



Fee Waivers

CONTENTS

Introduction	1
Fees: the rationale	1
How the Act and Regulation apply to fees and fee waivers	2
Assessment of fees	2
Fees for personal information	2
Payment of the initial fee	2
The fee estimate	3
The request for a fee waiver	3
The public body's duty to assist	3
Responsibilities of the applicant	3
Deciding whether to grant a fee waiver request	4
Financial hardship	4
Fairness	5
Public interest	6
Partial fee waivers	8
Review by the Commissioner	8
Processing the fee waiver request: a checklist	9
Appendix: "Public Interest" Criteria under IPC Order 96-002	10

INTRODUCTION

The *Freedom of Information and Protection of Privacy Act* (the FOIP Act) establishes a right of access to records in the custody or under the control of a public body, subject to the payment of fees in certain instances. Where a public body requires a fee, the FOIP Act allows the head of the public body to excuse the applicant from paying all or part of the fee.

In deciding whether to excuse all or part of a fee, a public body must consider all the circumstances relating to the particular request. While there are many aspects of the administration of the FOIP Act that allow public bodies to follow well-established procedures, requests for fee waivers require the exercise of judgment in each case.

This Bulletin discusses the rationale for fees and fee waivers, the way the Act and Regulation apply to the processing of a request that may involve a fee waiver, and matters to be considered when deciding whether to grant a request for a fee waiver. This publication is intended to supplement the information on fee waivers in Chapter 3 of *FOIP Guidelines and Practices*, produced by Access and Privacy, Service Alberta.

Publications produced by Access and Privacy, Service Alberta, cited in this Bulletin are available on the FOIP website at foip.alberta.ca. Decisions, practice notes and publications issued by the Office of the Information and Privacy Commissioner of Alberta may be found on the OIPC website at www.oipc.ab.ca.

FEES: THE RATIONALE

The administration of fees under the FOIP Act is based on principles established in two key provisions of the Act. First, one of the purposes of the Act is to allow any person a right of access to records in the custody or under the control of a public body, including records containing an individual's own personal information, subject to limited and specific exceptions (**section 2(a)** and **(c)**). The Act is intended to foster openness,

transparency and accountability in public bodies. The provision for fee waivers supports the objectives of the Act by ensuring that fees do not present an unreasonable barrier to access to information.

Second, the Act allows public bodies to require applicants to pay for specified services (**section 93(1)**). The Act's fee provisions do not allow public bodies to charge for all the services that may be associated with providing information, but they do allow public bodies to require applicants to bear a portion of the cost of providing information. The Information and Privacy Commissioner has said that fees should be reasonable, fair and at a level that will not discourage the exercise of access rights. At the same time, the fee structure should encourage an applicant to be reasonable and specific in the access request (see *IPC Order 96-002, Adjudication Order 2*).

HOW THE ACT AND REGULATION APPLY TO FEES AND FEE WAIVERS

Assessment of fees

The FOIP Act states that the head of a public body may require an applicant to pay fees to the public body for services as provided for in the regulations (**section 93(1)**). The fees must not exceed the actual costs of the services (**section 93(6)**).

The assessment of fees, as well as the waiver of fees, requires a decision of the head of the public body. The head must make the decision directly or have a delegation instrument in place to allow another person to make the decision. It should be clear within the public body who may authorize decisions relating to fees.

The Act does not impose any obligation to charge fees for the services listed in the fee schedule (**Schedule 2** of the FOIP Regulation). **Section 11(2)** of the FOIP Regulation requires only that an applicant pay an "initial fee" for a general request. **Section 11(4)** of the Regulation provides that fees in addition to the initial fee may be charged if the amount of fees for a general request, as estimated by the public body, exceeds \$150 (in which case the total amount is charged).

Fees for personal information

"Personal information" in the Act means recorded information about an identifiable individual. **Section 1(n)** of the Act includes a non-exhaustive list of the types of information that are considered to be personal information.

Section 93(2) of the Act states that a public body may not require an applicant to pay fees for services required to process a request for the applicant's own personal information, except for the cost of producing a copy. There is no initial fee for such a request.

Section 12(2) of the FOIP Regulation provides that fees may be charged if the amount of fees, as estimated by the public body, exceeds \$10 (in which case the total amount is charged).

Since there may be a significant difference between the cost to an applicant of a request for his or her personal information and a request for general information, the public body and the applicant need to understand clearly how the applicant's request is being categorized.

This may be an issue if, for example, the applicant requests both personal information and general information. This may also be an issue if there is uncertainty about the status of the applicant with respect to another individual. This can occur when an applicant has not explained that he or she is acting as that individual's authorized representative or when an applicant has asserted the right to act as an authorized representative and he or she is not authorized to act in that capacity.

Payment of the initial fee

Section 11(3) of the FOIP Regulation states that processing of a general request will not commence until the initial fee has been paid.

Although a public body may excuse an initial fee as well as other fees, the Commissioner has recommended that public bodies collect the initial fee before beginning the processing of a request (*IPC Order 96-002*). The fee may be refunded later if a waiver of that fee is granted. Whether or not a public body follows this recommendation, the public body

must make it clear to the applicant how it is going to treat the initial fee (*IPC Order F2002-023*).

If the public body decides to process a request without the fee, the public body should advise the applicant in writing that it is waiving the initial fee. If the public body decides that the fee is required before it will process the request, the public body must provide written notice to the applicant who has not paid the initial fee that it will not process the request without the initial fee (*IPC Order F2002-023*).

The fee estimate

Section 93(3) of the Act states that, if an applicant is required to pay fees for services, the public body must give the applicant an estimate of the total fee before providing the services.

This provision ensures that there is no financial commitment on the part of applicant until he or she understands the likely extent of that commitment. It also ensures that the public body does not take on the administrative obligations of processing a request until the applicant has agreed to the financial commitment. In *Order 99-011*, the Commissioner waived fees for services that the public body performed before the applicant accepted the estimate.

For further information on estimates, see FOIP Bulletin No. 1: *Fee Estimates*, produced by Access and Privacy, Service Alberta.

The request for a fee waiver

Section 93(3.1) of the Act states that 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 **section 93(4.1)** a public body must give written notice of the decision to grant or refuse the request within 30 days of receiving the request. If the head refuses an applicant's request, the notice must state that the applicant can request a review of that decision by the Commissioner (**section 93(5)**).

Section 93(3.1) and **section 93(4.1)** were added in 2003 to clarify that a request for a fee waiver must be *in writing* and that a public body that has received a written request for a fee waiver must respond in writing within *30 days*. There is no provision for extending the time to provide a response to the fee

waiver request. A public body can still excuse fees on its own initiative.

The Act does not set a time limit for an applicant to request a fee waiver. However, it is in the interests of both the applicant and the public body to address the possibility of excusing fees early in the request process, when there is scope for modifying the request. Although most applicants tend to make fee waiver requests at the time of the request or on receipt of the fee estimate, the Commissioner has ordered a fee waiver in the form of a refund in a case after the fee was paid and the records were released (*IPC Order 99-024*).

Section 93(4) of the Act, which sets out the grounds for granting a request, will be considered in the next section of this Bulletin.

The public body's duty to assist

The duty imposed on a public body under **section 10(1)** to use every reasonable effort to assist an applicant openly, accurately and completely is applicable to fee waiver requests. This includes assisting the applicant in clarifying the scope of the access request and clarifying the fee waiver process, including what information is required from the applicant. (See *IPC Order 2001-003* and *Adjudication Order 2*.) In certain circumstances, the public body may be in a better position than the applicant to identify which other files or offices of the public body hold the information being sought by the applicant (*IPC Order F2007-016*).

It will be particularly important for a public body to have a detailed record of the processing of the request and the assistance provided to the applicant if there is a request for a review by the Commissioner.

Responsibilities of the applicant

The Commissioner has made it clear that, when an applicant makes a request for a waiver of fees, the applicant must make the case, since the applicant is in the best position to put forward the grounds upon which relief from the payment of fees is being requested (*IPC Order 96-002*).

The Commissioner has also commented on other responsibilities of the applicant when requesting a

waiver of fees. The applicant should be clear about the reasons for the fee waiver request (*IPC Order 96-002*), but the applicant does not have to reveal the purpose for which he or she wants the records (*IPC Orders F2003-025, F2007-016*). The applicant should make the access request as precise as possible and be prepared to advance or accept compromises or solutions in good faith. This may include narrowing the scope of the request or using records already provided to the applicant (*IPC Orders 99-016, 99-027*).

DECIDING WHETHER TO GRANT A FEE WAIVER REQUEST

Section 93(4) states that 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,

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

or

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

When a public body receives a fee waiver request, the public body must make its decision on a case-by-case basis. The examples provided in this Bulletin provide guidance, but the combination of facts in each case may affect the weight to be given to any single factor and, in the event that a waiver is granted, the proportion of the fee that is waived. Partial fee waivers are discussed in the next section of this Bulletin.

When making a decision on a fee waiver request, the head of the public body must exercise his or her discretion in good faith, taking into consideration all relevant circumstances, the applicable law, including the objects of the Act, and the proper application of the law to the relevant facts and circumstances. The head of a public body will not have properly exercised his or her discretion if a fee waiver request is denied on the grounds of a standing policy rather than on consideration of the merits of the individual case (*IPC Order F2006-001*).

The fact that the public body has previously waived fees for an applicant does not mean that the public body must waive fees for subsequent access requests by the applicant (*IPC Order F2003-022*).

Financial hardship (section 93(4)(a))

The head may excuse payment if the applicant cannot afford the payment. The onus of substantiating financial hardship falls on the applicant (*IPC Order 96-002*). The applicant may be required to supply documentation of income and expenses (*IPC Orders 99-012, 2000-011*).

It is rarely sufficient for an applicant to request a fee waiver on the basis of a bare statement of the applicant's circumstances. The applicant must provide evidence of his or her inability to pay the fees requested. For example, in *IPC Order 2000-011*, an applicant could not claim an inability to pay merely on the assertion that the applicant was a single parent of dependent children or was employed part-time because of disability. Similarly, in *IPC Orders 2001-015 and F2003-011*, it was insufficient for the applicant to simply state that the applicant's political party did not have the specific budget to cover fees for access requests. Minimal evidence of an inability to pay was accepted from an inmate whose incarceration limited his ability to gather documentary evidence of his financial circumstances (*IPC Order F2006-001*).

An assertion about the imbalance of the resources available to the applicant and the public body is unlikely to be successful in the absence of other supporting facts (*IPC Order 2001-015*).

The public body should assure the applicant that personal financial information submitted to the public body in support of a fee waiver request will receive the protection of the FOIP Act with respect to use, disclosure and security.

A finding of an inability to pay does not, by itself, mean that the public body must waive the fees. The public body must consider all the relevant circumstances in the particular case and exercise its discretion (*IPC Orders F2005-006, F2007-016*).

What the relevant circumstances are will depend on whether the applicant's request is for personal or general information. When the applicant is requesting

his or her personal information, the scope and size of the request, whether the request has been narrowed, and the cost and burden to the public body for producing the copies of the record generally do not justify a refusal to grant a fee waiver. The possible exceptions to this are when the records have been previously received by the applicant or were provided to the public body by the applicant. Also, the past provision of similar information in other records at no cost or the presence of cheaper sources of the information do not justify the denial of a fee waiver, unless the *same* records have been provided before or the applicant can *successfully* obtain the information elsewhere (*IPC Order F2007-016*).

Conversely, an applicant requesting general information may be expected to obtain that information from other available sources or else pay for copies of that information if it is accessed through a FOIP request (*IPC Orders F2002-023, F2005-006 and F2007-016*). This is so even if the general information is contained in the applicant's personal file or the overall request is characterized as a request for access to personal information (*IPC Orders 97-003 and F2007-016*).

In general, the following principles, as summarized in *IPC Order F2007-016*, apply to fee waivers based on financial hardship.

- An applicant who has established an inability to pay should, if asking for the same records on numerous occasions, expect to pay a fee on each occasion (*IPC Order F2002-023*).
- An applicant who has established an inability to pay is entitled to a fee waiver with respect to those records that he or she has not already received (*IPC Order F2003-025*).
- The public body is in the better position to give evidence of what records have already been provided on previous occasions (*IPC Order F2002-023*), although the applicant may give evidence to deny that he or she has received them (*IPC Order F2005-006*).
- An applicant will be considered to have already received a particular record, and therefore not be entitled to a fee waiver for that record, if the record was obtained through a previous request

(*IPC Order F2003-025*). A previous request includes a request outside the FOIP Act (*IPC Order F2005-006*).

- An applicant will also be considered to have received correspondence between the applicant and the public body (*IPC Order F2002-023*), although it remains open to the applicant to argue that he or she did not receive, did not retain or no longer has a particular record and so that a fee waiver should apply to that record.

Fairness (section 93(4)(a))

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, it is fair to excuse the payment for any reason other than financial hardship.

The earlier Commissioner's Orders established that the onus is on the applicant to provide the reason why it is fair to excuse payment (*IPC Order 96-006*). Subsequent Orders have qualified that position by requiring a public body to consider factors that may not have been put forward by an applicant. In some cases, the Commissioner has granted a fee waiver on grounds of fairness where the applicants requested a waiver on other grounds (*IPC Orders 96-022, 99-027 and 2001-042*).

Section 93(4)(a) may also be used by a public body when it wishes to grant a fee waiver on its own initiative.

The reasons to excuse fees on grounds of fairness may relate to any number of matters. The following are some examples of circumstances where the fees may be waived on grounds of fairness.

- The public body has assessed fees where the records provide little or no information (see *IPC Order 99-027*).
- The public body has failed in its duties in processing the access request (e.g. by conducting an inadequate search for records or allowing undue delay; see *IPC Orders 99-039, F2003-023*).
- More than one applicant made the same or a similar request at around the same time, and it would not be fair for the public body to collect the total estimated amount of fees from both

applicants or to charge the first applicant substantially more than the second (see *Adjudication Order 2*). Alternatively, previous applicants have been given similar records at no cost (see *IPC Order F2006-032*).

- The information requested is important to bring closure to issues and concerns that have been outstanding between the public body and the applicant for a long time (*IPC Orders 2001-042* and *F2007-023*).

Other factors may also be relevant in deciding that fees should be waived on grounds of fairness such as the following.

- The records are critical for the applicant to exercise his or her rights, or are directly related to an individual's personal financial or health management.
- A person has a legitimate reason to request the personal information of another individual, but cannot exercise that individual's rights under **section 84** (if that individual requested the information, the request would be subject to copying fees only).
- Waiver of the fee would not significantly interfere with the operations of the public body, including other programs of the public body (*IPC Order F2006-032*).
- There are no less expensive sources of the information (*IPC Order F2006-032*).
- The request has been made as narrow in scope as possible and the public body has helped the applicant to define its request (*IPC Order F2006-032*).

The Commissioner has declined to waive fees where the applicant was in a position to reduce the fee, by not seeking access to records already provided in response to a previous request, and had not done so (*IPC Order 99-027*).

Public interest (section 93(4)(b))

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

Meaning of “public interest”

The concept of public interest has been explained in a number of Commissioner's Orders (*IPC Order 96-002*; reiterated in *IPC Orders 2001-023* and *F2003-011*). The term “public” may be applied to everyone and anyone. The term “interest” can range between the sense of individual *curiosity* and the notion of interest as a *benefit*. The Commissioner has reasoned that the weight of public interest depends on a balancing of the relative weight afforded to curiosity and benefit, and to a broad versus a narrow public. The Commissioner has also said that public interest is not confined to environmental and public health and safety issues. Reference to these in **section 93(4)(b)** is illustrative, not determinative.

It should be noted that the criteria for determining public interest under **section 93** are not the same as for the Act's provision for disclosure in the public interest (**section 32(1)(b)**). That provision imposes a statutory obligation on the public body to release the information, with or without a request, without delay. **Section 32(1)(b)** overrides all other provisions of the Act, including its provisions for the protection of personal privacy. Public interest in **section 32(1)(b)** must be narrowly interpreted, limited to compelling public interest. **Section 93(4)(b)**, on the other hand, is intended to support access rights, and is therefore interpreted more liberally. (See *IPC Orders 98-011*, *98-019*, *2000-031*.)

Burden of proof

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*).

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. 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. (See *IPC Orders 2001-023* and *F2003-011*.)

Category of applicant (e.g. media, elected officials)

The Act does not give any special consideration to identifiable groups such as the media, elected officials or advocacy groups (*IPC Order 96-022*). However, some of the criteria for public interest are likely to be of particular relevance to these categories of applicant. For example, a media or an MLA applicant would be likely to disseminate the information to the general public (*IPC Order F2003-011, Adjudication Order 2*). Similarly, some advocacy groups serve a public education or public watchdog function and would be likely to use records to promote debate on an issue of public interest (*IPC Order 99-015*).

Even when public interest has been established, it does not necessarily mean that the fee for all responsive records must be waived. The applicant still must show that the records sought relate to the public interest (*IPC Orders 97-001, 99-024*). A fee waiver may be granted only with respect to that portion of the request that involves records related to the public interest (*IPC Orders 2001-023, F2003-011*).

Criteria for determining public interest

In *Order F2006-032*, the Commissioner's Office revisited the thirteen "criteria" for determining public interest that had been established in *Order 96-002*.

These criteria were regrouped to create clearer and more discrete categories in order to address the fact that some criteria were repetitive or overlapping, some were subsets of others and some were related more to the issue of fairness for excusing payment than to the issue of public interest.

The revised criteria, with relevant considerations, are listed below. The list is not intended to be exhaustive; any other relevant factors presented by the parties are to be taken into account by the head of the public body. Not all of the criteria may be applicable in a particular request. A matter of public interest may still be established even if the claim meets only some of the criteria. The decision will be based on weighing

the strength of each argument and the relevance of each of the criteria in the particular context.

To date, there have been few decisions released by the Commissioner's Office that have applied the new criteria. However, it is likely that many of the principles found in decisions made under the previous criteria will be relevant in applying the revised criteria. For this reason, the discussion of the original thirteen criteria is included in this Bulletin in the Appendix.

Revised criteria

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 considerations:

- 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?

In *Order F2007-020*, the uniqueness of the public body's program, the amount of public funds involved and the errors that allegedly occurred in administering the program were found to be indicators that the public has or would have an interest in the records. This weighed in favour of disclosure. The fact that the information referred to the activities of another body, i.e. the federal government, was not relevant in determining whether the information would contribute to public understanding of the issue in question.

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 considerations:

- 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?

The fact that a print media applicant would publish the information in the records was a factor that favoured disclosure. However, requests for a fee waiver by the media are to be determined on the specific facts of the case. Public interest and not public curiosity is the standard to be applied (*IPC Order F2007-020*).

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 considerations:

- 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?

The disclosure of records relating to security breaches and errors around the distribution of resource rebate cheques was desirable for the purpose of subjecting the activities of the government to public scrutiny, and shedding light on a process that had not been addressed in the government news releases or program website (*IPC Order F2007-020*).

PARTIAL FEE WAIVERS

The Act allows a public body to excuse the applicant from paying all or part of a fee for services.

Partial fee waivers have been ordered by the Commissioner in the following circumstances:

- when only some of the responsive records pertain to the grounds for which the fee waiver was granted (*IPC Order F2002-023*);
- when the applicant was able to meet the criteria for public interest only in part (*IPC Order 2001-015*);

- when the applicant had a private interest in the records, but the release of the records would also benefit the general public (*IPC Order F2001-023*).

A partial fee waiver may also be appropriate

- when an applicant was willing to compromise on the terms of the request;
- when the fee was substantial and the applicant could afford to pay part of the fee, but not the entire amount;
- in the case of a request for personal information, when a token sum was required so that the applicant assumed a portion of the cost.

REVIEW BY THE COMMISSIONER

A person who makes a request to the head of a public body for access to a record may ask the Commissioner to review any decision, act or failure to act that relates to the request (**section 65(1)**). This includes a decision under **section 93(4)** on a request to excuse a fee.

If an applicant requests a review, the Commissioner may confirm or reduce a fee or order a refund (**section 72(3)**). The Commissioner is not limited to reviewing the exercise of discretion by the head of the public body. He can accept new evidence at an inquiry and render a new decision (*IPC Orders 2000-008 and 2000-011*). A public body may therefore need to consider relevant new information during the mediation stage and modify its position if the circumstances warrant.

If the matter proceeds to inquiry, the public body may find it helpful to have documentation on the following matters that have been considered in past inquiries relating to fee waivers:

- what advice was provided to the applicant on the fee waiver process and what information was requested from the applicant;
- whether the public body attempted to clarify or narrow the scope of the request;
- what records relating to the request had previously been provided to the applicant (*IPC Order F2002-023*);

- how the public body searched for responsive records;
- how the public body calculated the fee estimate;
- how the head of the public body arrived at his or her decision on the fee waiver request (*IPC Order 2000-025*);
- the decision on the fee waiver request;
- the public body's record on granting or refusing fee waiver requests.

A public body may revise its decision on a fee waiver request during the mediation stage of a review. The Commissioner has said he would not discourage a public body from exercising its discretion to waive fees at any stage of the process, provided the public body was not using the fee waiver decision to delay access (*IPC Order 99-005*).

PROCESSING THE FEE WAIVER REQUEST: A CHECKLIST

- Ensure that the public body has a delegation instrument in place if a person other than the head will be making decisions on assessing or excusing fees. Authority to assess and to excuse fees may be given to different persons.
- Clarify whether the applicant is requesting the applicant's own personal information or general information.
- For a general information request, collect the initial fee. If the applicant requests that the initial fee be excused, ask the applicant to submit the fee and advise him or her that consideration will be given to waiving the initial fee after the public body has provided a fee estimate.
- If the public body is permitted to charge fees in addition to the initial fee (i.e. the amount for a general information request will exceed \$150, not including the \$25 initial fee, or the amount for a personal information request will exceed \$10), and the public body intends to charge fees, provide the applicant with an estimate.
- Do not begin processing the request until the applicant has agreed to pay the fees and has provided at least 50% of an estimated fee that exceeds \$150.
- If the applicant requests a fee waiver, obtain the applicant's request in writing.
- Ensure that the applicant has the information necessary to make a fee waiver request that addresses the grounds in the Act and the factors addressed in key Orders of the Commissioner. The applicant should clearly understand what is expected of him or her.
- Consider any request for a fee waiver on the basis of the permitted grounds (financial hardship, fairness or public interest) and determine whether to waive fees in whole or in part.
- Respond to the fee waiver request within 30 days. If the public body is refusing the request in whole or in part, include a notice that the applicant may request a review. Do not take any further steps to process the request until the review is completed (unless the applicant has agreed to pay the fees, and has paid 50% of the estimated fee, subject to a refund in whole or in part if the review results in a fee waiver).
- If the applicant accepts the decision of the public body, and provides a deposit (if applicable), begin processing the request.
- Document each stage of processing the request, especially decision-making processes.

Currency

This Bulletin takes into consideration decisions issued by the Office of the Information and Privacy Commissioner of Alberta up to December 31, 2008.

Purpose

FOIP Bulletins are intended to provide FOIP Coordinators with more detailed information for interpreting the *Freedom of Information and Protection of Privacy Act*. They supply information concerning procedures and practices to assist in the effective and consistent implementation of the FOIP Act across public bodies. FOIP Bulletins are not a substitute for legal advice.

Further Information

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Appendix:

“PUBLIC INTEREST” CRITERIA UNDER IPC ORDER 96-002

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, the record relates to a matter of public interest (FOIP Act, **section 93(4)(b)**).

Prior to *Order F2006-032* (March 2, 2007), whether a matter was of “public interest” was determined on the basis of the non-exhaustive list of thirteen “criteria” established in *Order 96-002*. Although the thirteen criteria were revised in *Order F2006-032* to create clearer and more discrete categories, public bodies may find decisions of the Commissioner relating to the original criteria helpful in understanding and applying the revised criteria. For this purpose, the discussion of the original criteria that appeared in the previous edition of FOIP Bulletin No. 2: *Fee Waivers* is set out below.

1. Is the applicant motivated by commercial or other private interest?

When it is found that an applicant is motivated by a private interest, or is merely seeking to determine whether a public interest exists, the public interest claim tends to fail (*IPC Orders 99-016, 2000-008, 2000-011 and F2003-011*). Conversely, the fact that an applicant is not motivated by commercial or private interests may enhance the public interest argument (*IPC Orders 99-024 and 99-015*).

The fact that the applicant is a commercial organization does not necessarily negate a claim of public interest. Fee waivers have been granted to a publicly subsidized television station and a privately owned newspaper organization (*IPC Order 97-001, Adjudication Order 2*). In each case it was decided that the role of the applicant in making the information public outweighed the applicant’s commercial interest.

2. Will members of the public other than the applicant benefit from the disclosure?

The claim of public interest is generally supported if the applicant intends to release the records, or information based on the records, to the public, and the public would be likely to benefit. The Commissioner has indicated that the size of the potential audience is not decisive. In *Order 97-001 and Adjudication Order 2*, it was found that a broad segment of the general public

would benefit by becoming better informed or educated. On the other hand, in *Orders 99-015 and 99-024*, the Commissioner waived fees where the audience for the information consisted primarily of environmental groups.

3. Will the records contribute to the public understanding of an issue?

The argument for public interest is supported when it can be demonstrated that the specific records requested by the applicant could be used or summarized in a way that contribute to the public understanding (*IPC Orders 97-001 and 99-015*). Where records were already publicly available, the fact that additional information would allow the applicant to provide a more complete record was found to support the argument for a fee waiver (*Adjudication Order 2*).

The mere fact that the applicant intends to publish the records does not necessarily support a claim for a fee waiver. The argument may fail if the applicant or the public cannot properly analyze the records (*IPC Orders 2001-017 and 99-016*).

4. Will disclosure add to public research on the operation of the government?

Since one of the objectives of the FOIP Act is to promote transparency in government, an argument that the requested records contain information about government operations is likely to weigh in favour of a waiver. When there is no

evidence or likelihood that the records contain this kind of information, the argument is unlikely to be persuasive (*IPC Order 97-001*).

5. Has access been given to similar records at no cost?

If the public body has given the same or similar records to other persons without cost, it may be inequitable to charge another person for the records.

In *Order 97-001*, the Commissioner took into consideration that similar records are available at no cost in other North American jurisdictions and determined that this supported the claim of public interest.

6. Have there been persistent efforts by the applicant or others to obtain the records?

A persistent or diligent effort of the applicant in seeking the records would enhance the argument for a fee waiver (*IPC Orders 2000-033 and 2001-023, Adjudication Order 2*).

The Commissioner has said that an applicant does not need to show that there have been persistent efforts to obtain the actual records. He found that a folder of newspaper articles and a petition supporting the applicant's request for a fee waiver argued for public interest in the issue to which the records related (*IPC Order 2001-023*). The Commissioner urged public bodies to adopt a flexible interpretation with respect to expressions of public interest.

7. Would the records contribute to debate on or resolution of events of public interest?

The intention to use records to support public discussion of an issue is likely to weigh in favour of an applicant's request for a fee waiver. In *Order 97-001*, the Commissioner decided that it was probable that the use of records for a public broadcast contributed to public debate. Similarly, in *Adjudication Order 2*, it was decided that the use of records in a series of newspaper articles was likely to contribute to public debate. The Commissioner did not accept a public body's argument that an absence of other FOIP requests

on the issue indicated that there was a lack of public debate on the issue (*IPC Order 97-001*).

To succeed on this point it is not necessary to claim that the records will facilitate a resolution of the debate in the foreseeable future, especially where the issue is controversial and the debate of long standing (*IPC Order 2000-033*).

8. Would the records be useful in clarifying public understanding of a public interest established by the government?

An argument for public interest may succeed if the government itself has taken action to bring an issue to public attention. When the issue is related to an area in which government has enacted legislation, a strong case of public interest could be made (*IPC Orders 97-001 and 99-024*). However, it should be recognized that the government does not address all important issues through legislation, and that it takes some time before legislation is enacted in response to an emerging issue.

9. Do the records relate to a conflict between the applicant and the government?

When records relate to a conflict between the applicant and a public body, the claim of public interest has tended to fail (*IPC Order 2000-008*). Conversely, absence of a conflict enhances the argument of public interest (*IPC Orders 99-001 and 99-015, Adjudication Order 2*).

10. Should the public body have anticipated the need of the public to have the records?

If the public body should have anticipated public interest in an issue, it can be argued that the public body should have taken steps to make information publicly available rather than relying on individual applicants to request the information and to assume the burden of costs associated with the request.

However, it can be difficult for a public body to anticipate public interest in a particular issue and in the records related to that issue. The Commissioner has suggested that a compelling argument can be made that a public body should

anticipate the need for information about particular subjects, such as public health and safety (*IPC Order 97-001*). At the same time, the Commissioner has also recognized that an argument for public interest cannot reasonably be applied to a subject so broad that specific records cannot be identified (*IPC Order 2001-017*).

11. How responsive has the public body been to the applicant's request (e.g. by providing some records free, by providing alternative and less expensive options, and by narrowing the request)?

This question relates to the public body's duty under the FOIP Act to assist the applicant. Where the public body has attempted to find ways to reduce the burden of fees, an applicant's claim to a fee waiver in the public interest would be diminished if the applicant had been unwilling to cooperate or compromise (*IPC Orders 99-016, 99-027*).

A public body is likely to be judged to have been responsive to an applicant's request if the requested information has been made accessible to the public in the public body's head office, its regional offices, libraries, or on the public body's website (*IPC Order 99-015*).

An applicant may be able to present a case that the public body has not been sufficiently responsive if the public body has provided alternative options that do not meet the applicant's needs. For example, a public body may not be found to have met the test of responsiveness if the public body has made only a limited number of the records available to the public (*Adjudication Order 2*), or if the public body has relied on a third party to make the information available (*IPC Order 99-015*).

12. Would the waiver of the fee shift an unreasonable burden of the cost from the applicant to the public body?

Since public bodies are required to use their resources to fulfil their public mandate, consideration is given to whether the cost of the request to the public body would place an unreasonable burden on the public body and interfere with its ability to perform its primary

functions. In *Order 2001-017*, a public body successfully argued that the fee waiver requested would significantly interfere with the normal operations of the public body. In that particular case, the public body estimated a fee of \$624,921, a requirement of 4,083 work days and the temporary closure of some regional offices to process the request.

In other cases, public bodies have failed to persuade the Commissioner that waiving fees would require the public body to assume an unreasonable burden. In one instance, the Commissioner noted the size and available resources of the public body, and, in another instance, the fact that the public at large was likely to benefit. Some key examples may be found in *Order 2000-033*, where the estimated fee was \$8,289, and *Order 2001-015*, where the estimated fee was \$50,209.

13. What is the probability that the applicant will disseminate the contents of the records?

The argument of public interest is usually enhanced when the applicant intends to publish or disseminate the records or a summary or analysis of the information contained in the records. In some cases, the category of the applicant will lend force to the argument that the applicant is likely to disseminate the contents of the records. This will be the case with media applicants and MLAs. Nevertheless, any applicant requesting a fee waiver should address this question.

The likelihood that the records will be disseminated through the courts as a result of a lawsuit is unlikely to be a persuasive argument (*IPC Order 96-022*).