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Order F19-09

## INTERIOR HEALTH AUTHORITY

Chelsea Lott  
Adjudicator

March 7, 2019

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**Summary:** The complainant requested that the Interior Health Authority waive its fees for records related to emergency department closures. The adjudicator found that the records related to a matter of public interest within s. 75(5)(b) and that the applicant was entitled to a fee waiver.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 75(5).

### INTRODUCTION

[1] In August 2017, a journalist made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Interior Health Authority for records related to closures of the emergency department at the South Okanagan General Hospital. The journalist sought all communications of ten named individuals over a five month period regarding the closures.

[2] Interior Health provided the journalist with a fee estimate of \$360, later reduced to \$225, for retrieving and producing the records. The journalist asked that the fee be waived pursuant to s. 75(5)(b) of FIPPA, on the basis that the information is a matter of public interest.<sup>1</sup> Interior Health declined to waive any portion of the fees.

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<sup>1</sup> August 21, 2017 email.

[3] The journalist complained to the Office of the Information and Privacy Commissioner (OIPC) about Interior Health's refusal to grant a fee waiver. Mediation failed to resolve the matter and the complainant requested an inquiry.

***Preliminary issue - mediation material***

[4] Interior Health's submissions include information about what took place during mediation. The OIPC will not accept information from without prejudice mediation discussions as evidence in an inquiry without the consent of the opposing party. There is no such consent in this case.

***Records***

[5] When deciding whether to grant a fee waiver under s. 75(5)(b), public bodies should examine the requested records, or at least a representative sample to decide if they relate to a matter of public interest.<sup>2</sup>

[6] As a result, I requested, and Interior Health provided, a sample of the responsive records. Interior Health also provided a general description of information in a set of records that was released in response to a similar access request. With this evidence, I was satisfied that I had sufficient evidence to decide whether s. 75(5)(b) applies.

**ISSUE**

[7] The issue is whether a fee waiver is warranted under s. 75(5)(b). The complainant bears the burden of establishing that Interior Health should waive its fee.<sup>3</sup>

**DISCUSSION**

***Background***

[8] The South Okanagan General Hospital is located in Oliver, BC. The hospital services a population of approximately 10,000 people, including Osoyoos. Interior Health is responsible for staffing the hospital. In 2017, Interior Health closed the hospital's emergency department periodically due to a physician shortage.

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<sup>2</sup> Order F09-11, 2009 CanLII 42410 (BC IPC) at para. 35.

<sup>3</sup> Order No 332-1999, 1999 CanLII 4202 (BC IPC) at p. 3; Order 02-28, 2002 CanLII 42459 (BC IPC) at para. 8.

[9] In early 2017, the Chief of Staff at the hospital resigned and ran in the May 19, 2017 provincial election.<sup>4</sup> During his campaign, the Chief of Staff alleged that Interior Health was paying out-of-town physicians a bonus to cover the emergency department during the election period. He further claimed that he had asked for funding to attract more physicians for years, but his concerns were never addressed. Interior Health denied that it was paying bonuses to physicians.

[10] The complainant's request was for ten individuals' communications between March 1 and August 11, 2017. Interior Health states that the responsive records discuss Interior Health's efforts to fill shifts at the emergency room over a short term. Interior Health says that despite the Chief of Staff's allegations, the information in the records only reveals routine processes to fill physician vacancies.

### **Section 75 of FIPPA**

[11] Section 75(5)(b) of FIPPA permits the head of a public body to waive all or part of a fee under s. 75(1) if, in the opinion of the head of the public body, the record relates to a matter of public interest. The relevant provisions state:

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.

...

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.

[underlining added]

[12] Previous orders have set out a two-step analysis for determining if a fee waiver is appropriate.<sup>5</sup>

<sup>4</sup> While not raised by the parties, I take judicial notice that the provincial election was held on this date. See also *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 258 at para. 25 regarding the date of the election.

<sup>5</sup> Order No. 332-1999, *supra* note 3 at p. 5; Order F17-38, 2017 BCIPC 42 at para. 11.

[13] The first question is whether the records relate to a matter of public interest. The test is not whether a matter is “sufficiently” of public interest or to what degree a matter is of public interest. The question is simply whether the record can be said to “relate” to a matter of public interest.<sup>6</sup>

[14] If the records do relate to a matter of public interest, the next question is whether the applicant should be excused from paying all or part of the estimated fee.

***Do the records relate to a matter of public interest?***

[15] I will now consider the first step in the fee waiver analysis. The following non-exhaustive list of factors may be considered in determining whether records relate to a matter of “public interest”:

1. Has the subject of the records been a matter of recent public debate?
2. Does the subject of the records relate directly to the environment, public health or safety?
3. Could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
  - a. disclosing an environmental concern or a public health or safety concern?
  - b. contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue? or
  - c. contributing to public understanding of, or debate on, an important policy, law, program or service?
4. Do the records disclose how the public body is allocating financial or other resources?<sup>7</sup>

***Parties’ Positions***

**The complainant**

[16] The complainant submits that there has been a high level of public interest and concern regarding closures of the emergency department at the South Okanagan General Hospital. The complainant has tendered five news articles in

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<sup>6</sup> Order 03-19, 2003 CanLII 49192 (BC IPC) at paras. 36–37.

<sup>7</sup> *Ibid* at para. 35.

support of his position, including one which indicates that John Horgan, the current Premier, campaigned on the issue in the 2017 provincial election.<sup>8</sup>

[17] The complainant also provided evidence of a Facebook group with over 200 members concerned about healthcare in the South Okanagan. The complainant further states that there was a 20 person rally regarding the matter, which he describes as sizable given the local population has only 10,000 residents.

[18] The complainant argues that there are few matters more important to public health than emergency care. He says that the next nearest emergency department for Osoyoos residents is an hour away. He submits that the closures have a disproportionate effect on Osoyoos residents because of its elderly demographics and their increased need for emergency care.

[19] The complainant also argues that disclosing the information could reasonably be expected to yield a public benefit. He submits that the communications would contribute to the public understanding or debate on the hospital closures. The complainant suggests that the communications could reveal the efforts within Interior Health to stop closures.

[20] He states that the emails would offer insight into “what is going on behind the scenes”<sup>9</sup> on the issue; how Interior Health is addressing staff shortages; the tone of communications regarding the matter; and the level of priority to fill the vacancies. The complainant also argues that a void in the communications regarding resolving the closures would be revealing.

### Interior Health

[21] Interior Health suggests that physician vacancies and short term emergency department closures are not a unique occurrence in many small communities across Canada.

[22] Interior Health argues that a rally of 20 people fails to establish a “broad public interest.”<sup>10</sup> It also says that the news stories and Facebook group illustrate a broader public interest in health care in the community, “however they were not provided at the time of the fee waiver.”<sup>11</sup> It is not clear from this statement if Interior Health is suggesting that had the articles been presented when the fee waiver request was made, it would have granted the waiver.

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<sup>8</sup> England, N 2017, ‘B.C. Election 2017: John Horgan tours Liberal-dominated Okanagan’, *The Vancouver Sun*, 6 May, accessed January 2019 from <https://vancouver.sun.com/news/local-news/b-c-election-2017-john-horgan-tours-the-okanagan-2>

<sup>9</sup> Complainant submission at p. 2.

<sup>10</sup> Interior Health reply submission at p. 1.

<sup>11</sup> *Ibid.*

[23] Interior Health says that the records do not reflect any long term strategy regarding the emergency department. To support its position, Interior Health points to a set of emails that was released in response to a similar access request. It says these emails “illustrated discussion only of a routine, pre-existing, and already defined process to fill physician vacancies.”<sup>12</sup>

[24] Interior Health says that fulfilling the request will take staff 10.5 hours, not including time spent “redacting or preparing the records.”<sup>13</sup> Interior Health does not feel a fee waiver was appropriate “based on the information presented to establish public interest,” the nature of the records, and the financial impact on Interior Health.<sup>14</sup> It claims staff made a good faith decision to deny the fee waiver given the arguments and information presented by the complainant and Interior Health’s mandate under FIPPA “to balance access with accountability for taxpayer money spent.”<sup>15</sup>

[25] Lastly, Interior Health relies on *Clubb v. Saanich (Corporation of the District)*, which found that the term “public interest” in s. 25 of FIPPA “cannot be so broad as to encompass anything the public may be interested in learning.”<sup>16</sup>

#### *Analysis and findings*

##### 1. Recent public debate?

[26] One factor in deciding whether a fee waiver is warranted is whether the subject of the records has been a matter of recent public debate. The relevant time frame to gauge whether debate was “recent” is at the time of the access request and the public body’s response.<sup>17</sup>

[27] I am satisfied that the subject of the records was a matter of recent public debate in relation to the date of the access request, August 2017. The news articles, rally and Facebook group persuade me that staffing issues for the emergency department was a contentious issue in the South Okanagan in the spring of 2017. The fact that staffing the emergency department was an election issue also supports my conclusion.

[28] Interior Health relies on Order 02-28 which says that for s. 75(5) to apply, the records should be of present or prospective utility rather than historical concern or relevance.<sup>18</sup> The records in that order related to a matter that

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* at p. 2.

<sup>15</sup> *Ibid.*

<sup>16</sup> 1996 CanLII 8417 (BC SC) at para. 33.

<sup>17</sup> Order No. 332-1999, *supra* note 3 at p. 9.

<sup>18</sup> Order 02-28, *supra* note 3 at para. 28.

occurred over 10 years prior to the access request, rather than a few months in the present case. On this basis I would distinguish Order 02-28.

2. Does the subject relate directly to public health or safety?

[29] Interior Health characterizes the subject matter of the records as administrative in nature. It says the communications concern coverage by locum physicians for the emergency department. It says further that it followed routine policy in filling the vacancies and that the records would not reveal any larger debate or strategy about eliminating emergency department closures.

[30] Having reviewed a sample of the records, I confirm that the communications concern obtaining coverage for the emergency department. The records also contain statistics comparing staffing by hospital physicians versus outside physicians.

[31] While the records relate to staffing matters, the ability or inability of Interior Health to find physicians directly impacts the operation of the emergency department. Closing the emergency department is undoubtedly a public health matter for the residents of the South Okanagan. While Interior Health characterizes the subject matter as routine, given the allegations regarding out of town physicians and the ongoing hospital closures, I would not characterize staffing the emergency room as routine matters.

3. Could disclosure yield a public benefit?

[32] The next factor to consider is whether dissemination or use of the information could reasonably be expected to yield a public benefit. Disseminating the information would yield a public benefit if it discloses a public health or safety concern, or contributes to public understanding or debate on an important public health or safety issue.

[33] I am persuaded that disseminating the information would yield a public benefit. Hospital closure and staffing were clearly on the public's radar in spring of 2017. Revealing Interior Health's attempts to staff the emergency department would contribute to the public's understanding of the issue. A lack of communication about longer term solutions to the hospital closures would also be revealing. In addition, the Chief of Staff made allegations about Interior Health granting bonuses to outside physicians for political expediency. The communications in question would assist in clarifying the matter for the public.

4. Do the records disclose how Interior Health is allocating financial or other resources?

[34] The complainant's request was for records relating to hospital closures. The records pertain to attempts to staff the emergency department. In my view, such information would disclose how Interior Health is allocating resources.

*Summary regarding public interest*

[35] In summary, I am satisfied that hospital closures and staffing has been a matter of recent public debate for the purpose of s. 75(5)(b). I have also found that staffing the hospital relates directly to public health. In addition, disseminating information about staffing the hospital would yield a public benefit. The information would contribute to the public's understanding of the hospital closures and staffing. For these reasons, I find that the records relate to a matter of public interest.

***Should the complainant be excused from paying the fee?***

[36] If the records relate to a matter of public interest, I must consider whether the complainant should nevertheless be excused from paying all or part of the estimated fee. In making this decision, the focus is on who the complainant is and on the purpose for which the complainant made the request. The following factors should be considered:

1. Is the complainant'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?
2. Is the complainant able to disseminate the information to the public?
3. Whether the public body met legislated time limits in responding to the request.
4. The manner in which the public body attempted to respond to the request (including in light of the public body's duties under s. 6 of FIPPA).
5. Did the complainant, 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?
6. Has the complainant 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 a complainant to reject such a proposal



if it would materially affect the completeness or quality of the public body's response.

7. Would waiver of the fee shift an unreasonable cost burden for responding from the complainant to the public body?<sup>19</sup>

#### *Position of the Parties*

[37] Interior Health says that the complaint's revised request "will take a taxpayer funded position away from its core duties for over 1 full working day."<sup>20</sup> It says that it has made a good faith attempt to balance the competing interests of transparency and accountability to the taxpayers of BC. Interior Health argues that a fee waiver would set a precedent such that almost all of its records would be available free of charge to any media complainant which could have a significant impact financially and operationally moving forward.

[38] The complainant says that a fee waiver in this case will not set a precedent. He says that the request is not for "just any set of documents relating to a general provision of health care, but relates to a wider public health issue that has caused distress in a community."<sup>21</sup> The complainant says that he made a good faith effort to reduce the burden on Interior Health by reducing the number of officials to whom the request would apply. The complainant points to the importance of the news for government accountability and says that fees have a chilling effect on an already declining news industry.

#### *Analysis and findings*

1. Is the complainant's purpose a private one?

[39] The first question is whether the complainant's primary purpose for making the request is to disseminate the information in a way that can reasonably be expected to benefit the public or whether the purpose is to serve a private interest.

[40] The parties make no argument on this point.

[41] In my view, the complainant's request is to disseminate the information for the benefit of the public and not primarily for the purpose of advancing a private interest. There is certainly no suggestion that he has a personal, non-work related reason for the request. It is reasonable to infer that the complainant has made the request in his capacity as a journalist. It is significant that the complainant has submitted two articles which he wrote on the topic of hospital

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<sup>19</sup> Order F17-38, *supra* note 5 at para. 12.

<sup>20</sup> Interior Health reply submission at p. 1.

<sup>21</sup> Complainant submission at p. 2.

closures which were published in local news organizations. I infer that the complainant's intention is to research and potentially publish further articles on the issue. I find the complainant's request is for public purposes.

2. Ability to disseminate the information to the public?

[42] The fee waiver analysis also considers whether the complainant is able to disseminate the information to the public. For similar reasons respecting the complainant's intended use of the information, I accept that he is able to disseminate the information to the public.

3. The parties' conduct

[43] The next three factors can be considered together because they all relate to the parties' conduct in attempting to resolve the dispute over a fee waiver.

[44] The complainant's initial request was for "any and all communications" involving 10 individuals related to emergency department closures. Interior Health responded to the access request by providing its fee estimate, one week after the request was made. This was well within the legislated timeline of 30 days to respond.

[45] Interior Health estimated that the request would take 15 hours to complete and cost \$360. In response, the complainant narrowed his request to help reduce the costs of responding to the access request. As a result, Interior Health reduced its fee to \$225.

[46] The complainant then asked for a fee waiver. Interior Health asked the complainant to explain, which he did, how the records met the criteria for a fee waiver on the grounds of the public interest.

[47] In my view, both parties acted reasonably and cooperatively in attempting to resolve the matter.

4. Burden on the public body

[48] The last question is whether a waiver of the fee would shift an unreasonable cost burden for responding from the complainant to Interior Health. Interior Health says that responding to the request will take up more than 1 day of staff time. It further says that a fee waiver in this case would set a precedent whereby virtually all media requests for its records would be subject to a fee waiver.

[49] In my view, shifting the relatively modest cost of responding to the request will not create an unreasonable burden on Interior Health. One day's work to respond to an access request can hardly be described as an unreasonable

burden on Interior Health. In addition, I do not agree with Interior Health's assessment that a fee waiver would set a precedent, which would itself place an unreasonable burden on the public body. Journalists are not entitled to a public interest fee waiver by virtue of their occupation.<sup>22</sup> As illustrated above, a number of factors go into considering whether a public body should grant a fee waiver. Each request for a fee waiver will have to be considered based on the circumstances of the particular request.

*Summary on s. 75(5)(b)*

[50] As discussed above, I am satisfied that the records relate to a matter of public interest. I am also satisfied that the complainant should be excused from paying the fee. The complainant has a history of publishing articles on the issue of hospital closures in the Okanagan. I infer that he seeks the records in issue for further research. Both Interior Health and the complainant have acted reasonably and cooperatively in trying to resolve the dispute. Lastly, I am not convinced that waiving the fee will shift an unreasonable burden onto Interior Health. On a balance, I find that a complete waiver of the fee for processing the complainant's access request is appropriate in this case.

**CONCLUSION**

[51] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Interior Health must waive its fee for processing the complainant's access request.
2. I require Interior Health to give the complainant access to the records, subject to any severing under Part 2 of FIPPA, by April 18, 2019. Interior Health must concurrently provide the OIPC Registrar of Inquiries with a copy of the cover letter it sends to the complainant.

March 7, 2019

**ORIGINAL SIGNED BY**

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Chelsea Lott, Adjudicator

OIPC File No.: F17-71370

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<sup>22</sup> Order 03-19, *supra* note 6 at para. 61.