



Order F21-18

BC HOUSING MANAGEMENT COMMISSION

Lisa Siew
Adjudicator

May 7, 2021

CanLII Cite: 2021 BCIPC 23
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 23

Summary: An individual and his company complained about the BC Housing Management Commission’s decision to assess and charge a fee under the category of a “commercial applicant” and to deny a full or partial waiver of that fee. The adjudicator confirmed the BC Housing Management Commission’s decision to assess a fee for the actual costs of its allowable services because the applicants qualified as commercial applicants. However, the adjudicator concluded that it would be fair under s. 75(5)(a) to excuse the applicants from paying the estimated fee given the circumstances.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 75(5), 75(5)(a) and 58(3)(c); *Freedom of Information and Protection of Privacy Regulation*, ss. 1 (definition of “commercial applicant”), 13 and Schedule 1; *Interpretation Act*, s. 29 (definition of “person”).

INTRODUCTION

[1] This case is about the BC Housing Commission (BC Housing)’s decision to assess an individual and his construction company (applicants) a fee for access to certain records, under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicants asked BC Housing for information and documents related to its decision to disqualify them from participating in future procurement opportunities with BC Housing.

[2] BC Housing issued the applicants an estimated fee of \$20,550 to process their request and asked for a deposit of \$10,275. BC Housing calculated its fee estimate on the basis of its estimated actual costs since it believed the applicants qualified as a “commercial applicant” as defined under s. 1 of the *Freedom of Information and Protection of Privacy Regulation* (the Regulation).

[3] The applicants disagreed with BC Housing’s decision to assess a fee and its decision to treat them as commercial applicants. The applicants also later clarified that they were requesting BC Housing grant them a fee waiver. BC Housing defended its fee estimate and denied the applicants’ request for a fee waiver.

[4] The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review BC Housing’s decision. As a result of mediation, the applicants narrowed the scope of their access request, resulting in BC Housing issuing a revised fee estimate of \$5,685 and requesting a deposit of \$2,842.50. However, mediation failed to resolve the issues in dispute and the matter proceeded to inquiry.

ISSUES

[5] The issues I must decide in this inquiry are:

1. Do the applicants qualify as a “commercial applicant” as defined under s. 1 of the Regulation?
2. Should the estimated fee of \$5,685 be waived, in whole or in part, under s. 75(5) of FIPPA?

[6] Section 57 of FIPPA identifies the burden of proof in inquiries, but it does not specify which party has the burden to prove the above-noted issues. Previous OIPC orders have found, however, that the public body bears the burden of proving that an applicant is a “commercial applicant”¹ and the party seeking a fee waiver has the burden of establishing that a fee waiver should be granted under s. 75(5)(a).² I agree with this approach.

DISCUSSION

Background³

[7] BC Housing is a provincial crown agency that, among other things, develops, manages and administers provincial and federal-provincial housing with a focus on offering affordable housing options to people with low incomes or other disadvantages. The applicants are a construction company and the individual “principal” of that company. Over the last 10 years, the applicants have

¹ Order 02-31 2002 CanLII 42464 (BC IPC) at para. 6.

² Order 01-04, 2001 CanLII 21558 (BC IPC) at para. 5.

³ The information in this background section is gathered from the parties’ submissions and the investigator’s fact report.

completed numerous construction projects for BC Housing or organizations funded by BC Housing.⁴

[8] In 2019, BC Housing hired a financial audit firm to conduct an investigative review of the individual and his company's billing practices with BC Housing. The firm's findings were summarized in a nine-page report which concluded there was evidence the individual and his company had knowingly over-billed BC Housing on various construction projects (the Report).

[9] BC Housing sent the applicants a letter notifying them that they were disqualified from participating in procurement opportunities offered by BC Housing. It enclosed a copy of the Report in support of its disqualification decision. The letter also referenced a right to appeal the decision.

[10] The applicants requested answers to certain questions about the disqualification decision, the Report and the appeal process. They also requested a copy of a number of documents, including copies of any bylaws, policies, procedures or protocols and rules regarding the disqualification process and all documents and investigative material generated and reviewed.

[11] BC Housing responded to the request by providing the applicants with a copy of a document titled "Supplier Disqualification Policy." As for the remainder of the information and documents, BC Housing informed the applicants that it would "respond in accordance with the provisions of the *Freedom of Information and Protection of Privacy Act*."⁵

[12] BC Housing later issued the applicants an estimated fee of \$20,550 to process the request and requested a deposit of \$10,275. BC Housing calculated its fee estimate on the basis the applicants qualified as a "commercial applicant" as defined under s. 1 of the Regulation. BC Housing informed the applicants that a public body may charge a "commercial applicant" the actual cost of its services to process the access request.⁶

[13] The applicants disagreed with BC Housing's decision to assess them a fee because they were requesting the documents to appeal and respond to BC Housing's disqualification decision. The applicants also argued they were not a "commercial applicant" and requested the fee be waived.

[14] During mediation by the OIPC, the applicants narrowed the scope of their request to only the records supplied by BC Housing to the financial audit firm in order to compose the Report. BC Housing confirmed to the OIPC that it has custody and control of those records. As a result of the reduced scope of the

⁴ BC Housing's submission at para. 3.

⁵ Letter from BC Housing's lawyer to applicant's lawyer dated May 17, 2019.

⁶ Letter from BC Housing to applicants' lawyer dated June 25, 2019.

request, BC Housing issued the applicants a revised fee estimate of \$5,685 and requested a deposit of \$2,842.50, but maintained its position that the applicants qualified as a “commercial applicant” and declined to waive the fee.

The charging and waiving of fees under FIPPA – s. 75

[15] 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 the time spent severing information from a record.⁷ A public body also cannot charge a fee where an applicant requests their own personal information.⁸

[16] Under s. 75(6), public bodies are allowed to charge different fees based on whether an applicant falls into a prescribed category. Those categories are set out in Schedule 1 of the Regulation.⁹ Schedule 1 distinguishes “commercial applicants” from “applicants other than commercial applicants” and sets out the maximum fees a public body can charge each category of applicants for the services identified under s. 75(1) of FIPPA.¹⁰

[17] 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.¹¹ 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 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. Under s. 75(5)(b), the head of a public body may waive the estimated fee, upon request, if the record relates to a matter of public interest, including the environment or public health or safety.

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

[18] The Commissioner has broad jurisdiction to intervene in an inquiry over a fee dispute.¹² 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

⁷ Section 75(2) of FIPPA.

⁸ Section 75(3) of FIPPA.

⁹ Section 13 of the Regulation notes that the maximum fees for services that a public body can charge each category are set out in Schedule 1 of the Regulation.

¹⁰ Item 1 of Schedule 1 applies to “applicants other than commercial applicants” and item 2 applies to “commercial applicants”.

¹¹ Order 01-04, 2001 CanLII 21558 (BC IPC) at para. 25.

¹² Order No. 332-1999 [1999] BCIPCD No. 45 at para. 9.

exercised its discretion.¹³ Section 58(3)(c) gives the Commissioner or their delegate the authority to substitute their decision for that of the public body in fee waiver cases.¹⁴

Do the applicants qualify as commercial applicants?

[19] A “commercial applicant” is defined as “a person who makes a request for access to a record to obtain information for use in connection with a trade, business, profession or other venture for profit.”¹⁵ The maximum amount of fees that a public body can charge a “commercial applicant” is the public body’s actual cost in providing the allowable service.¹⁶

BC Housing’s position – commercial applicant

[20] BC Housing contends that the applicants qualify as a “commercial applicant” for the purposes of s. 1 of the Regulation and it is, therefore, appropriate for it to calculate the fees on the basis of its actual estimated costs. BC Housing submits that the definition of “commercial applicant” is broad and has been interpreted as such by the OIPC.¹⁷ BC Housing says the applicants fit into this broad definition since the construction company is a business, making a request on its own behalf, and the individual, “as principal of that business”, is making the request on behalf of the company.¹⁸

[21] BC Housing submits that the information the applicants are requesting is directly connected to its business and venture for profit. It says the applicants are seeking “voluminous disclosure to make an appeal of their disqualification in order to continue to be eligible to bid on building contracts with BC Housing and to profit from those contracts.”¹⁹ BC Housing also contends “the fact that the records are being requested in connection with an internal appeal process of BC Housing does not remove the commercial character of the reasons for the request.”²⁰

Applicants’ position – commercial applicant

[22] The applicants submit they are not commercial applicants for the purposes of FIPPA because “the disclosure requested here is in connection with the

¹³ Order 01-04, 2001 CanLII (BC IPC) 21558 at para. 14.

¹⁴ *Ibid.*

¹⁵ Section 1 of the Regulation.

¹⁶ Item 2 of Schedule 1.

¹⁷ BC Housing’s submission at para. 19, citing Order 02-31, 2002 CanLII 42464 (BC IPC) at paras. 25-26.

¹⁸ BC Housing’s submission at para. 20.

¹⁹ *Ibid* at para. 21.

²⁰ *Ibid* at para. 22.

defence of a proceeding initiated by the public body.”²¹ The applicants say their request for documents resulted from BC Housing’s decision to disqualify them from participating in procurement opportunities.²² The applicants argue that they have a right to appeal BC Housing’s disqualification decision and “a right to know the case against them, through a process of disclosure.”²³

Analysis and conclusions – commercial applicant

[23] Whether an applicant qualifies as a “commercial applicant” under FIPPA depends on the reason or the purpose for their access request and whether the request was made for a “commercial purpose” or a “business motive”.²⁴ As stated in the definition, the request must be made “to obtain information for use in connection with a trade, business, profession or other venture for profit.”

[24] I agree with BC Housing that previous OIPC adjudicators have broadly interpreted and applied this definition. In Order F09-05, Adjudicator Francis found that an insurance company qualified as a “commercial applicant” when it requested access to records to help it prepare for and provide submissions on a matter that the insurance company said “touched directly on its business interests.”²⁵ Adjudicator Francis concluded that the insurance company’s request was for information for use in connection with a business or a venture for profit, specifically its “continued ability to offer insurance products and services.”²⁶

[25] The applicants’ argument is that they are not commercial applicants in the context of this access request because they want the records to appeal the decision to disqualify them from BC Housing’s procurement opportunities. However, the purpose of appealing the disqualification decision is in connection with the applicants’ trade, business, profession or venture for profit.

[26] I agree with BC Housing that the applicants are seeking the requested information to appeal their disqualification in order to continue to bid on building contracts with BC Housing and to profit from those contracts. It is clear that the disqualification decision affects the individual and the construction company’s ability to continue doing business with BC Housing, thereby, impacting the applicants’ potential profits or earnings and their trade, business, profession or venture for profit.

²¹ Applicants’ submission at para. 8.

²² *Ibid* at para. 1.

²³ Applicants’ submission at para. 2. The applicants also cite and distinguish themselves from Order 02-31, 2002 CanLII 42464 (BC IPC) where former Commissioner Loukidelis found the applicant in that case qualified as a “commercial applicant” because it was seeking information in connection with a venture for profit, specifically to facilitate a claim of damages against the public body on account of lost profits.

²⁴ Order 02-31, 2002 CanLII 42464 (BC IPC) at paras. 22 and 24.

²⁵ *Ibid* at para. 8.

²⁶ Order F09-05, 2009 CanLII 21404 at para. 15.

[27] As a result, I find the applicants qualify as commercial applicants since they made the request to obtain information for use in connection with their continued ability to offer their construction contracting services to BC Housing. Similar to Order F09-05, I conclude the applicants made the request for a business motive, that is, to obtain information to appeal and defend themselves against a public body's decision that directly impacts their trade, business, profession or venture for profit.

[28] For the reasons given, I conclude the applicants qualify as commercial applicants in accordance with s. 1 of the Regulation and BC Housing was entitled to charge the applicants accordingly.

Fee waiver – s. 75(5)

[29] Section 75(5) permits the head of a public body to waive an estimated fee, for services it may charge an applicant, in the following circumstances:

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

- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or
- (b) the record relates to a matter of public interest, including the environment or public health or safety.

[30] The OIPC investigator's fact report and the notice of inquiry does not identify whether the applicants' request for a fee waiver is made under s. 75(5)(a) or s. 75(5)(b). Further, the applicants do not specify which provision applies in these circumstances.

[31] BC Housing says the applicants appear to argue that s. 75(5)(a) applies in this case, but have not provided any evidence that they cannot afford to pay the estimated fee.²⁷ It notes that the applicants appear to argue that it is procedurally unfair for them to pay for the actual cost of the requested records because their request was made in connection with an appeal process.²⁸

[32] I conclude the applicants are requesting a fee waiver under s. 75(5)(a) because they assert it is unfair for BC Housing to assess such a fee given the circumstances. I base that conclusion on the fact that the applicants say the fee

²⁷ BC Housing's submission at para. 33.

²⁸ *Ibid* at para. 34.

is unreasonable and they do not argue or provide evidence that they are unable to afford the fee or that the record relates to a matter of public interest.²⁹

Fee waiver based on fairness – s. 75(5)(a)

[33] 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 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' position – fee waiver

[34] The applicants say they have a right to appeal BC Housing's disqualification decision and their request for documents arises in a context where they have the right to know the case against them through a process of disclosure. The applicants submit BC Housing is subject to the principles of procedural fairness which, among other things, requires the decision-maker to disclose the information he or she relied on to make the decision, to allow the affected party to know the case they have to meet and to allow the parties an opportunity to bring evidence in support of their position.³⁰ The applicants explain BC Housing provided them with a copy of the Report which provides an overview of the investigation, but it provided no other disclosure related to the Report.

[35] The applicants contend that disclosure in these circumstances "should be provided as a matter of course"³¹ and that BC Housing's actions and its decision to assess a fee prevents substantive disclosure and is not in accordance with the principles of procedural fairness. The applicants say "one's ability to proceed through an appeal armed with the disclosure necessary to fully understand the case to meet should not be subject to their ability to pay, or at the very least, should not be subject to exorbitant fees."³² As a result, the applicants say "this is not an appropriate context for the application of the *Act* and/or the imposition of a fee for access to disclosure."³³ The applicants believe BC Housing should provide the requested documents at no cost or, alternatively, at a substantially reduced rate.³⁴

²⁹ I note there is no provision in FIPPA that requires a fee be "reasonable".

³⁰ Applicants' submission at para 3, quoting *May v. Ferndale Institution*, 2005 SCC 82 at para. 92.

³¹ Applicants' submission at para. 3.

³² *Ibid* at para. 2.

³³ *Ibid* at para. 5.

³⁴ The applicants did not discuss how that substantially reduced rate should be calculated.

BC Housing's position – fee waiver

[36] BC Housing submits that the applicants “appear to argue that in all cases it is procedurally unfair for an applicant to pay for the actual cost of the requested records if the request is made in connection to any appeal process, even if an applicant can afford it.”³⁵ BC Housing says this is not a reason that makes it fair to excuse payment.

[37] BC Housing notes that the purpose of s. 75(5) is to ensure that fees are not a barrier to access. Therefore, it argues that “when assessing if the Applicants have provided a reason that makes it fair to excuse payment, it must be viewed through this barrier-to-access lens.”³⁶ It says the applicants have not provided any evidence that the fees are a barrier to access and if there is no barrier to access, then there is no breach of procedural fairness. BC Housing says “if the Applicants agree to pay the fee, they will obtain all of the records they believe they need to meet the case, over and above the reasons provided to them in the 9-page Investigative Report.”³⁷

[38] BC Housing argues that there is nothing procedurally unfair about providing the requested records for a fee in accordance with FIPPA. It claims the applicants have the means to pay for access and to excuse them from paying a fee would give the applicants “a discretionary financial benefit”.³⁸ BC Housing submits the province would lose revenue it would otherwise be entitled to under FIPPA if the applicants were given a fee waiver.

Analysis and conclusions – fee waiver

[39] The applicants submit BC Housing is subject to the principles of procedural fairness and breached those principles by not providing them with free, full disclosure of the information and documents they need to understand the disqualification decision and to appeal that decision. The applicants are seeking access to the records supplied to, and referenced by, the audit and financial firm who prepared the Report used by BC Housing to make its disqualification decision.

[40] BC Housing argues that there is nothing procedurally unfair about processing the applicants' request under FIPPA and charging them a fee in accordance with FIPPA. I agree that, under different circumstances, inviting an applicant to submit a FIPPA request and then charging them a fee after they do so may not raise fairness concerns. However, the circumstances of this case are unique.

³⁵ BC Housing's submission at para. 34.

³⁶ *Ibid* at para. 36.

³⁷ *Ibid* at para. 37.

³⁸ *Ibid* at para. 28.

[41] A duty of procedural fairness rests on every public authority making administrative decisions affecting the rights, privileges or interests of an individual.³⁹ BC Housing is a public authority whose disqualification decision clearly affects the applicants' business interests, especially given the 10 year business relationship between the parties. The disqualification decision affects the applicants' ability to continue doing business with BC Housing and it could harm their reputations if the decision is publicized without the opportunity for them to respond to those findings.

[42] I agree with the applicants that, in the administrative context, the duty of procedural fairness generally requires that the decision-maker disclose the information and materials to be considered, to allow the affected party to know the case they have to meet and to allow them to respond before a decision is made.⁴⁰ There is nothing to suggest any of that took place in this case. BC Housing notified the applicants and provided them with a copy of the Report *after* the decision was made to place them on the disqualification list.⁴¹ Therefore, this is not a situation where the applicants were provided with disclosure during the decision-making process or had an opportunity to respond to the investigation's findings before a decision was made.

[43] I note that BC Housing's "Supplier Disqualification Policy" states that a notification letter informing a supplier that they are disqualified "must contain details as to the reasons for the disqualification, the scope of the disqualification and details of the appeal process."⁴² However, the policy does not provide the disqualified supplier an opportunity to know in advance that they are under consideration for disqualification or to comment on the information and materials the decision maker will consider. There is also no information before me about how a disqualified supplier can obtain the information it needs from BC Housing to understand and appeal the disqualification decision.

[44] Based on the correspondence between the parties, I can see that the applicants sought clarification, information and answers from BC Housing about the disqualification process, the Report and the appeal process.⁴³ At no time did the applicants specify in their original communication that they were making a FIPPA access request. It is clear to me that the applicants expected BC Housing to provide the information and answers as part of its appeal process. Instead, it was BC Housing who told the applicants that it would be responding to their request under FIPPA.⁴⁴ The applicants replied, "To the extent it may be

³⁹ *May v. Ferndale Institution*, 2005 SCC 82 at para. 94.

⁴⁰ Applicants' submission at para 3, quoting *May v. Ferndale Institution*, 2005 SCC 82 at para. 92.

⁴¹ Letter from the applicants' lawyer to BC Housing dated May 15, 2019. I was not provided with a copy of the notification letter or the Report.

⁴² Supplier Disqualification Policy (located in applicants' submission) at pp. 5-6.

⁴³ Letter from the applicants' lawyer to BC Housing dated May 15, 2019.

⁴⁴ Letter from BC Housing's lawyer to the applicants' lawyer dated May 17, 2019.

necessary to invoke the *Freedom of Information and Protection of Privacy Act* (as you have invited us in your letter of May 17, 2019), we do so”.⁴⁵ BC Housing then issued a fee estimate of \$20,550. I conclude the applicants were given no alternative other than to pay the assessed fee in order to obtain the information necessary to meaningfully exercise their right of appeal.

[45] With the assistance of the OIPC, the applicants reasonably narrowed their request to the records supplied by BC Housing to the financial audit firm in order to compose the Report. However, BC Housing chose to assess the applicants an estimated fee of \$5,685 and denied their request for a fee waiver for records that are, in my view, relevant to the applicants’ right to appeal the disqualification decision and a fair hearing of the matter. I find the records the applicants are now seeking are appropriate and relevant for the purposes of understanding and appealing the disqualification decision. Taking all of this into account, I conclude in these specific circumstances inviting an applicant to submit a FIPPA request and then charging them a fee after they do so, and after they have agreed to reduce the scope of their access request, raises concerns about fairness.

[46] BC Housing says the purpose of s. 75(5) is to ensure that fees are not a barrier to access. It argues, therefore, that a fee waiver request must be viewed through a “barrier-to-access lens” and the applicants’ face no barrier since they only need to pay the estimated fee in order to gain access.⁴⁶ It claims the applicants have the means to pay for access and should not receive a “discretionary financial benefit” from the province, which it defines as revenue the province forgoes when it excuses an applicant from paying a fee under FIPPA.⁴⁷

[47] First, a public body’s discretion to assess fees under FIPPA is not meant to generate revenue for the province. The discretion to charge fees is intended to recover certain costs that a public body may incur in processing a request for access.

[48] In addition, the applicants are not asking for a fee waiver because they cannot afford to pay. They are requesting a fee waiver under s. 75(5)(a) because it is unfair for BC Housing to assess such a fee given the circumstances. BC Housing also agrees that the applicants do not take the position they cannot afford to pay the estimated fee.⁴⁸

[49] Furthermore, I am not persuaded that an applicant should be denied a fairness fee waiver under s. 75(5)(a) simply because the applicant can afford to pay the estimated fee. BC Housing’s position amounts to saying that an applicant with financial means can always be denied a fairness fee waiver. I disagree with

⁴⁵ Letter from the applicants’ lawyer to BC Housing dated May 21, 2019.

⁴⁶ BC Housing’s submission at paras. 36 and 37.

⁴⁷ *Ibid* at para. 28.

⁴⁸ *Ibid* at paras. 33-34.

that position because the determination of whether it would be fair to excuse payment under s. 75(5)(a) will always depend on the facts and circumstances of the specific case.

[50] Given the circumstances relevant to this inquiry, as discussed above, I conclude the applicants have proven that it is fair to excuse them from paying BC Housing's estimated fee of \$5,685. I consider this case presents appropriate circumstances to order that the fee be excused under s. 58(3)(c).

CONCLUSION

[51] I confirm BC Housing's decision to charge the applicants an estimated fee on the basis of its actual estimated costs because the applicants qualify as commercial applicants in accordance with the Regulation.

[52] However, for the reasons given above, I find it is fair to excuse the applicants from paying the estimated fee of \$5,685 under s. 58(3)(c) and 75(5)(a) of FIPPA. I require BC Housing to waive the fee and process the applicants' access request in accordance with Part 2 of FIPPA.

May 7, 2021

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F19-80949