



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F20-14

CITY OF CHILLIWACK

Lisa Siew
Adjudicator

April 22, 2020

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Summary: Two applicants requested a review of the City of Chilliwack's decision to deny them a full or partial fee waiver for the processing of their access request. The applicants argued they were entitled to a fee waiver under s. 75(5)(a) because they could not afford to pay the estimated fee or because it was fair to excuse them from paying the fee under the circumstances. Ultimately, the adjudicator confirmed the City of Chilliwack's decision not to grant a full or partial fee waiver to the applicants under s. 75(5)(a).

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

INTRODUCTION

[1] A husband and wife (the applicants) requested the City of Chilliwack (City) provide access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records related to a property that they own.¹ In their request, they sought access to documents, photos and emails regarding their property over an approximately two-year period, including certain records related to a BC Ombudsperson investigation.

[2] The City responded to their request by issuing a fee estimate of \$5,000, which included photocopying costs. The applicants asked the City to waive the fee or to reduce the fee to a maximum of \$200.² The City denied the applicants'

¹ Originally, the husband made the access request to the City, but later correspondence about the access request came from both the husband and the wife. Therefore, the City and the OIPC determined that both the husband and wife were the applicants.

² At para. 10 of its initial submission, the City takes the position that the applicants only asked for a fee reduction. However, I am satisfied that the applicants are asking for a full fee waiver or a fee reduction based on the investigator's fact report, the applicants' submissions and the applicants' letter to the City dated February 16, 2018.

request on the basis they failed to provide any information that shows the estimated fee is not fair and equitable under the circumstances.³

[3] The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. As a result of mediation, the City reduced the fee estimate to \$1,437. However, mediation failed to resolve the matter and the applicants requested that it proceed to inquiry.

[4] Both parties provided submissions for this inquiry. The applicants requested and were given prior approval to submit some of their evidence *in camera*.⁴

PRELIMINARY MATTER

[5] The parties' submissions include facts and arguments about the public interest.⁵ Submissions about the public interest are normally considered under s. 75(5)(b).⁶ Section 75(5)(b) allows a public body to waive a fee upon request if the record relates to a matter of public interest, including the environment, or public health or safety.

[6] The OIPC investigator's fact report and the notice of inquiry do not set out s. 75(5)(b) as an issue for consideration in this inquiry. Past orders have said parties may raise new issues at the inquiry stage only if they request and receive permission to do so.⁷ The parties did not seek permission to add s. 75(5)(b) to the inquiry. There is also nothing in the materials before me that suggests s. 75(5)(b) may be engaged. For these reasons, I decline to add s. 75(5)(b) as an issue in this inquiry.

ISSUE

[7] The issue I must decide in this inquiry is whether the estimated fee should be waived in whole, or in part, under s. 75(5)(a) of FIPPA.⁸

[8] Previous OIPC orders have established that access applicants have the burden of establishing that a fee waiver or reduction should be granted under s. 75(5)(a).⁹

³ City's letter to the applicants dated March 13, 2018.

⁴ Pre-approved *in camera* materials dated "02/01/2020."

⁵ City's submission at para. 18 and applicants' response submission at p. 4-5.

⁶ See Order 01-51, 2001 CanLII 21605 (BC IPC) at paras. 69-72 and Order 02-01, 2002 CanLII 42426 (BC IPC) at para. 43.

⁷ Order F07-03, 2007 CanLII 30393 (BC IPC) and Order F11-28, 2011 BCIPC 34 at para. 11.

⁸ The reasonableness of the City's fee estimate is not at issue here. The applicants did not challenge the City's calculation and estimation of that fee.

⁹ Order 01-04, 2001 CanLII (BC IPC) 21558 at para. 5.

DISCUSSION

Background

[9] The applicants have been involved in an ongoing dispute with the City over an addition to the house on their property. The parties agree that the applicants constructed the addition without first obtaining the required building permit.¹⁰ The applicants engaged with the City for several years over the necessary approvals and permits. The parties also appear to have involved the BC Ombudsperson at certain points in time.¹¹

[10] During this ongoing dispute with the City, the applicants initially requested the City provide the requested records in both paper and electronic form. In response to the \$5,000 fee estimate, the applicants revised their request and asked only for an electronic copy of the records. The applicants also clarified the scope of their access request and requested the fee waiver at the center of this inquiry.

[11] After mediation by the OIPC, the City reduced the fee estimate to \$1,437 and requested a 50% deposit from the applicants before it would process their request. The City informed the applicants that it had determined the records could be provided on a USB stick and that there were some “personal records” that they would not be charged for.¹²

The charging and waiving of fees under FIPPA – section 75

[12] Section 4(3) of FIPPA states that the right of access to a record is subject to the payment of any fees required under section 75. Under s. 75(1), the head of a public body may require an access applicant to pay the public body a fee for locating, retrieving and producing the record; preparing the record for disclosure; shipping and handling the record; and providing a copy of the record. However, those fees must not include the first three hours spent locating and retrieving a record or time spent severing information from a record.¹³ A public body also cannot charge a fee where an applicant requests their own personal information.¹⁴

[13] Although FIPPA allows a public body to charge fees, s. 75(5) is intended to ensure that fees do not become a barrier to access.¹⁵ Under s. 75(5)(a), the head of a public body may excuse an applicant from paying all or part of a fee if it

¹⁰ Applicants’ response submission at p. 2 and their letter to the City dated October 20, 2017. City’s submission at para. 11.

¹¹ Applicants’ initial submission at pp. 2-3 and response submission at p. 2.

¹² City’s letter to the applicants dated October 5, 2018.

¹³ Section 75(2) of FIPPA.

¹⁴ Section 75(3) of FIPPA.

¹⁵ Order 01-04, *supra*, note 8 at para. 25.

receives a written request from the applicant and, in the head's opinion, the applicant cannot afford the payment or it is fair to excuse payment for any other reason.

The authority to intervene in a fee dispute – section 58(3)(c)

[14] The Commissioner has broad jurisdiction to intervene in an inquiry over a fee dispute.¹⁶ Under s. 58(3)(c), the Commissioner may confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met. The Commissioner's role is not restricted to reviewing the public body's discretion and intervening only where a public body has improperly exercised its discretion.¹⁷ Section 58(3)(c) gives the Commissioner or his delegate the authority to substitute their decision for that of the public body in fee waiver cases.¹⁸

Fee waiver because of inability to pay – section 75(5)(a)

[15] Under s. 75(5)(a), the head of a public body may waive a fee if the applicant cannot afford the payment. Past OIPC orders have made it clear that an applicant must do more than assert an inability to pay a fee.¹⁹ An applicant must provide some kind of evidentiary support for their claims, including sufficient evidence of their financial circumstances.²⁰

The applicants' initial submission

[16] The applicants' initial submission consists mostly of information about their lengthy dispute with the City over the addition to the house on their property. To summarize, the applicants allege that the City "resorted to deceitfulness and unreasonable unnecessary demands to delay [our] project."²¹

[17] In terms of their financial circumstances, the applicant(s) claim the following:

...I got loaded with debts trying to cope with the City's illegal acts against us...

Had my request for a BP [building permit] in Oct 2015 been properly, honestly processed in good will and timely manner, I would not be [sic] here to day [sic] trying to reclaim my loses. In the end I managed to get the job done but I incurred a debt of \$100,000 to obey the City's harsh, malicious and totally unjustified demands from me.

¹⁶ Order No. 332-1999 [1999] BCIPCD No. 45 at para. 9.

¹⁷ Order 01-04, *supra*, note 8 at para. 14.

¹⁸ *Ibid.*

¹⁹ Order F05-36, 2005 CanLII 46569 (BC IPC) at para. 35.

²⁰ Order 01-04, *supra*, note 8.

²¹ Applicants' initial submission at p. 4.

...

I need this file to prove in a small claims court my losses and try to recover them in order to reduce my debt especially when I am 71 years old and living on OAS CPP and some meagre income on the side. My wife works only part time trying to recover from our building expenses.

The City's submission

[18] The City submits the applicants have failed to prove an inability to pay the estimated fee. The City notes that the applicants appear to be arguing that they cannot afford the fee because they earn a modest income and have incurred substantial expenses from their interactions with the City over their property.²² In response, the City says the applicants have only made assertions about their inability to pay and have not provided any evidence that demonstrates they cannot afford the fee estimate of \$1,437.

[19] The City also claims the applicants have sufficient income to pay the estimated fee. The City provided publicly available information to establish that the wife was a practicing psychiatrist from 2015-2018 who billed the medical services plan in excess of \$125,000 each fiscal year. The City notes that the wife is publicly listed as a full, active, practicing psychiatrist by the BC College of Physicians and Surgeons as at October 2019. The City also provided publicly available evidence that the applicants own three properties with a combined, assessed value of over \$2.1 million. The City suggests the applicants could, or likely already do, receive rental income from some of those properties. As a result, the City submits the applicants can afford the fee.

The applicants' response

[20] The applicants submit that they cannot afford the fee since they earn a modest income and carry a large debt load. The applicants say their income comes from government pensions and benefits and part-time professional work where the wife is employed as a psychiatrist. The applicants provided evidence to show the wife's reported net income for her practice in 2018 was \$15,000.²³

[21] The applicants also made a list of their liabilities that includes two lines of credit totalling approximately \$94,882 and a mortgage balance of approximately \$27,563. The applicants have titled this document "list of line of credits used during construction period and the dollar amount balance in each one." The applicants claim their total debt of over \$140,000 was "incurred solely as a result of the City of Chilliwack actions" towards them.²⁴

²² City's submission at para. 21.

²³ The applicants were given prior approval by the OIPC to submit this information *in camera*. However, the applicants subsequently waived this entitlement by disclosing it to the City in their reply submission at p. 7.

²⁴ Applicants' reply submission at p. 8.

[22] The applicants say all their cash is going to pay their debts, taxes and carrying costs of their assets and liabilities. The applicants claim the husband receives limited income from government pension and benefits and has no RRSP income. They say the wife had to withdraw \$50,000 from her RRSP to make ends meet in 2018 as the net income of \$15,000 from her practice was hardly enough to live on.

[23] The applicants admit to receiving rental income, but they claim it is not a steady income. The applicants say they are “barely coming out even.”²⁵ According to the applicants, all their 2018 rental income went to fixing extensive damage caused by their last tenant. They also claim that they rent one of their homes to just one family so “the expenses far outweigh the meagre income it generates.”²⁶

Analysis – waiver based on inability to pay

[24] As previously noted, under s. 75(5)(a), an applicant must provide evidentiary support to establish they cannot afford an estimated fee. In Order F05-36, a non-profit society provided copies of its official financial statements and its bank account statements to show that the estimated fee for its access request exceeded its revenues and current bank balance. Based on this evidence, the adjudicator was satisfied the applicant provided sufficient evidence of an inability to pay.²⁷

[25] In this case, the applicants say they cannot pay the entire fee; however, they have not provided enough evidence that allows for a complete picture of their total income and assets. As a result, the applicants have not presented sufficient evidence for me to conclude that they cannot afford the fee. For example, in their submissions, the applicants indicate their income comes from the following sources:

- the wife’s part-time psychiatry practice,
- the husband’s government benefits and pensions,
- the husband’s “meagre income on the side”, and
- some rental income.

[26] While the applicants identify these various income sources, they do not explain or provide evidence about the husband’s side income or their total rental income. There was also no supporting documentation that shows how much the husband is receiving from government benefits and pensions. Further, the applicants’ *in camera* material indicates the wife receives income from other

²⁵ Applicants’ reply submission at p. 8.

²⁶ Applicants’ reply submission at p. 9.

²⁷ 2005 CanLII 46569 at para. 41.

sources. However, these other income sources are not mentioned or explained in the applicants' submissions. I also note the applicants do not appear to dispute the City's evidence that they own three houses.

[27] In terms of their liabilities, the applicants claim two lines of credit and a mortgage for one house. The applicants also claim they are barely getting by because of their professional and rental expenses and their debt, including the construction and permitting costs for the addition. They note that they had to withdraw funds from the wife's RRSP in 2018 to make ends meet. However, the applicants did not provide supporting documentation for their debts or expenses. These evidentiary gaps do not persuade me that the estimated fee exceeds the applicants' total available financial resources or monthly income.

[28] Ultimately, the applicants' submissions and evidence leave many unanswered questions and unsupported assertions. Since I do not have a clear picture of the applicants' financial circumstances, I am not satisfied the applicants cannot afford to pay the estimated fee.

Fee waiver based on fairness - section 75(5)(a)

[29] Under s. 75(5)(a), the head of a public body may waive a fee where they consider it fair to do so. The decision to waive or reduce a fee is based on what is fair and equitable in the circumstances of the case. The party seeking a fee waiver bears the burden of providing reasons and evidence to show that a fee waiver would be fair in the circumstances.

Applicants' submission

[30] The applicants claim the City is responsible for their dire financial circumstances. They also allege the City treated them unfairly regarding the addition on their property. The applicants say they would not be here today asking for the records if the City had honestly cooperated and treated them with respect.²⁸ The applicants say they made their access request to prove their losses in small claims court and to recover those losses from the City in order to reduce their debt.²⁹ They allege the City's actions cost them a lot of unnecessary stress, time and money.

[31] I understand the applicants to mean that it is fair to excuse payment in their case because the City caused them grief and suffering and the City is to blame for their inability to pay the estimated fee.

[32] I also understand the applicants to argue that it is fair to grant them a fee waiver because the City acted inappropriately in responding to their access

²⁸ Applicants' initial submission at p. 5.

²⁹ *Ibid.*

request. They allege the City obstructed their efforts to obtain their file by “making it prohibitory [*sic*] expensive to release it and knowing fully well that what is in it, will be shameful to them.”³⁰ The applicants also claim the City issued them a fee as a delay tactic in order to make them miss the statute of limitations for commencing their court action.³¹ The applicants say the City’s ultimate goal is to make sure they are not compensated for their losses.

City’s submission

[33] The City submits the applicants have not demonstrated that it is in the interests of fairness to waive or reduce the estimated fee. The City states that “being involved in a collateral dispute with a public body should not animate a decision to waive or reduce a fee.”³² In support of its position, the City cites Order 01-04 where former Commissioner Loukidelis found that unproven allegations or accusations against a public body should not form the basis for a fee waiver under s. 75(5)(a). He said the following:

...Section 75(5)(a) contemplates that a fee may be excused "for any other reason it is fair to excuse payment". The applicant alleges, at para. 11 of his reply submission, that the Institute "has assisted a [third party] and has supported his malicious and false allegations against me." He also says, again, that the Institute has acted unfairly in expelling him from its membership.

The Institute strongly denies all of this. It suffices to say that the applicant's underlying concerns respecting the Institute appear to have their own life in the judicial system. Any eventual resolution of the dispute lies in that forum. These allegations do not form the basis for a fee waiver under s. 75(5)(a).³³

[34] The City submits that Order 01-04 is directly applicable since the applicants’ stated purpose for their access request is to prove their losses in small claims court.³⁴ The City believes that the applicants’ unproven allegations and alleged entitlement to damages against the City should not form the basis for a fee reduction or waiver in the interests of fairness. The City submits that the judicial system is the proper forum for the resolution of such claims.

[35] The City also disputes any allegations of wrongdoing and says it has been fair in its interactions with the applicants. The City provided an affidavit from its Corporate Officer who is the City’s designated head for the purposes of FIPPA.

³⁰ Applicants’ initial submission at p. 5.

³¹ The applicants do not say if they actually missed the deadline for filing their claim.

³² City’s submission at para. 31.

³³ 2001 CanLII at paras. 27-28.

³⁴ City’s submission at para. 31, quoting from applicants’ initial submission at p. 5.

The Corporate Officer deposes that the applicants' allegations that City staff acted improperly, unfairly, unlawfully or dishonestly are without any basis.³⁵

[36] With regards to the fee estimate, the Corporate Officer attests to the following:

I am aware that the reasonableness of the City's fee estimate is not an issue in this inquiry. By way of context, however, I note that, in estimating the now-reduced fee, I concluded the Request would generate roughly 10,000 records spread over about 20 individuals' personal and email hard drives, as well as departmental and shared drives. In arriving at this estimate, I noted that it took one manager, searching her own email directory, 14 hours to identify approximately 1,000 records, leading me to determine that total staff time in completing this Request would be 70 hours.

Analysis – waiver based on fairness

[37] I agree with the City's submission that the applicants' allegations and claims against the City regarding the property dispute do not form an appropriate basis for a fee waiver under s. 75(5)(a). The applicants say they are pursuing the City in court for those grievances. Consistent with Order 01-04, I conclude those matters are best left to the courts who have the jurisdiction to determine claims of misconduct or negligence, as well as damages, and to award compensation where necessary. I understand the applicants feel mistreated or misunderstood by the City; however, any compensation, relief or settlement of those grievances is not available or appropriate under s. 75(5) of FIPPA.

[38] I have also considered the applicants' allegations that the City issued them a fee estimate to obstruct or delay them from obtaining the requested records. I can see from the parties' submissions and evidence that the relationship between the applicants and the City has deteriorated, leaving feelings of distrust. However, there is nothing in the materials before me or the circumstances of this case that suggests City employees sought to wrongfully block or delay access. The Corporate Officer's evidence indicates the fee was assessed to reflect the amount of work required by City staff to respond to the applicants' access request which spans over two years and includes records from approximately 20 City employees.

[39] I also note that making an access request under FIPPA does not prevent an applicant from initiating or continuing a court action against a public body. While some of the requested records may be relevant to the applicants' legal claims, the applicants did not establish that there is any legal requirement that they have this information before commencing a civil claim in the BC courts. The court system also has its own document exchange or discovery process so that

³⁵ Corporate Officer's affidavit at para. 12.

parties can obtain any necessary documents or evidence that may be relevant to their case. Therefore, taking into account the circumstances, I find the applicants have not proven that it is fair to waive or reduce the fee charged by the City.

[40] To summarize my findings regarding s. 75(5)(a), I conclude the applicants did not establish that they cannot afford to pay the fee or that they should be excused from paying the fee based on fairness.

CONCLUSION

[41] Under s. 58(3)(c) of FIPPA, I confirm the City's decision not to excuse the applicants from paying the estimated fee of \$1,437.

April 22, 2020

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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