Office of the Information & Privacy Commissioner for British Columbia

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Order F18-11

CITY OF KELOWNA

Chelsea Lott
Adjudicator

March 29, 2018

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Summary: The complainant requested that the City of Kelowna provide any communications by certain Kelowna officials that mention him by name. Kelowna imposed a fee under s. 75(1) of FIPPA to process the access request. The complainant argued that the public body could not charge him a fee because he was requesting his own personal information within the meaning of s. 75(3). The adjudicator held the complainant's request was for his own personal information and Kelowna was not authorized to charge a fee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 75(1) and 75(3).

Authorities Considered BC: Order F12-07, 2012 BCIPC 10; Decision F08-02, 2008 CanLII 1647 (BC IPC); Order F17-26, 2017 BCIPC 27; Order F17-38, 2017 BCIPC 42; Order F15-01, 2015 BCIPC 1; Order F14-42, 2014 BCIPC 45; Order F10-38, 2010 BCIPC 58; Order F09-11, 2009 CanLII 42410 (BC IPC); Order F09-05, 2009 CanLII 21404 (BC IPC) ; Order F07-09, 2007 CanLII 30394 (BC IPC); Order No 332-1999, 1999 CanLII 4202 (BC IPC); Order No 316-1999, 1999 CanLII 1369 (BC IPC); Order No 293-1999, 1999 CanLII 1495 (BC IPC); Order No. 137-1996, 1996 CanLII 754 (BC IPC); Order 00-19, 2000 CanLII 10662 (BC IPC); Order F10-07, 2010 BCIPC 11; Order P12-01, 2012 BCIPC 25; Order F18-02, 2018 BCIPC 2; Investigation Report F15-01, 2015 BCIPC 15; Order F13-04, 2013 BCIPC 4; Order P13-01, 2013 BCIPC 23; Order P13-02, 2013 BCIPC 24; Order F17-43, 2017 BCIPC 47.

Authorities Considered ALTA: Order P2009-005, 2010 CanLII 98663 (AB OIPC).

Cases Considered: *British Columbia Teachers' Federation v British Columbia*, 2012 BCCA 326; *Attaran v Canada (Foreign Affairs)* 2011 FCA 182; *Ontario (Public Safety and Security) v Criminal Lawyers' Association,* 2010 SCC 32; *British Columbia (Public Safety and Solicitor General) v Stelmack*, 2011 BCSC 1244.

Texts Considered: *British Columbia Administrative Law Practice Manual*, (looseleaf) Vancouver: The Continuing Legal Education Society of British Columbia, 2012 (updated to 2015); Sopinka et al., *The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2014).

INTRODUCTION

[1] The complainant requested that the City of Kelowna (Kelowna) provide any records that mention his name over a certain time frame. Kelowna charged the complainant a fee of $297.50 to process his access request pursuant to s. 75(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The complainant filed a complaint with the Office of the Information and Privacy Commissioner (OIPC), saying that he should not be required to pay a fee because he was requesting access to his own personal information within the meaning of s. 75(3) of FIPPA. During mediation, the complainant narrowed the scope of his request and Kelowna reduced its fee to $117.50. The complainant remained dissatisfied with the fee and requested that the matter proceed to an inquiry.

Preliminary matter – expanding the inquiry

[2] The complainant raises a number of matters which are not set out as issues for the inquiry in either the notice of inquiry or the investigator's fact report. More specifically, the complainant asks the Commissioner to decide whether:

- Kelowna adequately searched for records and otherwise complied with its duty to assist applicants (s. 6(1)).
- Records in the personal email and social media accounts of Kelowna's mayor are within Kelowna's custody or control (ss. 3 and 4(1)).
- Kelowna was authorized to grant itself a time extension to respond to his request (s. 10(1)).
- Kelowna responded to his request within the statutory time limits for doing so (s. 7(1)).
- Kelowna's actual estimate of its fees is appropriate (s. 75(1)).

[3] The complainant made comprehensive submissions on the merits of these issues, which I will not attempt summarize. He explains that he raises these issues for the first time in his submissions because he did not become aware that Kelowna had only found five responsive records until Kelowna provided its initial

submissions for this inquiry (which include the records in dispute).[1] He has submitted 134-pages of records which he said Kelowna should have identified, at a minimum, as responsive to his access request.

[4] Kelowna submits the OIPC should decline to exercise its discretion to consider new issues. Kelowna says it would be prejudiced if the new issues are added because it has not had an adequate opportunity to make submissions or provide evidence regarding these matters. Further, Kelowna says that any finding related to the adequacy of its search would be premature because it has not yet provided its entire response to the complainant's access request. Based on records the complainant submitted, Kelowna says it will expand its response to include an additional email account contained in those records as it initially did not understand the complainant to be seeking access to those records.

[5] The Commissioner will only accept new issues raised for the first time in a party's initial submission in exceptional circumstances.[2] The possibility that Kelowna's submissions may provide information that supports a s. 6(1) complaint to OIPC does not mean that the circumstances are exceptional and warrant adding that complaint or any other new issues to the inquiry. In Order F12-07, an applicant made submissions to add s. 6(1) to the inquiry at issue because "it did not have the information necessary to provoke a complaint, until it received the initial submission of the Ministry in this inquiry."[3] In that order, the adjudicator found that "[t]his is an issue better suited to investigation by the OIPC as a complaint as there is insufficient material before me to make a finding. The [applicant] has a right to request that the OIPC conduct a formal investigation."[4] The same reasoning applies here.

[6] Where an applicant complains that a public body has not performed a duty under FIPPA, the OIPC requires the complainant to first provide the public body an opportunity to respond and attempt to resolve the complaint prior to making a complaint to the OIPC.[5] Once the OIPC has accepted a complaint, they are usually investigated and resolved by a case review officer or investigator and not at a formal inquiry.[6]

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[1] The complainant should have been aware of roughly the number of records Kelowna had located when, during mediation and investigation by the OIPC, Kelowna gave him its reduced fee estimate which provides for copying charges totaling $5.00 at $0.25 per page. The fee estimate is exhibit K to the affidavit of the FOI-Legislative Coordinator.

[2] OIPC, May 2017, online: Office of the Information and Privacy Commissioner, *Instructions for Written Inquiries*, https://www.oipc.bc.ca/guidance-documents/1744 at p. 4. Complainants are directed to review this document by the registrar's notice of inquiry.

[3] 2012 BCIPC 10 at para. 6.

[4] *Ibid*.

[5] OIPC, January 2018, online: Office of the Information and Privacy Commissioner, *Guide to OIPC Processes (FIPPA)*, https://www.oipc.bc.ca/guidance-documents/1599 at p. 7. See also Decision F08-02, 2008 CanLII 1647 (BC IPC) at para. 38.

[6] *Ibid* at p 8. See also Order F17-26, 2017 BCIPC 27 at para. 7.

[7] The OIPC's procedures for handling complaints and requests for review are in place to ensure the efficient, cost effective and fair administration of FIPPA. When a party raises new issues for the first time at an inquiry, all parties are deprived of the benefits of an investigation and early resolution procedures provided by the OIPC. This means matters which could have been addressed more efficiently end up in the more formal process of an inquiry. It can put parties to additional expense as often they will only retain counsel at the inquiry stage. More importantly, such a result interferes with and diminishes the legitimate exercise of the same rights by others who have followed the OIPC's procedures and not jumped the queue.

[8] If Kelowna has failed to respond to the complainant's access request, it is appropriate for it to be dealt with by the OIPC's usual procedures for handling such disputes. Furthermore, the issues raised by the complainant would greatly broaden the scope of the inquiry, to the prejudice of Kelowna who has not had the opportunity to attempt to resolve the complaints. Adding the issues would also prejudice other parties whose inquiries would be delayed. For these reasons, I decline to exercise my discretion to add the new issues to this inquiry.

ISSUE

[9] The issue to be determined in this inquiry is whether the complainant is requesting his own personal information within the meaning of s. 75(3). If so, Kelowna is not authorized by s. 75(1) to require the complainant to pay fees to process his access request.

BURDEN OF PROOF

[10] The parties disagree on the burden of proof in this inquiry.[7] The complainant submits that Kelowna has the burden of proving that he is not requesting his own personal information. Kelowna argues that there is no evidentiary burden on either party.

[11] Section 57 of FIPPA allocates the burden of proof for an inquiry into a public body's decision to give or refuse to give access to all or part of a record. However, FIPPA is silent on the burden of proof for an inquiry into any other matter, including a public body's decision to require an applicant to pay fees for processing the request under s. 75(1). Previous OIPC orders are conflicting on the burden of proof for matters under s. 75.[8]

[7] The legal or persuasive burden of proof is the requirement on a party to prove a legal issue that is essential to that party's case. The evidential burden is the burden associated with proof or disproof of a fact: *British Columbia Teachers' Federation v British Columbia*, 2012 BCCA 326 at para. 62.

[8] Order F17-38, 2017 BCIPC 42 at para. 3; Order F15-01, 2015 BCIPC 1 at paras. 7–8; Order F14-42, 2014 BCIPC 45 at para. 12; Order F10-38, 2010 BCIPC 58 at para. 10; Order F09-11, 2009 CanLII 42410 (BC IPC) at para. 9; Order F09-05, 2009 CanLII 21404 (BC IPC) at para. 7; Order F07-09, 2007 CanLII 30394 (BC IPC) at para. 5. Older orders which stated a certain party

[12] In Order 00-19, Commissioner Loukidelis held, "[c]onsistent with previous decisions, the [public body] bears the burden of proof in relation to the fee issues and the completeness of its responses."[9] More recent orders, however, have all consistently stated that where there is no statutory burden of proof, it is in the interests of each party to present argument and evidence to justify its position. For instance, in Order F10-07, which involved a complaint about a public body's collection, use and disclosure of personal information, Commissioner Loukidelis stated:

> [w]hile a public body is expected, for all practical purposes, to provide evidence of compliance with Part 3 of FIPPA in the context of an investigation under s. 42, in my view, this does not equate with the imposition of a legal burden of proof. Where the legislation is silent, I do not accept that a formal burden of proof lies on either party.
> …
> In the absence of a statutory burden of proof, it is incumbent upon both parties to bring forward evidence in support of their positions, recognizing, of course, that I must ultimately determine whether or not there has been compliance with these provisions of FIPPA and that the public body is ordinarily best placed to offer evidence of its compliance.[10]

[13] However, the lack of a statutory burden of proof does not mean there is no burden of proof. In the administrative law context, "the general rule is that a person challenging a ruling of a lower body has the burden of proof, of making its case in accordance with the tests set out in the statute…."[11] The burden may shift during the proceedings depending on the particular statutory provision or common law matter at issue.[12]

[14] There are no steadfast rules to assist in determining where the burden of proof lies, rather there are general criteria.[13] The placement of the burden of proof depends upon the particular circumstances before the court.[14] In addition, as stated in *The Law of Evidence in Canada*:

> [t]he case law shows that policy, fairness and probability may influence the incidence of either the evidential burden or the persuasive burden in

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bore the burden of proof include: Order No 332-1999, 1999 CanLII 4202 (BC IPC) at p. 2; Order No 316-1999, 1999 CanLII 1369 (BC IPC) at p. 2; Order No 293-1999, 1999 CanLII 1495 (BC IPC) at p. 3; Order No. 137-1996, 1996 CanLII 754 (BC IPC) at p. 3.

[9] 2000 CanLII 10662 (BC IPC) at p. 2.

[10] 2010 BCIPC 11 at paras. 10–11.

[11] See *British Columbia Administrative Law Practice Manual*, (looseleaf) Vancouver: The Continuing Legal Education Society of British Columbia, 2012 (updated to 2015), §5.11, p. 5-16.

[12] *Ibid*.

[13] *British Columbia Teachers' Federation v British Columbia*, 2012 BCCA 326 at para. 65; Sopinka et al., *The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2014) at §3.84.

[14] *Attaran v Canada (Foreign Affairs)* 2011 FCA 182, at para. 20 leave to appeal to SCC refused, 2012 CanLII 16379.

> order to deal with perceived difficulties of proof by a party in criminal and civil proceedings, to achieve efficiencies or to level the playing field.[15]

[15] This is illustrated in *Attaran v Canada (Foreign Affairs)*, which addressed who had the burden of proof regarding the exercise of discretion under the federal *Access to Information Act*. The Federal Court of Appeal quoted with approval the following passage from *Ruby v Canada (Solicitor General)*:

> …In our view, in these peculiar circumstances--where accessibility to personal information is the rule and confidentiality the exception, where an applicant has no knowledge of the personal information withheld, no access to the record before the court and no adequate means of verifying how the discretion to refuse disclosure was exercised by the authorities, and where section 47 of the Act clearly puts on the head of a government institution the burden of establishing that it was authorized to refuse to disclose the personal information requested and, therefore, that it properly exercised its discretion in respect of a specific exemption it invoked--an applicant cannot be made to assume an evidential burden of proof. …[16]

[16] The court in *Attaran* held that the public body had the burden of proof regarding its exercise of discretion because the applicant was unaware of the precise content of the unredacted record as well as the *ex parte* evidence and submissions filed by the respondent *in camera*.

Analysis of the burden of proof

[17] The relevant portions of s. 75 are as follows:

> 75(1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:
>
> (a) locating, retrieving and producing the record;
>
> (b) preparing the record for disclosure;
>
> (c) shipping and handling the record;
>
> (d) providing a copy of the record.
>
> …
>
> (3) Subsection (1) does not apply to a request for the applicant's own personal information.
>
> …

[15] *The Law of Evidence in Canada, supra* at §3.97.
[16] *Attaran*, *supra* at para. 22 quoting from *Ruby v Canada (Solicitor General)*, 2000 CanLII 17145 (FCA), *Ruby* was overruled in part on other grounds: 2002 SCC 75.

[18] I agree with the reasoning of Commissioner Flaherty in Order No. 137-1996 that a public body bears the initial burden of proving the appropriateness of its fee assessment:

> …because it is the public body which has prepared the fee estimate based on its own calculations of time spent on providing chargeable services under section 75 of the Act, and has refused to alter that estimate--again, based on its own assessments--it appears to me appropriate that the public body should bear the burden of proof in this matter.[17]

[19] In other words, a public body's calculation of fees is something particularly within the knowledge of the public body and it is only fair to require the public body to support its calculations.

[20] Further, the default under FIPPA is that applicants have a right of access to records to further important aims of the legislation. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, the court stated that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society."[18] The payment of fees imposes a barrier to access to information. For this policy reason, it is appropriate that the public body bears the burden of proof under s. 75(1).

[21] Turning to s. 75(3), as far as I am aware, Order 00-19 which says the public body has the burden of proof under s. 75(3), is the only order with a statement about the burden for that section. However, no decisions are cited in support of the statement, nor is there any analysis of the issue. I can only presume that the Commissioner was relying on previous decisions regarding the burden of proof under s. 75(1) and that he did not consider s. 75(3) on its own. For these reasons, I decline to follow Order 00-19.

[22] I have concluded that the complainant bears the burden of proving that he is requesting his own personal information for the following reasons. Whether the request was for the complainant's own personal information is something which the complainant is in a better position than the public body to establish. The issue is not whether the records actually contain the complainant's personal information. Rather it is whether the *request* is for the complainant's personal information. That is a matter that he is in the best position to prove given that he generated the request and can explain the intention and meaning of his request. The content of the records which the public body deems as responsive does not change the nature of the request.

[23] Placing the legal burden on the complainant at s. 75(3) to prove that the request is for his own personal information does not defeat the statutory intent

[17] Order No. 137-1996, *supra* at p. 3.
[18] 2010 SCC 32 at para. 1.

of FIPPA, namely that access to information is the default. It is relatively easy to provide evidence that the request is for your own personal information. It will usually be simply a matter of tendering the originating request. Further, the intention of s. 75 in general is to permit public bodies the discretion to issue processing fees.

Application of s. 75(3)

[24] Applying the burden of proof set out above, I will now consider whether the applicant's request was for his own personal information within the meaning of s. 75(3).

[25] "Personal information" is defined in FIPPA as meaning "recorded information about an identifiable individual other than contact information." "Contact information" means information to enable an individual at a place of business to be contacted.[19]

[26] The complainant relies on the statutory definition of FIPPA and also cites the OIPC's *Guide to Access and Privacy Protection under FIPPA* which states in part:

> [p]ersonal information is any recorded information that uniquely identifies you, such as your name, address, telephone number…It also includes anyone else's opinions about you and your own views or opinions.[20]

[27] Kelowna disputes that the request is for the applicant's personal information. It argues that in order to be personal information, information must 1) be reasonably capable of identifying and individual and 2) the information was collected, used or disclosed for a purpose related to the individual. This definition is drawn from Order P12-01, in which former Commissioner Denham stated:

> I conclude that 'personal information' is information that is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information, and is collected, used or disclosed for a purpose related to the individual. Consistent with PIPA's statutory purposes, this recognizes that information may be used for different purposes at different times.[21]

[28] Many decisions have stated that personal information is simply information about an identifiable individual, without the second requirement set out in Order

[19] See Schedule 1 for these definitions.
[20] OIPC, October 2015, online: Office of the Information and Privacy Commissioner, *Guide to Access and Privacy Protection under FIPPA*, https://www.oipc.bc.ca/guidance-documents/1466.
[21] 2012 BCIPC 25 at para 85.

P12-01.[22] The departure from this definition in Order P12-01 and orders which have followed it can be explained by the nature of the issues in those inquiries.[23]

[29] The common issue in orders in which the two step approach has been applied has been whether an organization or public body was authorized to collect and use information generated by computer software in vehicles or cell phones (such as GPS and engine data). The purpose for which a public body collected and used the information determined whether it was *about* individuals in a meaningful way. In the normal case, there is no issue as to whether information is *about* identifiable individuals. A person's name, age and other identifying information are clearly about that individual. Similarly, someone's opinion of another person is *about* the other person. The information at issue in orders in which the two-step analysis was involved was not so obviously about individuals because it was also about their work vehicles and cell phones.

[30] Kelowna also relies on Alberta Order P2009-005.[24] In Order P2009-005, an individual had asked an organization for access to information about payments made by the organization and its insurers to his treatment providers. At issue was whether the request was for the applicant's personal information under Alberta's privacy legislation. The adjudicator found that although the information was connected to the applicant, it was not "about" him and therefore not personal information. Ultimately, the adjudicator stated that the answer to whether or not information is an applicant's own personal information "…depends on the nature of the request and the facts and circumstances."[25]

[31] In my view, Order P2009-005 does not support Kelowna's argument that the definition of personal information depends on the circumstances of its collection, use and disclosure. The adjudicator applied the definition of "personal information" under the Alberta privacy legislation which is, "information about an identifiable individual."[26] The issue was whether the information was *about* the applicant although it was only tangentially related or linked to the applicant. The adjudicator did not consider the circumstances of its collection, use or disclosure in his analysis when deciding if it was personal information.

[32] In summary, the purpose for which a public body collects, uses or discloses information is only relevant in complaints about the collection, use or disclosure of information, similar to the type of information at issue in Order P12-01. In all other matters, information is "personal information" if it is

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[22] See for example: *British Columbia (Public Safety and Solicitor General) v Stelmack*, 2011 BCSC 1244 at para. 503–504; Order F18-02, 2018 BCIPC 2 at para. 40; Investigation Report F15-01, 2015 BCIPC 15 at p. 18.
[23] Order F13-04, 2013 BCIPC 4; Order P13-01, 2013 BCIPC 23; Order P13-02, 2013 BCIPC 24.
[24] 2010 CanLII 98663 (AB OIPC).
[25] *Ibid* at para. 26.
[26] *Personal Information Protection Act*, SA 2003 c P-6.5 at s. 1(k).

reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.

The request

[33] The complainant requested that Kelowna provide him with all records that contain his name over a certain time period in communications by a number of Kelowna officials. Kelowna argues that the complainant's request is not for records "that in substance relate to the Complainant" and as such are not requests for his own personal information as contemplated by s. 75(3).[27] Kelowna further argues that the request is broad enough to include records that contain the complainant's name, "but do not in any other way relate to the Complainant" and therefore is not a request for personal information.[28] Kelowna relies on the responsive records in support of its position.

[34] Kelowna cites Order 00-19 which involved a request by an employee to his employer for records relating to the employee in the possession of a supervisor and the supervisor's emails to and from the employee. The Commissioner held the requests were not requests for the applicant's personal information within the meaning of s. 75(3). He explained:

> The definition of "personal information" in Schedule 1 of the Act includes an individual's name. This does not mean a request for work related communications from or to the applicant, which bear the applicant's name but contain no other information about him, is in substance a request for his own "personal information" as contemplated by s. 75. The applicant is not seeking these records with reference to their inclusion of his name as his personal information. It was therefore permissible for the BCSC to assess a fee in the circumstances of this case...[29]

[35] The complainant's request is meaningfully different than the request at issue in Order 00-19. In that order, the employee was requesting work related communications. As he was an employee of the public body, it was reasonable to expect the majority of the responsive records would relate to the daily operations of the public body and would not contain the employee's personal information.

[36] The complainant made his request to Kelowna as a concerned citizen and not as an employee or contractor. He is not seeking information about the daily operation of the city. He seeks records from elected and non-elected staff at Kelowna in which his name appears. In my view, it is reasonable to assume that the complainant's request was for the purpose of obtaining people's views and opinions about him, or their reactions to his emails, which is his personal

[27] Kelowna submissions at para. 30.
[28] *Ibid*.
[29] At p. 11.

information. This is supported by the complainant's correspondence with Kelowna:

> I will tell you that I am not particularly concerned in record recovery of the specific original emails generated by myself. … I have copies of these in my record archive.
>
> I am however very concerned with the recovery of records in which any of my originating correspondence, emails included, have been distributed beyond the original recipient either internally within or external of the City of Kelowna, with or without distribution comments. I am further concerned about any opinions or views by City Staff, Mayor and/or Council about myself and/or the content of my correspondence.[30]

[37] In my view, it is an error to characterize such a request as not being in substance for the complainant's personal information. The complainant seeks to learn who had copies of his communications, as well as elected officials' opinions about him. Opinions about the complainant are his personal information.[31]

[38] Kelowna submits that an applicant's subjective views on whether he or she is requesting his or her own personal information should not govern whether s. 75(3) applies. Instead, Kelowna relies on the responsive records to argue that the request is not for personal information. However the wording of s. 75(3) is unambiguous. If the applicant's "request" is for personal information, then the public body cannot charge a fee. A fee waiver under s. 75(3) does not depend on the content of the responsive records.

[39] Kelowna further argues that:

> … the Legislature could not have intended for applicants to be able to manipulate the application of fees to a request under section 75(3) by qualifying a request for records to records that only contain some item of personal information or by stating that the request is for his or her own personal information. Such an interpretation would result in processing inefficiencies for public bodies since applicants may be encouraged to widen the scope of their requests to make requests appear to be a request for their own personal information in order to avoid fees. It may also create situations in which applicants have no incentive to narrow overly broad requests that will produce records that in no way relate in substance to the applicant since the applicant would not have to consider potential fees that he or she may incur. The City submits that these potential results of interpreting section 75(3) in such a manner are absurd results which the Legislature is presumed not to have intended.[32]

[30] Affidavit of FOI-Legislative Coordinator at exhibit F.
[31] Order F17-43, 2017 BCIPC 47 at para. 55.
[32] Kelowna reply submissions at para. 1.

[40] I am not convinced that the mischief Kelowna alludes to will result because of my conclusions. In every case, a public body must consider whether an applicant's request is in substance for his or her personal information. The public body is not obliged to blindly accept an applicant's subjective views on whether it is a request for personal information. The public body must consider the wording of the request and any additional explanation about the nature of the request in order to determine if it is truly a request for the applicant's personal information. In the present case, I am satisfied that the applicant's request is for his own personal information within the meaning of s. 75(3).

CONCLUSION

[41] For the reasons given above, I find that the complainant's request is for his own personal information within the meaning of s. 75(3) and therefore Kelowna is not authorized to require the complainant to pay a fee for the services outlined in s. 75(1).

March 29, 2018

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F17-70160