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Order F17-38

TOWN OF GIBSONS

Celia Francis
Adjudicator

September 13, 2017

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Summary: The Gibsons Alliance of Business and Community (GABC) made two requests to the Town of Gibsons (Town) for records about the George Hotel and Residences development. The Town denied the GABC's requests to be excused from paying fees for processing their access requests because the records relate to a matter of public interest. The adjudicator found that the records do not relate to a matter of public interest, so GABC is not eligible for a fee waiver. The adjudicator also confirmed the Town's exercise of discretion in deciding to charge fees, citing, among other things, the duplicative and broadly-worded nature of the GABC's past and current requests and the negative effect on the Town's resources.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 75(5)(b), 58(3)(c).

Authorities Considered: BC: Order No. 332-1999, 1999 CanLII 4202 (BC IPC); Order F14-42, 2014 BCIPC 45 (CanLII); Order 01-24, 2001 CanLII 21578 (BC IPC); Order 01-35, 2001 CanLII 21589 (BC IPC); Order F05-36, 2005 CanLII 46569 (BC IPC); Order F09-11, 2009 CanLII 42410 (BC IPC).

INTRODUCTION

[1] This order arises out of two requests for records related to a real estate development in Gibsons. In mid-July 2015, the applicant, the Gibsons Alliance of Business and Community (GABC), made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Town of Gibsons (Town) for records related to the George Hotel and Residences development proposal

(George project), from 2012 to the date of the request.¹ In late August 2015, the GABC requested records related to the Gibsons Marina lease between the Town and Gibsons Marine Hotel Inc. (GMHI), from 2011 to the date of the request.² I refer to these below as the “George” request and the “Marina” request. The GABC requested a fee waiver on public interest grounds for both requests.³

[2] The Town issued a fee estimate for both requests and denied the GABC’s requests for a fee waiver. The GABC paid the fees, “under protest”, and the Town disclosed the responsive records.⁴ The GABC then complained to the Office of the Information and Privacy Commissioner (OIPC) about the Town’s refusal to grant the two fee waivers.⁵ Mediation by the OIPC did not resolve the issues and the two matters proceeded jointly to inquiry.

ISSUE

[3] The issue before me in each case is whether a fee waiver is warranted under s. 75(5)(b) of FIPPA on public interest grounds. Section 57 of FIPPA, which sets out the burden of proof in inquiries, does not expressly impose an evidentiary burden on either party regarding fee waivers.⁶ However, previous orders have held that, in such cases, as a practical matter, it is in the interests of each party to present argument and evidence as to whether the provision in issue applies.⁷ I agree.

DISCUSSION

Preliminary matters

[4] **Applicant cannot afford fees** – A public body may excuse an applicant from paying fees if the applicant cannot afford the payment.⁸ In its complaints to the OIPC about the two requests, the GABC claimed that, for a number of

¹ OIPC file F16-66340; Town’s file FOI 2015-08. The GABC said that this request excluded records it had asked for in earlier requests on this topic.

² OIPC file F16-66230; Town’s file FOI 2015-07.

³ The GABC provided the Town with extensive arguments in favour of a public interest fee waiver for the George request in its letter of October 28, 2015 but did not provide any such arguments for the Marina request.

⁴ In the George request, the initial fee estimate was \$1,654.00 and the final fee was \$1,061.75. In the Marina request, the Town’s initial fee estimate was \$1,211.50 and the final fee was \$1,423.10.

⁵ The GABC’s complaint letter of June 13, 2016 to the OIPC about the George request also requested a review of the Town’s severing of the records and expressed concern that records were missing. The fact report for this inquiry does not say what happened with these issues. There is, however, no indication that the OIPC’s normal process for dealing with such matters did not occur.

⁶ The Town argued that the GABC had the burden of proof. Town’s initial submission in the George request, para. 26.

⁷ See for example, Order F14-42, 2014 BCIPC 45 (CanLII).

⁸ Section 75(5)(a) of FIPPA.

reasons, it could not afford to pay the fees the Town had assessed.⁹ In their inquiry submissions, both parties addressed the issue of whether the GABC could afford to pay the fees for the two requests.

[5] There is, however, no evidence in the material before me that the GABC expressly asked the Town to waive the fee on these grounds for either request. Nor is there any indication that this issue was added during mediation. The Town has not had the opportunity to make an official decision on whether to grant a fee waiver under s. 75(5)(a). I will therefore not consider that issue here. If the GABC actually asks the Town for a fee waiver under s. 75(5)(a) and is not satisfied with the Town's decision, it may complain to the OIPC about that decision.

[6] **Calculation of fees** – The GABC complained generally in its submission that the fees were “exorbitant” for all its requests. The GABC did not, however, explicitly complain to the OIPC that the Town had calculated the fees improperly in either the George request or the Marina request, for example, by including elements that s. 75(1) of FIPPA does not permit.¹⁰ I will therefore not consider whether the Town calculated the fees properly.

Background

[7] The Town said the George project includes a hotel, marina, conference facilities, spa and pool. It said the initial rezoning and development application process began in February 2013.¹¹ The GABC described the George development project as a “controversial issue” that included the acquisition of the Marina, a “public asset”.¹²

Records

[8] **George request** – The 435 pages of records for this request comprise the following:

- correspondence with the developer regarding the development application process for the George project;

⁹ GABC's letters of June 13, 2016 and May 31, 2016.

¹⁰ Section 75(1) specifies the services for which public bodies may charge fees, including locating records or providing copies of records.

¹¹ Town's initial submission in the George request, para. 4.

¹² GABC's letters of October 28, 2015 and June 13, 2016 and response submission, para. 30. The disclosed records in the Marina request show that the Town leased its own land to Gibsons Hotel Marina Inc. (GMHI) and that it leased the water lot from the Province and subleased the water lot to GMHI; pp. 81-83. The records also show that the developer of the George project subsequently purchased GMHI's marina assets and that GMHI's lease with the Town was transferred to the developer; pp. 1332, 1347, 1476.

- correspondence from members of the public expressing support or non-support for the project. The Town had previously publicly disclosed these records as part of Town meetings on the George project;¹³
- reports, appraisals and staff notes about the George project, which were also already public because the Town had disclosed them during Town meetings or on its website;¹⁴ and
- administrative and other routine materials about the development application and Council process.

[9] **Marina request** – The 1,666 pages of records for this request comprise the following:

- correspondence among the Province, the Town and Gibsons Marina Hotel Inc. (GMHI) related to the leasing of the land and water lot on which the marina is located;
- copies of the relevant leases and lease extension agreements;
- rent renewal analyses and appraisal reports;
- correspondence on rental payments, riparian access and an arbitration regarding the lease;
- presentations to the public;
- legal advice and *in camera* reports to the Town council (withheld); and
- third-party financial information (withheld).

Application of s. 75(5)(b) of FIPPA

[10] The relevant part of s. 75(5) of FIPPA reads as follows:

Fees

75(5) If the head of a public body receives an applicant's written request to be excused from paying part or all of the fees for services, the head may excuse the applicant if, in the head's opinion,

...

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

¹³ Affidavit of Town's Corporate Officer, para.20.(iv). The Corporate Officer also said that the correspondence had been published on the Town's website and that other correspondence was available for public viewing at the Town Hall.

¹⁴ These publicly disclosed records were part of two earlier, concluded access requests. The Town and the GABC agreed that the George request would include a review of the withheld records from those earlier requests to see if they could now also be disclosed; Town's letter of September 28, 2015.

Two-Part Test for Public Interest Fee Waivers

[11] Previous orders have set out a two-step analysis for determining if a public interest fee waiver is warranted. For instance, in Order No. 332-1999, former Commissioner Loukidelis said:

1. The head of the Ministry must examine the requested records and decide whether they relate to a matter of public interest (a matter of public interest may be an environmental or public health or safety matter, but matters of public interest are not restricted to those kinds of matters). The following factors should be considered in making this decision:
 - (a) has the subject of the records been a matter of recent public debate?
 - (b) does the subject of the records relate directly to the environment, public health or safety?
 - (c) could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
 - (i) disclosing an environmental concern or a public health or safety concern?
 - (ii) contributing to the development or public understanding of, or debate on, an important environmental or public health or issue? or
 - (iii) contributing to public understanding of, or debate on, an important policy, law, program or service?;
 - d) do the records disclose how the Ministry is allocating financial or other resources?
2. If the head of a Ministry, as a result of the analysis outlined in paragraph 1, decides the records relate to a matter of public interest, the head must still decide whether the applicant should be excused from paying all or part of the estimated fee. In making this decision, the head should focus on who the applicant is and on the purpose for which the applicant made the request. The following factors should be considered in doing this:
 - (a) is the applicant's primary purpose for making the request to use or disseminate the information in a way that can reasonably be expected to benefit the public or is the primary purpose to serve a private interest?
 - (b) is the applicant able to disseminate the information to the public?

It should be emphasized that the references in para. 1, above, to the environment and public health or safety do not exhaust scope of what may be a matter of public interest. This is made clear by para. 1(c)(iii).¹⁵

[12] Regarding the second step in the analysis, previous orders have added these factors:

Although the list of factors will never be exhaustive, I consider that the following criteria may, in addition to those described or referred to above, be relevant to a head's exercise of discretion:

1. As expressly contemplated by s. 58(3)(c) of the Act, whether "a time limit is not met" by the public body in responding to the request;
2. The manner in which the public body attempted to respond to the request (including in light of the public body's duties s. 6 of the Act).
3. Did the applicant, viewed reasonably, co-operate or work constructively with the public body, where the public body so requested during the processing of the access request, including by narrowing or clarifying the access request where it was reasonable to do so?;
4. Has the applicant unreasonably rejected a proposal by the public body that would reduce the costs of responding to the access request? It will almost certainly be reasonable for an applicant to reject such a proposal if it would materially affect the completeness or quality of the public body's response;
5. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?¹⁶

Step 1 - Do the records relate to a matter of public interest?

[13] I will now consider Step 1 in the fee waiver analysis, bearing in mind that it does not suffice if the applicant intends to use the records in a matter that relates to the public interest.¹⁷ The records themselves must relate to the public interest.¹⁸

[14] **George request** – Some of the records in this request relate to the environment, public health or safety, and therefore to a matter of public interest.¹⁹ However, the Town said, and the GABC did not dispute, that the majority of the George request records (*i.e.*, the geotechnical reports, the real estate appraisal,

¹⁵ Order No. 332-1999, 1999 CanLII 4202 (BC IPC). See also Order F14-42 and Order 01-24, 2001 CanLII 21578 (BC IPC).

¹⁶ Order 01-35, 2001 CanLII 21589 (BC IPC) at para. 46.

¹⁷ Order 01-24, 2001 CanLII 21578 (BC IPC), at paras. 56-62.

¹⁸ See, for example, Order F05-36, 2005 CanLII 46569 (BC IPC).

¹⁹ I refer here to three geotechnical reports on the possible effects of the George project on an aquifer which provides much of the Town's drinking water.

meeting notes and correspondence from the public) had already been made publicly available, either on the Town's website or through public Town meetings, when it disclosed them to the GABC.²⁰ The Town also provided evidence that it established a website on the George project in June 2014 which includes a description of the project, the development process, with updates, and links to relevant information such as design drawings and plans, landscape drawings, development agreements, studies and reports, appraisals, staff reports, meeting and public hearing minutes, bylaw amendments and presentations.²¹

[15] I am satisfied that the requested records in the George request that relate to a matter of public interest have already been made public. The only records that have not are the correspondence with the developer regarding the development application process and administrative and other routine materials about the development application and Council process. There is no evidence that the development application process was the subject of public debate. I also do not see how those records would contribute to the public's understanding of the George project. Given that the Town had already made publicly available the information on the George project that might be of public interest, I conclude that the disclosure of the George request records to the GABC under FIPPA could not reasonably be expected to yield a public benefit, or further public debate on or contribute to the public's understanding of the George project. I find that the records in the George request do not relate to a matter of public interest pursuant to s. 75(5)(b).

[16] **Marina request** – Most of the records in this request date back some years. They concern negotiations on the renewal of the marina lease, a related arbitration and the sale of the marina to the George developer. The Town argued,²² and I agree, that these records do not relate to the environment or public health or safety or to another matter of public interest. Moreover, apart from one local news article from November 2014 that the GABC provided,²³ there is no indication in the material before me that the lease renewal and the sale of the Marina were the subject of public debate, either at the time these events occurred or when the GABC made its request. In any event, the records themselves show that information about marina issues was made publicly available at the times in question: a public presentation by the Town on the sub-lease renewal in 2012;²⁴ a news release by the Town on the results of the

²⁰ The reports, correspondence and meeting notes formed part of the agenda package for the May 12, 2015 Town council meeting; Town's letter of November 26, 2015 and Affidavit of Town's Corporate Officer, para. 20.(iv).

²¹ Town's initial submission, paras. 28-31; Affidavit #1 of Town's Corporate Officer, para. 20.

²² Town's initial submission, paras. 14-18; Affidavit #2 of Town's Corporate Officer, para. 15.

²³ One of the attachments to para. 35 of the GABC's response submission. The GABC also provided two news articles from its own website in support of its public interest arguments. However, they appear to post-date the disclosure of the records from the Marina request.

²⁴ Pages 162-179.

arbitration in November 2013;²⁵ a 2013 local news article on the arbitration;²⁶ and a news release in February 2015 by the George developer about its purchase of the marina.²⁷

[17] The GABC provided examples of how it believes the records in the Marina request relate to a matter of public interest because they reveal supposedly improper actions by the Town regarding the George project.²⁸ It did not, however, point to specific pages on these points and did not explain how, in its view, the records reveal these supposed improprieties.

[18] I accept that the public may be interested in the marina issues. I note that the Town addresses that interest by publishing updates on various aspects of the George project on its website. I am not persuaded that the Marina request records would add anything further to the public's understanding of the marina lease renewal or sale. I therefore find that the Marina request records do not relate to a matter of public interest pursuant to s. 75(5)(b).

Step 2 - Exercise of discretion

[19] Section 75(5)(b) says that the head of the public body "may" excuse fees if the record relates to a matter of public interest. I found above that the records in both cases do not relate to a matter of public interest. Technically, this means that the Town was not obliged to consider excusing the fees and I do not need to consider the Town's exercise of discretion, which is step 2 in the fee waiver analysis. However, the parties addressed it in their submissions and, for the sake of completeness, I will deal with it. The parties' arguments on each request were similar and I have dealt with them collectively below.

[20] The Town did not address the initial factors in step 2 of the fee waiver analysis, *i.e.*, the GABC's primary purpose for making the request (whether it was for a public or private interest) and whether the GABC has the means of disseminating the information to the public. However, based on the GABC's evidence,²⁹ I am satisfied that its purpose for making its request was to use or disseminate the information to benefit the public and that it had the means of doing that via its website.

[21] **Other factors:** The Town said that, when it was deciding whether to excuse the GABC from having to pay a fee for its requests, it considered the GABC's behaviour regarding its various FIPPA requests. For instance, the Town considered the GABC's practice of making broadly-worded, duplicate and

²⁵ Exhibit L, Affidavit of Town's Corporate Officer.

²⁶ Exhibit L, Affidavit of Town's Corporate Officer.

²⁷ Page 1347.

²⁸ GABC's response submissions, paras. 31-32.

²⁹ GABC's response submission, for example, paras. 5-10. The GABC also provided copies of its own articles on the George project that it has published on its website.

overlapping requests, its resistance to narrowing or combining its requests and its practice of making detailed complaints about the Town's responses to its requests. The Town added that the hundreds of hours it has expended responding to the GABC's requests, follow-up complaints and other communications have placed a significant burden on its small administrative staff.³⁰

[22] The GABC argued that the number and scope of its requests should not be considered a relevant factor. It also suggested that the facts that the Town considers the GABC's use of the records to be "malicious" and that the Town believes the GABC inaccurately represented the records to the public are not relevant.³¹ It did not, however, address the Town's other arguments about the GABC's practices regarding its access requests.

[23] Previous orders have taken various factors into account in confirming fees. For example, in one case, the applicant had made over 30 previous requests for similar information; the public body had "devoted considerable resources" to providing records to the applicant, without a fee in most cases; and the public body had made considerable information available to the public.³² Other orders have also taken into account applicants' and public bodies' behaviour and willingness to co-operate with each other in deciding whether or not to confirm fees.³³

[24] In my view, the Town has, at considerable cost to itself, been diligent, co-operative and helpful in its processing of both the George and Marina requests and the previous requests. I acknowledge that the GABC has public interest considerations at heart and is able to disseminate information. However, having regard for the factors in previous orders, I find that appropriate circumstances exist to confirm the fees in both requests, for these reasons:

- the George request was for "any and all records" related to the George project generated and shared among specified individuals from January 2012 to mid-July 2015, excluding records previously released. It included all correspondence, reports, minutes, meeting notes and any other information related to the George project. This request largely duplicated and overlapped with the GABC's previous requests on the George project, both in timelines and subject matter, and required that the Town review records it had already

³⁰ The Town's administrative staff comprise two people: the Chief Administrative Officer and the Corporate Officer. Town's initial submission on the George request paras. 43-51. Town's initial submission on the Marina request, para. 24. Affidavits of the Town's Corporate Officer.

³¹ GABC's response submission, paras. 55-56. The Town said it had never stated or implied that the GABC's use of the information was malicious; Town's reply submission, para. 13.

³² Order 01-35, 2001 CanLII 21589 (BC IPC).

³³ See, for example, Order F09-11, 2009 CanLII 42410 (BC IPC).

reviewed (e.g., the requests of August 5, 2014,³⁴ September 5, 2014³⁵ and July 13, 2015);³⁶

- the GABC admitted that the George request was purposely a duplicate, broadly-worded request to ensure nothing had been missed from previous requests;³⁷
- the GABC disagreed with the Town’s reasonable suggestion to lower fees by narrowing the George request or combining it with two other similar requests it had made the same day, again because, as the GABC explicitly said, it wanted to ensure no records had been missed from previous requests;
- in the George request, the GABC also asked the Town to review for a second time records withheld in two previous requests to see if anything could now be disclosed. The GABC admitted that it asked this because it had missed the deadline for asking for a review by the OIPC of the earlier requests.³⁸ While the Town disclosed further records as a result of this second review, it nevertheless required time and effort on the Town’s part to review the previous files;
- the Town has made substantial amounts of information on the George project freely available on its website, including most of the George request records;
- the Marina request was broadly worded³⁹ and the GABC did not respond to what in my view was the Town’s reasonable suggestion of narrowing this request to lower the fees;
- in the Marina request, the GABC did not provide the Town with any reasons for being excused from paying the fee;⁴⁰
- I accept from the Town’s evidence that the Town, which has two staff in its corporate administration area, has reviewed thousands of pages of records

³⁴ It asked for “any and all records generated by staff and elected people” on the George project, including those who attended various meetings, for various periods in 2013 and 2014.

³⁵ It asked for “any and all minutes and notes” of meetings attended by a Town official regarding the George project, including all records generated by those who attended certain meetings in 2013.

³⁶ It asked for “any and all records related to the George” project generated by or shared among specified individuals, including Town officials and representatives of the developer, from May 2014 to July 2015, including all correspondence, all reports, minutes, meeting notes and any other information related to the George project.

³⁷ The Town’s letter of November 15, 2015 lists the GABC’s other requests and tells the GABC that they spanned the same time and subject matter as the George request.

³⁸ Regarding this and previous three bullets, see GABC’s request of July 13, 2015 and Exhibit H to the Affidavit of the Town’s Corporate Officer, GABC’s emails of August 28 & 31, 2015 and September 3, 2015 to the Town.

³⁹ It asked for “any and all records” related to the marina lease, “created, generated or shared by any and all parties” between November 2011 and late August 2015, including all emails among Town staff and elected officials, the GMHI, provincial and federal staff, the George developer and a named local property group.

⁴⁰ The GABC did provide such arguments regarding the George request.

and spent hundreds of hours processing the GABC's various requests of 2014 and 2015.⁴¹ This has had a significant effect on its limited resources.⁴² In my view, waiving the fees in these cases would shift an unreasonable cost burden onto the Town;

- the GABC made lengthy, detailed, and in my view trivial and unreasonable, complaints about the Town's processing of the two requests, saying, for example, that given the "lengthy time period" and "broad scope" of the George request, the information released was "wholly inadequate" and, regarding both requests, many pages were "useless", not responsive to the requests, "random", "unidentifiable", "unrelated" or "meaningless", records were missing or duplicated and page numbers had been tampered with;⁴³
- the Town provided detailed and reasonable explanations of its searches for records in response to these complaints.⁴⁴ The GABC's repeated complaints in the face of these explanations were, in my opinion, trivial and unwarranted.⁴⁵

CONCLUSION

[25] For reasons given above, under s. 58(3)(c) of FIPPA, I confirm the Town's decision not to excuse the GABC from paying the fees in both requests.

September 13, 2017

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File Nos.: F16-66230
F16-66340

⁴¹ Affidavit of Town's Corporate Officer, para. 7.

⁴² Affidavit of Town's Corporate Officer, paras. 4-8.

⁴³ GABC's letters of 15 November 2015 and 15 December 2015.

⁴⁴ Town's responses to search complaints in its letters of December 1 & 15, 2015.

⁴⁵ In its response submission to this inquiry, the GABC reiterated its complaint that most of the records in the George requests were not responsive to the request, despite the Town's explanation of how they were responsive. It also said that, in both requests, the Town had "loaded up" the release packages with "duplicate and non-responsive documents" and charged "exorbitant fees" to deter the GABC's access to information; paras. 28 & 47.