

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2012-16

July 11, 2012

ALBERTA HEALTH SERVICES

Case File Number F5675

Office URL: www.oipc.ab.ca

Summary: The Applicant requested a fee waiver for records relating to staffing shortfalls or deficiencies at the South Calgary Hospital from 2008 to the date of the request (November 18, 2010). The fee waiver was denied by Alberta Health Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). The Applicant argued that the fees should be waived in the public interest under section 93(4)(b) of the Act.

The Applicant also argued, in the alternative, that the fees charged were unreasonable. The Public Body had charged \$603.75 for 39 pages of records.

The Adjudicator found that the Applicant had not provided sufficient evidence to find that the fees for the records should be waived in the public interest. However, the Adjudicator also found that the fees charged for the records were not reasonable; specifically, the Adjudicator found that the evidence provided by the Public Body did not justify the number of hours charged for locating and retrieving the records. The Adjudicator reduced the number of hours the Public Body charged for locating and retrieving records from 21 to 12.45 hours.

The Adjudicator found that the circumstances warranted a reduction in fees, and ordered the Public Body to refund part of the fees paid by the Applicant, based on the revised calculation of 12.45 hours for locating and retrieving records.

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

Authorities Cited: AB: Orders 96-002, F2006-032, F2007-023, F2009-034.

I. BACKGROUND

[para 1] On November 18, 2010, the Applicant made an access request to Alberta Health Services (the Public Body) for “all reports, documents and internal correspondence about potential staffing shortfalls or deficiencies at the South Calgary Hospital from 2008 – present.” On January 7, 2011, the Public Body provided a fee estimate of \$637.00 for 65 pages of records, reflecting 21 hours for locating and retrieving records, 2 hours for preparing the records for disclosure, and photocopying.

[para 2] By letter dated January 12, 2011, the Applicant requested a fee waiver from the Public Body, arguing that the information in the records relates to a matter of public interest. The Public Body denied the Applicant’s request on February 9, 2011, and the Applicant sought a review of that decision by this office.

[para 3] During the course of the review, the Applicant paid the fees and received the records from the Public Body. The final fees payable by the Applicant were as follows:

Locating and retrieving records: 21 hours @ \$27.00 per hour = \$567.00
Preparing and handling records for disclosure: 1 hour @ \$27.00 per hour = \$27.00
Photocopies: 39 pages @ \$0.25 per page = \$9.75
Total: \$603.75

II. RECORDS AT ISSUE

[para 4] As the issue relates to a fee waiver, there are no records at issue.

III. ISSUES

[para 5] The issue in this inquiry, as set out in the Notice of Inquiry, dated November 23, 2011, is:

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

[para 6] As an alternative argument, the Applicant also addressed in his submission whether the fees were reasonable in the circumstances. I asked the Public Body to provide me with information about its calculation of fees in order to consider whether it would be appropriate to reduce the fees under section 72(3)(c) of the Act.

IV. DISCUSSION OF ISSUES

[para 7] Section 93 of the Act states in part:

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

...

(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).

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

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

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

...

[para 8] The Commissioner's jurisdiction to review decisions regarding fee waivers was described in Order F2007-023:

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.

[Order F2007-023, at paras. 23-25]

[para 9] In Order F2006-032 the Adjudicator set out a non-exhaustive list of criteria for determining whether to grant a fee waiver in the public interest (these criteria are a revised version of thirteen criteria set out in Order 96-002):

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
 - Have others besides the applicant sought or expressed an interest in the records?
 - Are there other indicators that the public has or would have an interest in the records?
2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
 - Do the records relate to a conflict between the applicant and government?
 - What is the likelihood the applicant will disseminate the contents of the records?
3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:
 - Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
 - Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
 - Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?

[Order 2006-032, at para. 43]

[para 10] In Order F2009-034 the adjudicator summarized the “public interest” issue as follows:

As noted by the Public Body, the requested records should be of significant importance in order for the cost of processing the access request to be passed on to taxpayers (Order 2000-011 at para. 52). Fee waivers on the basis of public interest are to be granted only when there is something about the records that clearly makes it important to bring them to the public’s attention or into the public realm (Order F2006-032 at para. 39). It is not sufficient for there to be some marginal benefit or interest in the record; there should be a compelling case for a finding of public interest (Order F2007-024 at para. 47).

[Order F2009-034, at para. 73]

[para 11] The Applicant provided minimal argument on the issue of public interest. He argues that “the public should have reasonably full disclosure on how their health care system is being run and that the plans or lack thereof for the staffing of major new capital projects in that system should be part of that disclosure”, and further that “it is essential

for public bodies to be transparent about how they spend tax dollars and plan for the future.”

[para 12] Although funding of the public health care system is often an issue in public and political debate, the Applicant did not provide me with any evidence suggesting that information about staffing levels at the South Calgary Hospital is of interest to anyone other than the Applicant. The Public Body argued that no other access requests had been made by the public or media on this issue. The Applicant’s argument that public bodies need to be transparent regarding the spending of tax dollars is not particularly persuasive, given that the activities of public bodies in general involves the spending of tax dollars. The Applicant has not persuaded me that the public has or would have an interest in the records.

[para 13] The Public Body states that it refused the Applicant’s fee waiver request because the Applicant did not specify how the records would contribute to the public understanding of the issue. The Public Body also argued that the information in the records regarding staffing levels for the South Calgary Hospital were speculative and did not related to a current public issue, as the request was for records created between 2008 and 2010 and the Hospital was not scheduled to open until 2012.

[para 14] The Public Body provided me with a copy of the 39 pages of severed records that it provided to the Applicant. After reviewing the records, it is apparent that the records address the issue of staffing levels for the South Calgary Hospital. Some of the records address factors considered in determining the Public Body’s approach to staffing the hospital, including some projections and numbers relied on. Some of the records shed light on the Public Body’s early consideration of staffing issues regarding the South Calgary Hospital; however, in my view, the records do not provide sufficient information about the Public Body’s actions and decisions on the issue to warrant a fee waiver. The Public Body refers to the content of the records as “speculative”, and I agree that the information in the records that does address the staffing issue does not fully and directly address the actions and decisions that the Public Body plans to take. Therefore the records do not fully meet the test set out in Order F2006-032, that they contain information showing how the government will reach a decision. Moreover, about a third of the records address only internal requests for staffing information (for example, emails between Public Body employees regarding the development of a slide presentation for senior management).

[para 15] The Applicant has also not provided me with any indication that any activity of the Public Body or Government of Alberta, related to the staffing of the South Calgary Hospital, has been called into question.

[para 16] Regarding the motivation of the Applicant, although he identified himself in his access request as a reporter for a media organization, and is therefore likely requesting the information with an intent to disseminate it to the public, he has not actually stated this. Even if the Applicant’s primary interest is to inform the public, I find

that he has not provided sufficient arguments or evidence for me to conclude that the fees for the records should be waived in the public interest.

[para 17] I find that the records requested by the Applicant do not meet the test for public interest in section 93(4)(b) of the Act.

[para 18] Section 72(3)(c) of the FOIP Act permits me to reduce fees in appropriate circumstances. I will therefore review whether appropriate circumstances exist that would support reducing the fees.

[para 19] The Applicant also argued that the fees charged by the Public Body were unreasonable. I asked the Public Body to provide me with a breakdown of the fees charged. I agree that some of the fees charged by the Public Body were unreasonable based on the arguments provided to me.

[para 20] I asked the Public Body the following questions:

- How did the Public Body arrive at the rate of \$27 per hour or \$6.75 per quarter hour for locating and retrieving records as its actual costs?
- What activities were included in calculating the time spent “searching for records?” Why did it take 21 hours to locate and retrieve responsive records?
- What activities were included in calculating the time spent “preparing” the records?
- How was the cost per page for photocopying calculated? Does the cost charged per page reflect the Public Body’s actual costs? Please provide evidence regarding the Public Body’s actual costs for making photocopies.

[para 21] The Public Body responded to the first question by informing me that four employees were involved in locating and retrieving the records as follows:

HR Manager	4.15 hrs
Data Analyst	8.30 hrs
HR Advisor	1.00 hrs
Senior Advisor	8.00 hrs

The Public Body also provided the hourly rate of each employee; all but one exceeded the \$27/hr maximum charge (per Schedule 2 of the FOIP Act); the remaining hourly wage was only slightly below \$27/hr. The Public Body also noted that it accounted for the costs of employee benefits as well, which adds on approximately 15% of each employee’s rate. Lastly, the Public Body noted that three other management-level employees conducted preliminary searches in response to the Applicant’s request, but as their time spent was not logged, it was not included in the fees.

[para 22] In response to my question about photocopying costs, the Public Body provided a calculation of the average cost per page for photocopying based on the cost of

paper and other related supplies, as well as the rental fee for the photocopier. The calculation came to \$0.0635 per page. As this is lower than the \$0.25 per page originally charged to the Applicant, the Public Body agreed to refund the difference (\$7.41).

[para 23] In response to my second and third questions, the Public Body stated that the search for records was difficult because staffing projections for the South Calgary Hospital were included in files for the entire Calgary zone and the 21 hours reflected the time spent extracting the information specific to the South Calgary Hospital. The Public Body described the responsive records as “emails between Data Advisors and Senior Advisor in Calgary, emails from Senior advisors to Advisors, copies of all reports generated by the Project Director SCH, a slide deck and Excel worksheets,” and further, that “there is no reason to doubt that the time recorded in the log is incorrect.”

[para 24] The records contain approximately four or five separate email chains, totaling 14 pages; multiple short reports or forms totaling 16 pages, and a slide presentation consisting of 9 pages. It remained unclear to me why it took four employees of the Public Body approximately a half-hour per page to locate the 39 pages of records, even if they were stored with records relating to Calgary as a whole, given that the Public Body performed an electronic search. Therefore I requested direct evidence from the Public Body regarding the steps taken to locate and retrieve the records.

[para 25] The Public Body provided me with an affidavit from the manager of the area responsible for locating and retrieving the records, as well as a chart filled in by three of the four employees primarily involved (one employee had since left, but had logged only one of the 21 claimed hours): a Data Analyst, a Senior Advisor, and the Manager who swore the affidavit.

[para 26] The Senior Advisor listed his time spent as 8 hours. He searched his personal hard drive, shared drive and email with the following search terms: SHC, Calgary, South Health Campus. His search resulted in 20 documents. He states that he did not have difficulty with the search but had limited results because of limited involvement with the project.

[para 27] The Data Analyst listed her time spent as 8.3 hours. She searched her personal hard drive, shared drive and email with the following search terms: SHC, Calgary, South Health Campus, Projections, Forecasting, Staffing Projections, Nursing Scenarios. Her search resulted in 200 records (including many duplicates). She states that she had a large amount of data on projections and forecasting on all Calgary zones and sifting through the information was time consuming.

[para 28] The Manager listed her time spent as 4.15 hours. She searched her personal hard drive, shared drive and email with the following search terms: Staffing Projection, Staffing Shortage, Staffing Deficiencies, SHC, Calgary Zone, South Health Campus, Workforce Planning. Her search resulted in 283 records (including many duplicates). She states that determining which records were duplicates was cumbersome and required a manual search. She also stated that the search words showed up in “nearly every single

file in our office due to our department name being Clinical Workforce Planning. It was very time consuming and involved multiple employees in multiple provincial offices. In the end, I only recorded 1 day (8 hrs) for 2 of us and ½ day for the 2 others. All told, it did take us many more hours, but given that we are a public body I felt it was prudent to limit the time taken to research all of our files, then sort through and categorize them, to 21 hrs.” She also noted that removing duplicates was the most time consuming activity because of the multiple employees and offices who kept both paper and electronic copies of documents.

[para 29] I have a few concerns about the above information. I note that all three of the employees searched the shared drive. Given that these three employees are part of the same team, it seems likely that they use the same shared drive, and therefore it was redundant to have all three employees search the same drive.

[para 30] Both the Data Analyst and Senior Advisor state that they did not track their time; rather the Manager did. It is not clear to me why the Data Analyst took 8.3 hours to go through 20 documents, while it took the Senior Advisor only eighteen fewer minutes to go through ten times as many documents. The Manager logged only 4.15 hours to go through the largest number of documents. The Manager indicates that many other employees of the Public Body were involved and took many more hours than the 21 claimed; however, I have no other information about the involvement of these employees.

[para 31] The Manager’s 4.15 hours seems reasonable given the activities she describes. It is not clear to me why double the time was logged for the other two employees, as their searches seem to have been less extensive. As such, and because these employees admitted that they did not track their own time and did not provide any information as to the time “assigned” to them by the Manager (for example, that they recall spending an entire day on the project), I find that the 8 and 8.3 hours logged for these employees is unreasonable. I find that the 4.15 hours logged by the Manager is a more appropriate amount of time to claim for each of the other two employees (amounting to 12.45 hours in total).

[para 32] No information was provided to me regarding the one hour logged by the other Advisor. As such, I will not include that hour in my revised calculation of fees.

[para 33] I note that the cost for photocopies (\$0.06 per page) seems far lower than the cost for searching for and removing duplicate copies of records. The Public Body may consider, when responding to future requests, providing the applicant with the option of paying for duplicates where the time spent removing duplicates would result in far higher fees.

[para 34] I accept the Public Body’s new charge of \$0.06 per page for photocopying, as well as the charge of \$27/hr for searching, locating etc. However, I find the 21 hours logged for searching and locating the records to be unreasonably high. As the Public Body was unable to provide me with persuasive arguments in this point, I find that it is appropriate to reduce the fees in the circumstances, under section 72(3)(c) of the Act. I

find 12.45 hours to be a more reasonable amount of time. I am therefore reducing the amount charged for searching and locating records from \$567 to \$336.15.

V. ORDER

[para 35] I make this Order under section 72 of the Act.

[para 36] I order the Public Body to reduce the fee for responding to the Applicant's access request from \$603.75 to \$365.49 (this includes the 12.45 hours x \$27 for locating and retrieving records, 1 hour x \$27 for preparing and handling records, and photocopies at \$0.06 x 39 pages). I order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with its terms.

Amanda Swanek
Adjudicator