The Applicant made two requests for access to information from the Public Body. In one request (OIPC file 002118), he asked for “all audit and all financial statements concerning inmate welfare fund accounting at Calgary Remand Centre (CRC). All audit and all financial statements concerning inmate phone system daily costs to operate and daily revenues, of all Alberta jails – as well as initial set up costs and initial installation costs”. In the other request (OIPC file 002919), he asked for information related to hunger strike protocols and disciplinary hearings at the Calgary Remand Centre.

[para 2] The Public Body requested the Applicant pay a \$25.00 initial processing fee for each request. The Applicant did not pay the initial fee of \$25.00 for either request.

[para 3] The Public Body, following the direction in Order F2016-61, subsequently requested the Applicant pay a reduced initial fee of \$1.00 for each request. The Applicant requested a review of the reduced initial fee. The Applicant, at the time submissions were made, had 57 other requests for access to information before the Public Body. He suggests that the cumulative effect of paying \$1.00 for each of these requests is prohibitive and should be taken into account when determining if he has the ability to pay.

[para 4] Following the closure of submissions in this inquiry, the Applicant provided the Public Body a cheque for \$3.00 to cover the initial fees of the two access requests at issue in this inquiry (OIPC files 002118 and 002919), and one other access request. The Public Body requested that the inquiry be closed as the issue was now moot. The Applicant took the position that the issue was one of general importance and requested that the inquiry continue.

II. INFORMATION AT ISSUE

[para 5] As this matter regards a review of the Public Body’s decision to refuse a waiver of fees, there is no information at issue.

III. ISSUES

[para 6] The issues in this inquiry are:

- 1. Is the issue for inquiry moot? If so, should I exercise my discretion to decide a moot issue?**

The Notice of Inquiry, issued May 19, 2017 set out the following issue:

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

As this issue has been determined in Order F2016-61, the new question with respect to this matter is whether consideration should be given to the number of requests an Applicant makes in determining if an Applicant should be excused from paying all or part of a fee.

IV. DISCUSSION OF ISSUES

1. Is the issue for inquiry moot? If so, should I exercise my discretion to decide a moot issue?

[para 7] Following the closure of submissions in this matter, the Applicant provided the Public Body with a cheque for \$3.00 to cover the initial fees of the two access requests at issue in this inquiry (OIPC files 002118 and 002919), as well as another access request. The Public Body stated that the issue was now moot and asked for the inquiry to be closed. In response, the Applicant took the position that the issue was one of general importance and asked for the inquiry to continue.

[para 8] An issue is “moot” when it presents no actual controversy, or the issue has ceased to exist because the matter has already been resolved; a matter is also said to be moot when a determination is sought on the matter which, when rendered, cannot have any practical effect on the existing controversy (Order 99-005 at para. 27)

[para 9] The Supreme Court of Canada has explained mootness as follows:

The doctrine of mootness is an aspect of general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. [*Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.), [1989] 1 S.C.R. 342 at p. 353 or para. 15, cited in Order 99-005 at para. 28]

[para 10] I do not agree with the Public Body that this issue is moot. Although the Applicant paid the initial fee of \$1.00 for each of the access requests at issue in this inquiry, the issue of whether the Public Body should consider the number of requests the Applicant has made in determining whether the Applicant should be excused from paying all or part

of the fee remains live, because if the Applicant is to be excused, the initial fee (or part of it) would be refunded. The issue is not moot.

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

As this issue has been determined in Order F2016-61, the new question with respect to this matter is whether consideration should be given to the number of access requests an Applicant makes in determining if an Applicant should be excused from paying all or part of a fee.

[para 11] Section 93(4) of the Act states:

93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,

(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or

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

[para 12] The Public Body, in its submissions, provided further details regarding the Applicant's other requests for information.

As of June 30, 2017 the Applicant had 64 open access requests with this Public Body. Only requests for general information are subject to the initial processing fee. Of these 64 open access requests, 19 were requests for general information. Fees were waived on six of these 19 requests because the Public Body is not in compliance with section 11 of the Act. Eleven of the remaining 13 access requests for general information are presently with the OIPC for consideration under section 55(1) of the Act. The Applicant did not provide initial fees for any of these 11 requests and the Public Body has deferred its decision to request the initial fees from the Applicant until such time as the OIPC has made its decision on the section 55 requests. As such, there are presently only TWO open access requests for general information where the initial fee was requested by the Public Body. These are the two access requests that are the subject of this inquiry.

[para 13] Order F2016-61 reviewed cases dealing with the burden of proof for this issue. At paragraphs 12-14 the adjudicator stated the following:

Order 96-002 established that a person requesting a fee waiver bears the burden of proof. Former Commissioner Clark stated that an applicant is in the best position to argue why the waiver is justified and must provide sufficient information to allow the head of a public body to make an informed and objective decision. Former Commissioner Work, in Order 2001-042 stated, at paragraph 19 that

...notwithstanding the Applicant's burden of proof, section 72(3)(c) [previously section 68(3)(c)] provides me with the power to substitute my own decision on whether to waive all or part of a fee, after looking at all of the evidence and circumstances that existed when the Public Body denied a fee waiver and at the time of the inquiry.

Section 72(3)(c) states:

72(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

...
(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;

Former Commissioner Clark stated, in Order 96-002,

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

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

[para 14] This inquiry deals with two requests for information. In both cases, the Public Body initially denied a fee waiver. In one case (OIPC file 002118), the Applicant had submitted a copy of his Trust Account statement that covered the period of March 17, 2014 through March 16, 2015. The statement showed a balance of \$323.24 on March 16, 2015. In the other case (OIPC file 002919) the Trust Account statement covered the period of January 6, 2015 through November 16, 2015. The balance on November 16, 2015 was \$190.69.

[para 15] After a review of Order F2016-61 where the Adjudicator ordered the Public Body to reduce the initial fee to \$1.00, the Public Body advised the Applicant that in keeping with the spirit of that order, upon receipt of an initial fee of \$1.00 for each of these requests, the files would be reopened and processed.

[para 16] The Public Body submits the number of access requests made by the Applicant should not be taken into consideration when determining if an applicant should be excused from paying all or part of a fee. It submits there is nothing in the Act or the Regulations "that support broad generalizations such as fee waivers for Applicants with multiple access requests".

[para 17] Further, the Public Body states:

This Public Body assigns each new access request a unique identifier. Fees may be requested on each separate access request based on the type of request and the fee schedule outlined in the regulations of the Act. There is no categorical formula for assessing fee waiver requests. The Public Body must consider each request for fee waiver on its own merits. It must weigh many factors when determining whether to grant/deny a request for fee waiver. There is no set level of income at which an individual will automatically be provided a fee waiver.

[para 18] The Public Body provided submissions outlining the considerations it made when considering the Applicant's request for a fee waiver. It stated the following:

The Public Body considered the following factors when determining whether to grant/deny the fee waiver to the Applicant in accordance with section 93(4)(a) of the *FOIP Act*.

- a) The following information provided by the Applicant:
 - he is unable to pay
 - he has been incarcerated since 2013 and is not able to earn income
 - a \$1.00 fee is a physical and psychological barrier to prisoners' rights of free access to information
 - he states he has multiple access requests which cumulatively makes fees unaffordable to him
- b) The request was for non-personal information
- c) The ruling on OIPC Order F2016-61

The Act includes a user should pay principle. In relation to fees for non-personal information, section 11(2) of the FOIP regulations states "*an applicant is required to pay an initial fee ...*"

Order F2016-61 required the Public Body to process a request from the Applicant upon payment of an initial fee of \$1.00. The Public Body extended this to two additional access requests however it would be fiscally irresponsible of the Public Body to leave this as a blanket decision for all current and future access requests. The inmate trust account statement used to justify the ruling in F2016-61 as the burden of proof of the Applicant's ability to pay was a trust account statement for the time period of March 17, 2014 through March 16, 2015. This inmate trust account statement is now two years old and although the Applicant remains in jail, other circumstances could have changed his financial position during the last two years.

The Applicant did not provide the public body with any other supporting documentation nor a current copy of his trust account statement as proof that he could not afford the \$1.00 initial fees requested for each of 002118 and 002919.

The Public Body has requested fees from the Applicant for TWO access requests only, which cumulatively amounted to \$2.00.

[para 19] The Public Body submits the Applicant did not provide current information as to his financial position, so it made its decision to deny a fee waiver based only on the information it had in its possession regarding the Applicant's financial position. That information was the Applicant continued to be incarcerated and cannot earn income. The Public Body suggests that while it is true inmates cannot earn an income, "it is also true that they do not have any expenses. Housing, utilities, clothing, meals, medical care and basic hygiene items are all provided by the centre."

[para 20] During the course of this inquiry, the Applicant provided updated information on his financial position. He also stated, in his request for inquiry, "...if people outside could only spend \$100 a week on food/hygiene/office supplies/etc., they might understand why \$ [sic] is worth a lot more in jail than it is outside".

[para 21] The Public Body's submissions state it is the Applicant's choice as to how his money is spent:

It is the choice of the inmate how they spend the money in their own trust account and what their own priorities are. For example, one inmate may choose to use the money from their trust account to purchase snacks, stationary [sic] and additional hygiene items, whereas another inmate may prefer to use their trust account money toward fees for FOIP requests. It is a matter of priorities. People "outside" are faced with the same choices and prioritize their spending based on what is most important to them.

[para 22] The Public Body also considered the following:

Further, family, friends, counsel etc. of inmates, have the ability to deposit money into that individual's trust account.

[para 23] In Order F2016-61, the adjudicator stated the following at paragraph 19 with respect to that consideration:

The Public Body erred in considering the ability of the Applicant's "family, friends, counsel etc." in assisting the Applicant to pay the fees. The Act refers to the Applicant's ability to pay, not the ability of others to assist him in paying.

I adopt that reasoning in this case.

[para 24] In his initial submissions, the Applicant states the following:

[Regarding] OIPC Order F2016-61, I request to argue that this order confirms that it is reasonable to reduce or waive my fees, and so the issue now is by how much. I submit that Order F2016-61 confirms that a \$25 original fee was too much of a burden, and confirms even \$2 is too much of a burden, so 57 separate files of \$1.00 would qualify for being too much of a burden as well – and to waive all the fees is appropriate and reasonable in my circumstances.

[para 25] The Public Body responds to this by stating the Applicant has not been asked to pay \$57.00. He has been asked to pay \$1.00 for each of the two requests.

[para 26] Further, the Public Body posits a number of considerations to be made in determining the outcome in this matter. These include the following:

- What number of access requests would be the threshold for considering categorically waiving fees due to volume?
- Would this decision encourage Applicants to make multiple requests at a time to avoid fees? For instance, if 10 access requests for general information was the threshold, would an Applicant make 10 requests in order to get fee waivers for volume of requests due to financial hardship (\$250) that they may not have been eligible for fee waivers due to financial need if only one request was made (\$25).
- How would this support fairness for all Applicants when one Applicant may make one access request for general information and pay the \$25 initial fee and another Applicant make 10 access requests for general information and pay nothing?

Discussion of the issue

[para 27] Section 6(1) of the Act reads as follows:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[para 28] Section 6(3) of the Act restricts the right of access:

6(3) The right of access to a record is subject to the payment of any fee required by the regulations.

[para 29] In Order F2016-61, the Adjudicator determined the Applicant was excused from paying part of the initial fee on a particular access request. She ordered the Applicant to pay a nominal initial fee of \$1.00. She stated “This will compel the Public Body, upon receipt of the fee to embark on a search for records and provide the Applicant with an estimate of costs (if any, and considering my decision with respect to to the Applicant’s ability to pay).”

[para 30] The Applicant suggests the Adjudicator determined that since he could only pay \$1.00 for the initial fee, any charge above that would be “too much”. With respect, that was not the determination in Order F2016-61.

[para 31] At paragraphs 29 and 30, of that decision, the Adjudicator stated the following:

...if the Applicant pays the initial fee as I have determined, the Public Body must locate records, look at exceptions to disclosure, etc. and prepare a fee estimate.

At that point, the Applicant will have more choices with respect to his request for access to information. He may narrow the scope of his request, he may abandon his request, he may request further assistance, in the form of a review, from this office (my emphasis).

[para 32] It is clear the Adjudicator did not make any decision regarding the Applicant's ability to pay more than \$1.00 for anything other than *the initial fee* for the access request before her. What she determined was that if the initial fee was reduced to \$1.00, the Public Body could then prepare a fee estimate for the Applicant for his request for access to information. At that time, the Applicant could then determine his next steps.

[para 33] She stated the following at paragraph 32:

While I cannot order the Public Body to do anything with respect to the initial fee for those other cases, I am hoping the principles of sound management of public resources would compel the Public Body to follow the direction of this Order.

[para 34] Clearly, if she had determined the Applicant could not pay more than \$1.00 in total for *all* requests, that statement would not have been made. She urged the Public Body to consider reducing the initial fee in the Applicant's other requests for access.

[para 35] The Public Body, in the spirit of Order F2016-61, reduced the initial fee of \$25.00 to \$1.00 for both of the requests in this inquiry. I commend the Public Body for that decision.

[para 36] The FOIP Act allows public bodies to charge the fees provided for in the regulations to offset some of the cost of providing applicants with access to records. Applicants who cannot afford the payment may apply to the head of the Public Body to be excused from payment. Each request for a fee waiver must be determined on its own merits, considering the factors set out in section 93(4) of the Act.

[para 37] A public body must treat all applicants with fairness in exercising discretion to excuse payments. Applicants with multiple requests cannot be treated differently than those with a single request.

[para 38] As former Commissioner Clark noted in Order 96-002 in response to a question regarding whether Members of the Legislative Assembly be categorically given a waiver of fees:

I do not have the jurisdiction under the Act to grant such a waiver. If I were to purport to do so, I would in effect be amending the Act and I have no jurisdiction to make legislation. The Legislature has made it a principle of the Act and a fact of life that there is an initial fee to be paid. The status, role or occupation of the applicant is but one factor which must be considered in *each* case (my emphasis).

[para 39] A public body is accountable for the use of public resources. An individual is accountable for the use of their own resources. It is a decision of ordering priorities most

Albertans exercise every day. It is rare that individuals have unlimited resources. Given his limited resources, the Applicant is therefore required to determine which of his access requests is most important to him.

V. ORDER

[para 40] I make this Order under section 72 of the Act.

[para 41] I find that the Public Body properly exercised its discretion in reducing the Applicant's initial fee for his access requests (OIPC files 002118 and 002919) to \$1.00 for each request.

Jill Clayton
Information and Privacy Commissioner