

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-18

May 18, 2021

ENVIRONMENT AND PARKS

Case File Number 009788

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Environment and Parks (the Public Body) for records related to an employee survey conducted by the department. The Applicant also requested a fee waiver, on the grounds that the records relate to a matter of public interest (section 93(4)(b)).

The Public Body did not grant a fee waiver. The Applicant requested a review of the Public Body's decision. The Applicant also requested a review of the Public Body's response, stating that the Public Body failed to consider his initial fee waiver request. The Applicant subsequently requested an inquiry.

The Adjudicator found that the records sought and obtained by the applicant did not meet the test for a fee waiver on the grounds of public interest.

The Adjudicator also found that the Public Body met its duty to assist the Applicant.

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

Authorities Cited: **AB:** Adjudication Order #2, Orders 96-002, 2001-023, F2003-011, F2006-032, F2007-017, F2007-020, F2007-023, F2009-009, F2009-034, F2013-10, F2013-43, F2016-39, F2016-40, F2020-18, F2020-19

Other Sources Cited: *FOIP Bulletin Number No. 2* (Revised March 2009); Service Alberta

I. BACKGROUND

[para 1] The Applicant states that he received a tip from a confidential source alleging workplace bullying within the Public Body, which was not being addressed. The Applicant states that he met with the source, who told him about specific incidents of bullying within the Public Body, including who was involved. The source also told the Applicant about the Pulse survey undertaken by the Public Body, and a PowerPoint presentation that was given at a staff meeting.

[para 2] On May 2, 2018, the Applicant made an access request to Environment and Parks (the Public Body) for records

... related to the department's Pulse Survey. Specifically, I am seeking the survey itself and any records related to it, including a Powerpoint presentation prepared for a staff gathering at Fort Edmonton Park In September 2017.

[para 3] The Applicant states that he made a fee waiver request with his access request, on the grounds that the records relate to a matter of public interest (section 93(4)(b)).

[para 4] On May 3, 2018, the Public Body acknowledged receipt of the request. On May 28, 2018, the Public Body provided a fee estimate to the Applicant. On May 29, 2018, the Applicant sent an email to the Public Body asking whether the Public Body considered his fee waiver request. The Public Body responded the same day, asking the Applicant to make a 'formal' fee waiver request, which would be considered.

[para 5] The Applicant then sent a written request for a fee waiver to the Public Body. One copy of this request is date May 31, 2018 (provided by the Applicant) and another copy is dated June 1, 2018 (provided by the Public Body). Other than the dates, the requests appear to be identical. In this letter, the Applicant set out the reasons he believes the fees should be waived in the public interest.

[para 6] On June 26, 2018, the Public Body informed the Applicant that it was denying the request for a fee waiver, as it did not believe the criteria for a waiver in the public interest were met.

[para 7] On July 11, 2018, the Applicant narrowed his request to exclude

... the administration of the Pulse survey. Specifically, I am not interested in any records related to the contracting out of the survey or emails reminding staff to complete the survey, or email notifications to staff about the survey.

[para 8] The Applicant also specified that he does not want duplicates and wants only the final email in a string. On July 18, 2018, the Applicant confirmed that he is interested in records indicating what was or is being done about the survey results.

[para 9] The Public Body provided an updated fee estimate on July 20, 2018. The Applicant paid the fee and the Public Body provided the responsive records on October 23, 2018.

[para 10] The Applicant requested a review of the Public Body's decision to deny the fee waiver request; on December 18, 2019, the Applicant requested an inquiry. The Applicant also argued that the Public Body failed to respond to his initial fee waiver request.

II. RECORDS AT ISSUE

[para 11] As the issue relates to a fee waiver, there are no records at issue.

III. ISSUES

[para 12] The issues in this inquiry, as set out in the Notice of Inquiry, dated January 21, 2021, are:

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

IV. DISCUSSION OF ISSUES

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

[para 13] 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 14] The Commissioner's jurisdiction to review decisions regarding fee waivers was described in Order F2007-023 (at paras. 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 15] 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? (At para. 43)

[para 16] In Order F2009-034 the adjudicator summarized the "public interest" issue as follows (at para. 73):

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).

The Applicant's arguments

Records requested versus records received

[para 17] The Applicant has argued that it is not only the responsive records, but also the context of the access request that is relevant to the determination of whether there is public interest.

[para 18] While the Applicant requested a fee waiver, he paid the fees in order to receive the requested records. In his request for inquiry, the Applicant states that while his request was not limited to the survey and PowerPoint presentation, those were the only records he obtained in response to his request. He said (at page 2):

It must be noted that the only records produced by the Public Body were related to the PowerPoint presentation and the Pulse Survey. Although I made the request knowing, for a fact, that there had been formal complaints by several staff members about yelling and belittling, and that a consultant had been retained to address these matters, I received no records related to these matters. The Powerpoint presentation was also redacted to remove critical comments related to bullying within the ministry.

[para 19] The Applicant has provided background information that led to his access request. He states that he received a tip from a confidential source about "allegations of wrongdoing within the Public Body from high ranking employees" (rebuttal submission at para. 54). He states (rebuttal submission, at paras. 17-21):

On March 25, 2018, the Applicant received a tip alleging bullying and a toxic atmosphere within Alberta Environment and Parks, which allegedly was not being addressed by senior managers despite the government's clear public direction on this issue.

The Applicant, and a colleague, subsequently met with the confidential source who had sent the tip. The source described in detail serious incidents, including names of aggressors and victims, of workplace bullying that involved yelling and intimidation of individuals in front of other staff. Those incidents involved high ranking employees within the department.

The confidential source informed the Applicant of several formal complaints that had been filed, and how a consultant had been hired in an attempt to address this serious ongoing problem. Yet, the source says no real change was observed.

The confidential source also described a Pulse survey conducted by the ministry, and a subsequent PowerPoint presentation at a staff [sic].

On May 2, 2018, the Applicant sought access to the following records dating from Jan. 1, 2017: “all records as defined by Section 1(q) of the Act related to the department’s Pulse Survey. Specifically, I am seeking the survey itself and any records related to it, including a Powerpoint presentation prepared for a staff meeting at Fort Edmonton Park in September 2017”. (“Records Sought”)

[para 20] The Applicant’s argument might mean that the Public Body interpreted the Applicant’s request too narrowly, or that the request was interpreted properly but the search was inadequate.

[para 21] I have copies of the communication between the Applicant and the Public Body relating to the processing of the request. There were several emails clarifying the scope of the access request. The Applicant clearly requested the survey, the PowerPoint presentation given at a staff event, and records showing what was done about the survey results. Records relating to the administration of the survey and duplicates were expressly removed from the scope. The Applicant didn’t refer to seeking information about particular complaints or incidents, or formal complaints, in any of the correspondence with the Public Body.

[para 22] The incidents apparently described to the Applicant by the source seem to have preceded the survey and PowerPoint presentation. If the Applicant was seeking information about the particular incidents, it is not clear why he did not specifically request them instead of, or in addition to, the survey, PowerPoint presentation given at a staff event, and records relating to what was being done about the survey results. It seems unlikely that a survey circulated among all employees, a PowerPoint presentation made by a deputy minister at a large employee event, and discussions about the survey results, which were anonymous, would yield information about particular incidents that seem to have preceded the survey.

[para 23] I do not know why the Applicant expected to receive records other than what he did receive in fact. He hasn’t provided any reason why he expected information about particular incidents or complaints, other than to say that he was told such incidents occurred at some point.

[para 24] It was open to the Applicant to request a review of the Public Body’s response; specifically whether the Public Body failed to meet its duty to assist the Applicant under section 10 of the Act, which includes conducting an adequate search for records. The Applicant’s request for review, request for inquiry, and submissions do not indicate that he raised this issue. Therefore, the scope of this inquiry does not include whether the Public Body has additional responsive records that the Applicant did not receive.

[para 25] I cannot treat this fee waiver request as if it related to records that the Applicant believes would have been in the public interest but that were not produced in response to his request, and that do not appear to be responsive to the request he made. At this time, I have no reason to believe such records exist or that they would have been responsive to his request.

[para 26] The Applicant also argues that it is arbitrary and improper to limit the analysis to the survey and PowerPoint presentation (the responsive records). He argues (rebuttal submission, at para. 45)

Lastly, the analysis should focus on the records sought, as opposed to the records ultimately obtained. This is clear from FOIP Bulletin on Fee Waivers and from case law. Basing a fee-waiver decision only on the records produced by the public body would be illogical because applicants effectively would be required to prove that every record provided by the public body after the applicant made the fee-waiver request meets the three-part test - without having the records.

[para 27] The Applicant cites Orders F2007-020, F2009-009 and F2013-10, as well the FOIP Bulletin Number 2, published by Service Alberta, in support of his argument.

[para 28] The statement in the Bulletin cited by the Applicant in support of his argument is the following (emphasis added):

The earlier Commissioner's Orders took the position that the applicant bears the burden of establishing that an issue is a matter of public interest and that the *records being requested* are related to a matter of public interest (IPC Order 96-002).

[para 29] I do not interpret this statement to mean that it is the request and not the records themselves that must relate to a matter of public interest. The Bulletin clearly states in several places that the *records* must relate to a matter of public interest. More importantly, this is the language in the Act. There is nothing in the Bulletin that discusses what factors are relevant once the records have already been provided to the applicant. In any event, the Bulletin is not binding on me.

[para 30] Regarding the past precedents from this Office cited by the Applicant, in Order F2007-020 the adjudicator clearly states that he reviewed the responsive records and made his determination based on the content of those records (see paras 19, 28, 33).

[para 31] The Applicant also cites Order F2013-10 in support of his argument. In that case, the applicant had not yet received the responsive records; therefore, they could not be reviewed. The public body had argued that the records would likely be withheld under section 17 of the Act and so a fee waiver shouldn't be granted. The adjudicator disagreed with this argument, finding (at para. 50):

The Public Body notes the presumption against disclosure of the former Superintendent's personal information relating to his employment history under section 17(4)(d) of the Act. However, the possibility that the Public Body may properly withhold most of the requested information from the Applicant is not relevant to whether a fee waiver is warranted on the basis of public interest. A determination that records relate to a matter of public interest simply means that there is sufficient public interest to justify the taxpayers bearing the cost of the public body's processing of the access request, during which it will go on to decide whether the records should be disclosed, sever any information that is believed to be subject to an exception to disclosure, and produce a copy of the records to be released to an applicant (Order F2009-034 at para. 69).

[para 32] I agree with the above analysis. If the records relate to a matter of public interest, it cannot be that an applicant will be granted a fee waiver only if the public body discloses the information of interest. Whether the public body can or will withhold the information does not change the character of the information. Further, it seems nonsensical to waive the fees where

the applicant will receive information that is in the public interest, but to require the applicant to pay *not* to receive information that is in the public interest.

[para 33] In this case, the Applicant argues that the PowerPoint presentation was redacted to remove critical comments related to bullying within the ministry. Such information could relate to a matter of public interest even if it were withheld from the Applicant.

[para 34] I have only the redacted copy of the PowerPoint presentation as provided by the Applicant. There are several redactions made from the presentation. The redacted information consists of discrete items of information, and the remaining information provides context for the redacted information. It is clear that most of the redacted information consists of photos of individuals (likely Public Body employees). In a few instances, the redacted information appears to be a name, in a list of employees that were otherwise disclosed. The context of the redactions do not indicate that the redacted information consists of critical comments relating to bullying. The PowerPoint presentation does include two references about bullying, both of which were disclosed to the Applicant.

[para 35] Aside from this, I do not see how the cited case supports the idea that the applicants' access request should be considered rather than the responsive records, when determining whether there is a matter of public interest.

[para 36] Finally, the Applicant argues it is illogical to require an applicant to show public interest in every record "without having the records." The test for a fee waiver under section 93(4)(b) is whether the *records* are in the public interest, not whether the *request* is in the public interest. Where the applicant has not yet received the responsive records, I agree that it is illogical to ask the applicant to show that *records* relate to a matter of public interest. In that scenario, the only arguments that can be made are regarding whether the records *sought* relate to a matter of public interest. The applicant is limited to arguments about what they believe is in the records and why, and how that information relates to a matter of public interest.

[para 37] Again, I do not see a parallel to the present case. Here, the Applicant has received the records. It does not seem illogical to focus on whether the contents of the responsive records relate to a matter of public interest in a situation where the applicant *has* received the records.

[para 38] A similar argument was considered and rejected in Order F2013-43, which found (at paras. 34-38):

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.

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."

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.

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.

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] This analysis seems applicable in this case as well. In my view, it is appropriate to consider the records obtained by an applicant in determining whether they relate to a matter of public interest.

The significance of context

[para 40] The Applicant cites Order F2009-009 as stating that not only the content of the records, but also the context of the access request are relevant to the question of public interest. Order F2009-009 does not relate to a fee waiver.

[para 41] The Applicant cites Order F2009-009 in support of this argument. The quote provided by the Applicant and the paragraph numbers indicate he intended to cite Order F2016-40, which states (at para. 53-55):

I understand the Public Body to argue that only the content of each record is relevant to the determination to be made under section 93(4), and not the context created by the Applicant's reasons for requesting the records and the nature of the public interest raised by the Applicant.

I recognize that there are circumstances in which an applicant may raise a matter of public interest and then request records that appear to be entirely unrelated to that interest. (See Order F2010-004 at paragraph 7). However, I disagree that the context created by an applicant's access

request and supporting evidence is irrelevant to the question of whether records *relate* to a matter of public interest.

A record in and of itself will not necessarily state that it is about a particular matter of public interest, or be created to explore such a matter. However, that does not mean that it will not contain information or data that *relates* to such a matter.

[para 42] In that case, the public body’s argument seemed to be that the requested records were created or collected for a purpose that was unrelated to a matter of public interest. The adjudicator found that despite this unrelated purpose, the content of the records related to the matter of public interest. She found (at para. 62):

Turning to the question posed by the Alberta test, I find that the contents of the records will contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is, or would be, of concern to the public. If, as the Public Body argues, the purpose of the records the Applicant requested “was to ensure that the numbers and calculations provided by the producers on their GHG emissions estimates were accurate and that the producers were filling out the Schedule “A” form accurately and complying with the grant requirements”, then this purpose does serve the public interest in that it informs the public that the Public Body is disbursing grant money appropriately. If the records reveal that producers are meeting the requirements of the program and that the Public Body disbursed grant money appropriately, the records relate to a matter of public interest to the same extent that they would if they demonstrated the opposite. To put the point differently, the contents of the records will contribute to the public understanding as to whether the Public Body has corrected the deficiencies noted by Auditor General in two different reports, and whether the program is serving to reduce emissions, and therefore, whether it is spending public money on this program appropriately.

[para 43] It is clear from these excerpts that the adjudicator made a determination regarding whether there was a public interest in the records by considering the content of the records. However, I agree that the content of the records should not be considered without context. If a record reveals information that relates to a matter of public interest, it doesn’t matter if the record was created in relation to an entirely different issue that does not relate to a matter of public interest.

[para 44] I agree with the adjudicator’s conclusions in the above Order. However, the Applicant did not specify how this Order relates to the case at hand and I do not see the parallel between the cited case and the present case. Neither do I see how that case supports the Applicant’s argument that the records he sought are more relevant than the records he obtained.

Is the public interest test met in this case?

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 45] The factors listed in Order F2006-032 as relevant are:

- 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 46] With respect to the first bullet point above, the Applicant argues that asking whether others have requested the same or similar records puts journalists at a disadvantage. He argues that journalists are often the first to ask for such records.

[para 47] As with all the factors set out in Order F2006-032, this factor may be more or less relevant depending on the facts of each case. I agree with the Applicant that it may not be appropriate in every case to give this factor much weight. It seems to me that there will always be a ‘first person’ to ask for particular records, and that person shouldn’t be at a disadvantage for being first.

[para 48] The next factor asks whether there are *other indicators* that the public has or would have an interest in the records. Regarding this factor, the Applicant argues that the records are in the public interest because the government at the time “had made workplace bullying and harassment an issue of such public significance that it passed a law to address it” (request for inquiry, at page 3). He also states (at page 1):

It is incontrovertible that a request for information about bullying and harassment in a government ministry would be in the public interest because, as I stated, the records would show the ministry either did not address the problem, or did. Either way, it is in the public interest for the public to know if the government is abiding by its own legislation.

[para 49] With his April 19, 2021 submission, the Applicant provided several news stories about allegations of bullying within Alberta Health Services, at a non-profit organization, within Edmonton Police Services, within the City of Edmonton, within the Governor General’s office, within the CBC, and against the current Health Minister. The Applicant also included a story about workplace bullying more generally in Alberta and the government’s response to it.

[para 50] I agree with the Applicant that bullying in the workplace, including the public sector, is a matter that has received a fair amount of attention recently. However, it is not clear how the records requested and received by the Applicant relate to these stories.

[para 51] The Applicant argues (rebuttal submission, at paras. 51-56):

In Order F2016-39, it was determined that in a situation such as the present, which involves the practices of a public body, it is enough that there be a reasonable likelihood that some significant sector of the public would wish to know about the matter or debate the merits of the practices for the first criteria to be met [emphasis added].

Previous orders have found that the first criterion was met in circumstances where: security breaches and errors were made in the administration of a program , there were allegations of fraud, breach of trust and excessive expense claims against a public employee , the records related to the functioning of a statutory entity and its distribution of public funds.

In the present case, the government of Alberta has recognized that “workplace bullying is a serious problem that can deeply affect the mental, physical and financial health of the bully’s target (the person or group the bully abuses). The Canada Safety Council reports that in the workplace, one person in six has been bullied and one in five has witnessed a co-worker being bullied”.

Furthermore, the confidential source has reported allegations of wrongdoing within the Public Body from high ranking employees. In Order 2013-10, this was enough for the first criterion to be met:

“I also find that the records would contribute to the public’s understanding of the circumstances surrounding the Superintendent’s departure [from] the public body, which is of sufficient importance, given his high-level position and alleged misconduct”.

The consequences of workplace bullying and harassment can also be directly observed in the Records Obtained. The Pulse Survey, for instance, contains a collection of quotes provided by ministry staff for the survey. The quotes includes:

“Bullying is also very prevalent still. It is not being reported because nothing is ever done to resolve it, or people are too scared of the consequences to them if they report. It’s almost like bullying is an accepted behaviour.”

“Stop turning a blind eye to workplace bullying...shutting down those with opinions and stop keeping the mentality that ‘they have been here for thirty years and that is just the way they are.’ Behaviours and drama are continually allowed to go on here and nobody does a thing about it.”

Given that the government through legislation sought to inform workers and employers of their rights and responsibilities in relation to workplace bullying and harassment, it is obvious on the face of it that the public would be interested in records from a ministry related to an alleged failure to address this issue.

[para 52] The responsive records include the two references to bullying cited by the Applicant above.

[para 53] I agree that these quotations show that some employees of the Public Body were concerned about workplace bullying. Possibly, the Public Body inclusion of these quotes in the PowerPoint presentation indicates that the Public Body identified a theme of bullying and/or intended to highlight it as an issue to address. The Applicant also pointed to an email from an executive director of another public body, referencing a meeting involving the Public Service Commissioner. The email was sent to another Government of Alberta employee, though I do not know the role of that employee or whether they work for the Public Body. The email states that the Public Service Commissioner met with the deputy ministers of “low scoring departments” and discussed common themes that the Public Service Commissioner intended to address in the future. The email specifies that bullying and harassment was one theme to be addressed. The emails do not refer to any particular incident.

[para 54] I agree that stories about significant allegations of harassment and bullying in the workplace, especially in the public sector, have been in the public eye recently. Possibly, records relating to significant allegations made about bullying within the Public Body would have been a matter of interest to the public. I do not mean to imply that only records revealing wrongdoing can be characterized as relating to a matter of public interest; it is possible that in other circumstances, the fact that a survey was conducted on a topic may be in the public interest to know. However, in this case it seems unlikely that the survey in this case, the PowerPoint presentation, or discussion of the survey results relate to a matter of public concern generally.

[para 55] That some employees have concerns about workplace bullying not being adequately addressed is not sufficient to indicate that the public would be concerned about the issue.

[para 56] In response to a question about whether the Applicant published information from the records he obtained (which will be discussed under the next heading), he said that he had not because the records did not contain the information he had expected to receive. This does not support a finding that the public would have an interest in the information in the records.

[para 57] Regarding the argument that information he sought would have been in the public interest, again, the Applicant did not question the adequacy of the Public Body's search for records and so I have no information about why the Applicant believes other information exists that might have been in the 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 58] The factors listed in Order F2006-032 as relevant are:

- 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 59] There is no indication in this case that the records relate to a conflict between the Applicant and Public Body.

[para 60] Regarding the likelihood of dissemination, the Applicant argued in his fee waiver request to the Public Body (attached to the request for review):

As a journalist, but most especially as a journalist working for a publicly funded broadcaster, I have no commercial interest. I have an established track record of producing stories that are in the public interest, which has been acknowledged not just by the public but by associations that recognize journalism in the public interest.

A subsection of this criteria is: What is the likelihood the applicant will disseminate the contents of the records?

Obviously, we intend to publish and broadcast this information widely. Addressing workplace harassment and bullying is a major initiative of the NDP government. The fact that this culture exists within one of its own ministries would clearly be of interest to the public.

[para 61] The Public Body argued (initial submission, at page 2):

The Applicant has advised he does not have a commercial interest in the requested records. However, the Applicant represents the media and has a professional interest as he has stated that the information contained in the records will be “published and broadcast widely”. This in turn will likely create a monetary interest in the records as well.

[para 62] This argument has been made in past cases and has been unequivocally rejected. In Order F2007-017, former Commissioner Work in Order F2007-017 said (at para. 50):

I acknowledge that the Applicant is employed by a for-profit newspaper and that the newspaper received some commercial benefit from publishing the information. However, I do not find that the Applicant’s primary purpose in making the request as a member of the print media was to advance a commercial or a private interest. Simply because a journalist makes an access request for information that is subsequently published in a for-profit publication does not mean that the primary purpose of the request is private and not public. I must also consider the important role the media plays in obtaining information and making it available to the public in the pursuit of government accountability (Adjudication Order #2, Order F2005-022, B.C. Order 03-19).

[para 63] Justice McMahon, in Adjudication Order #2 cited by Commissioner Work, rejects the same argument with stronger language (at paras. 51-52):

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

Alberta Justice also argues that this request is about selling advertising and “whether the applicant can turn a profit”. That argument characterizes a free and independent press at its basest level. The media, in my view, has a higher role to play. Absent proof of overriding self-interest, I decline to reduce respected print media to this level, or to dismiss its attempts to bring accountability to government management of public funds, as merely an effort to sell advertising. The role of the press in reporting on court proceedings was addressed by the Supreme Court of Canada in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. The media role in relation to government management of public funds is no less important. Cory, J. said at 1339-40:

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

[para 64] Justice McMahon concluded his analysis of the fee waiver request in that case by stating (at para. 73):

I emphasize that the burden of proving a public interest is an onerous one. It will neither be frequently nor easily met. It has been met here in the unique factual circumstances of this case.

[para 65] I agree with the analyses above. The fact that a journalist makes a career of writing articles does not mean that any particular access request made by that journalist in pursuit of a story is motivated by a commercial interest. A request motivated by a commercial interest might be where a business seeks the terms accepted by a competitor in order to outbid that competitor in the future. The Applicant's access request bears no similarity to that type of scenario. Therefore, this factor does not weigh against the fee waiver.

[para 66] With respect to dissemination of the information in the responsive records, in Order F2020-18, I said (at para. 34):

Waiving fees in the public interest means transferring the cost to the public because the disclosure of the records is in the public interest (as opposed to transferring the cost on the basis of the applicant's inability to pay the cost). To ask the public to bear the burden of the cost on the basis of public interest in the records, the public should receive some benefit to the records being disclosed to the Applicant. This benefit is primarily from the distribution of the information in the records to the public by the applicant, in some fashion.

[para 67] I agreed with the reasoning in Order F2016-39, finding (at para. 40):

There is no clear timeline past which this factor weighs against finding the applicant ought to receive a fee waiver in the public interest. However, I disagree that a consideration of the amount of time that has passed since the Applicant received the records is arbitrary or unfair. My decision must include the evidence before me at this time. At this point, the Applicant has had the records for over five years and the public has not received a benefit from the Applicant's access request in that time.

[para 68] In my March 26, 2021 letter, I asked the Applicant when he received the responsive records and how he as distributed or made public any information from the records in that time.

[para 69] The Applicant states that he had not published or broadcast the information "due to the fact that he did not receive all the information he expected to see" (rebuttal submission, at para. 113). The Applicant also argues (rebuttal submission, at par. 67):

The Applicant who is a journalist, and their employer, must be allowed to exercise editorial discretion without regard to whether it will affect their ability to claim a fee waiver in the public interest. Any attempt by a public body to impose a timeline on a journalist for publication would be both arbitrary and inherently unfair.

[para 70] A similar argument was considered and rejected in Order F2020-19. I said (at para. 34):

Waiving fees in the public interest means transferring the cost to the public because the disclosure of the records is in the public interest (as opposed to transferring the cost on the basis of the applicant's inability to pay the cost). To ask the public to bear the burden of the cost on the basis

of public interest in the records, the public should receive some benefit to the records being disclosed to the Applicant. This benefit is primarily from the distribution of the information in the records to the public by the applicant, in some fashion.

[para 71] In that case, I also discussed the fact that the applicant needn't have already disseminated the information to meet this part of the test. I noted that the applicant had stated her intent to publish an in-depth story, and agreed that she could not be expected to publish the information before she had time to produce her story. This finding followed Order F2016-39 (at para. 50), which was upheld on judicial review.

[para 72] In this case, the Applicant has not argued that he intends to publish the information in the responsive records at all. He states that he has not published the information because it was not the information he expected to receive. This indicates that the Applicant does not intend to publish the information in the responsive records.

[para 73] I understand that had the records contained the information the Applicant believed they would, he would have published that information. Nevertheless, this factor is about the public receiving a benefit from the Applicant's access request by way of the Applicant sharing the information with the public. That has not happened in this case, nor does it appear that it will in the future.

[para 74] I find that this factor weighs against a fee waiver.

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

[para 75] The factors listed in Order F2006-032 as relevant are:

- 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 76] The Applicant argues (rebuttal submission, at paras. 76-78):

Despite the government's contention that bullying and harassment would not be tolerated, the confidential source and some respondents to the Pulse Survey insisted bullying and harassment was not being adequately addressed within the Public Body.

Records Sought could shed light on what exactly is being done and could also expose alleged misconduct by high ranking employees or wilful blindness within the Public Body.

On the face of the request, the public body should have granted the fee waiver given the government's position on workplace bullying and harassment. The rationale provided by the

public body in this case for not waiving the fee is simply that it considered the records to be only for internal consumption. The public body appeared not to have considered how the records sought - not those produced - could be in the public interest.

[para 77] As stated earlier in this Order, the records the Applicant received do not reveal any specific allegations of bullying, nor do they expose misconduct by high ranking employees.

Conclusion regarding the fee waiver in the public interest

[para 78] The Applicant states that he was informed about an issue of workplace bullying and harassment within the Public Body, and that the informant suggested he may be interested in the Pulse survey and PowerPoint presentation. Based on this information, the Applicant expected to receive information other than what was contained in the records at issue. He expected the records to contain information that the public would have been interested in hearing about. By his own admission, this is not what the records contained. The Applicant argues that the fact that the responsive records do *not* reveal this information is irrelevant because they could have.

[para 79] If the Applicant believes that additional records exist that would have been in the public interest, he could have requested a review of the Public Body's search for records. To the best of my knowledge he did not, and the question is not part of this inquiry.

[para 80] If the Applicant is satisfied with the Public Body's search for records and is arguing that records relating to a matter of public interest were not responsive to his request but that they hypothetically could have been, that is not the test under section 93(4). In Order F2003-011, former Commissioner Work commented that an 'exploratory' request, intended to determine *if* a matter of public interest exists, does not meet the test for public interest (at para. 33).

[para 81] I find that the records requested by the Applicant do not meet the test for a fee waiver in the public interest.

2. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 82] Section 10(1) of the Act reads as follows:

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 83] As noted earlier in this Order, the Applicant made a written fee waiver request dated May 31 or June 1, 2018 (I have two copies of this request, one with each date). In that request for the waiver, the Applicant states that the Public Body initially denied his fee waiver request without providing adequate reasons. The Public Body's acknowledgement of the fee waiver request, dated June 1, 2018, notes that it had not yet made a decision on the fee waiver request. In other words, there was no previous or initial decision.

[para 84] In his request for review and request for inquiry, the Applicant also argued that the Public Body ignored his initial fee waiver request. He states that he made a fee waiver request

with his access request (May 2, 2018), on the grounds that the records relate to a matter of public interest.

[para 85] The Public Body states that the access request does not include a mention of a fee waiver. The Public Body states (initial submission, at page 2):

Additionally, in a telephone conversation between the AEP FOIP Advisor and the Applicant on May 8, 2018, which was logged in the FOIP Office's Running Record for the FOIP request, when advised that there is potential for a fee estimate as the records requested in his original scope could be quite extensive, the Applicant asked the Advisor why the public body had not considered waiving the fee due to public interest. The Advisor told him that the FOIP Office did not receive a request to waive it from him. The Applicant said that it should have been in the scope but was advised that it was not. The Applicant then checked and realized it was an electronic request and said there is not enough room in the scope section online to put their (CBC's) standard request scope, which includes a fee waiver request in the public interest. The system, however, can accommodate up to 750 characters in the Information Requested section where the scope was entered. The request scope that was entered by the Applicant was only 288 characters long. It's unclear why the additional statement requesting a fee waiver in the public interest was not input. Regardless, AEP did not have a request to waive fees in the public interest with the initial request, as suggested by the Applicant.

[para 86] I have a copy of the access request from each party and agree that there is no mention of a fee waiver. In his April 19, 2021 submission, the Applicant provided an affidavit in which he states he requested a fee waiver along with his access request, as is his usual practice.

[para 87] I have no reason to doubt the Applicant's belief that he requested a fee waiver with his access request. However, the copies of the access request provided to me by each party do not have any indication of a fee waiver request. Therefore, the evidence does not support the Applicant's belief.

[para 88] The Applicant also argues that the Public Body must also independently determine whether the records are in the public interest. In his request for review, he states:

FOIP Bulletin 2 (Fee Waivers) states:

"More recent Commissioner's Orders have established that a public body is required to assume some responsibility for determining whether records relate to a matter of public interest. A public body must not use a narrow and legalistic approach, based solely on the applicant's arguments, to assess the extent of public interest...The public body should take into consideration...the objectives of the Act. Even when an applicant has failed to establish independently a public interest in the records sought, the public body should still determine whether a public interest exists in the records. The public body should take into consideration the relevant facts and circumstances that the public body itself is aware of, as well as the objectives of the Act."

(pg. 6-7, FOIP Bulletin No. 2, March 2009, referencing IPC Orders 2001-023 and F2003-011; emphasis mine. See attached in Appendix E.)

[para 89] The Orders cited in the FOIP Bulletin – Orders 2001-023 and F2003-011 – do not find that a public body must determine whether a fee should be waived in the public interest, in the absence of a fee waiver request. Order 2001-023, relied on in Order F2003-011, states (at paras. 28-29, emphasis added):

This passage from *Oakwood Development* emphasizes that applying the 13 criteria to an applicant's case cannot substitute for a fully considered exercise of discretion. Nor can the head of a public body properly assess the extent of a public interest in records solely on the basis of the case made by the applicant, or on a selective consideration of the organization's own knowledge and information. All of the relevant facts and circumstances, and the principles and objects of the Act, should be factored into the exercise of discretion to grant or to refuse a fee waiver under section 87(4)(b) [now section 93(4)(b)]. Otherwise, the head of a public body cannot form a proper opinion about the extent of a public interest in the records, and cannot properly exercise the discretion granted under section 87(4)(b).

This does not relieve an applicant of the burden of proving that the records relate to a matter of public interest in a fee waiver inquiry. It merely emphasizes that a public body must consider more than the facts and circumstances raised by an applicant. Section 87(4)(b) does not ask that a particular party bear the burden of proving a public interest in the record. Rather, it requires the head of a public body to form a proper opinion about whether the record itself relates to a matter of public interest, and then decide whether to excuse the applicant from paying all or part of a fee. An applicant could fail to independently establish a public interest in the records sought, but the head of a public body could nonetheless look to all of the relevant facts and circumstances, the principles and objects of the Act, and exercise his or her discretion to find a public interest in the records under section 87(4)(b).

[para 90] In other words, in determining whether to waive fees on the grounds that the records relate to a matter of public interest, the public body is not limited to the arguments put forward by the applicant. The public body must also consider any other factors that are relevant.

[para 91] To the extent that the Applicant is arguing that the Public Body is obligated to consider a fee waiver of its own accord, and therefore failed to meet its obligations under the Act, I disagree. The Public Body is obliged to consider a request for a fee waiver made by an Applicant. There is no obligation in the Act that a public body must consider a fee waiver in the absence of a request.

[para 92] The first reference to a fee waiver from the Applicant in the records before me is an email to the Public Body in response to the Public Body's fee estimate, dated May 29, 2018. In that email, the Applicant told the Public Body that the information he is seeking is in the public interest and the Public Body was obliged to consider a fee waiver at the time of his access request. He further noted that the Public Body's fee estimate did not indicate whether any such decision had been made. He offered to make a formal fee waiver request.

[para 93] The Public Body responded by email the same day, asking for a written fee waiver request. The Applicant submitted his request on May 31 or June 1, 2018. The Public Body's response denying the waiver, is dated June 26, 2018. Even if the Applicant's first mention of a fee waiver on May 29, 2018 started the clock on the Public Body's time to respond, it seems to

me that the Public Body responded within the 30-day timeframe provided in section 93(4.1) of the Act.

[para 94] I conclude, on the basis of the evidence before me, that the Applicant did not make (or the Public Body did not receive) a fee waiver request with the access request. There is no indication that the Public Body failed to meet its duty to assist the Applicant in this regard.

V. ORDER

[para 95] I make this Order under section 72 of the Act.

[para 96] I uphold the Public Body's decision to deny a fee waiver on the grounds of public interest.

[para 97] I find that the Public Body met its duty to assist the Applicant under section 10.

Amanda Swanek
Adjudicator