



Order F22-18

BRITISH COLUMBIA UTILITIES COMMISSION

Celia Francis
Adjudicator

April 25, 2022

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Summary: The City of Richmond (City) made eight requests to the British Columbia Utilities Commission (BCUC) for records about the Inquiry into the Regulation of Municipal Energy Utilities. BCUC estimated that a \$24,000 fee would be required to process the requests. The City paid the fee and then requested a fee waiver under s. 75(5)(a) (fair to excuse payment) and s. 75(5)(b) (public interest). BCUC denied the fee waiver requests. The adjudicator found the City had not established that a fee waiver was warranted and confirmed the fee.

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

INTRODUCTION

[1] This order resolves a fee dispute between the access applicant, the City of Richmond (City), and the public body, the British Columbia Utilities Commission (BCUC).

[2] In February 2021, the City sent eight requests under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to BCUC for records related to BCUC's Inquiry into the Regulation of Municipal Energy Utilities, Order Number G-177-19 (Inquiry).¹ BCUC responded, in March 2021, by noting that several of the requests were broad and that there could be tens of thousands of pages of responsive records. Accordingly, BCUC said, an estimated fee of \$24,000 would be required to respond to the requests, although the final fee might be higher. BCUC also requested that the City consider narrowing its requests, to reduce the fee.

¹ <https://www.bcuc.com/OurWork/ViewProceeding?ApplicationId=695>.

[3] The City paid the estimated fee in April 2021. BCUC wrote to the City later that month to say that it would not disclose the majority of the records, as they were “protected by the principle of deliberative privilege” under s. 3(1)(b) (now s. 3(3)(e)) of FIPPA and s. 61 of the *Administrative Tribunals Act*.² BCUC also told the City that information related to its proceedings is publicly available on its website.³

[4] In May 2021, the City asked that BCUC waive the fee under ss. 75(5)(a) and (b) of FIPPA and explained why it considered a fee waiver was warranted. BCUC replied later the same month by saying it did not agree that a waiver of the fee was justified. It added that the requests involved the search and review of thousands of pages of records.

[5] In June 2021, the City complained to the Office of the Information and Privacy Commissioner (OIPC) that BCUC’s fee was excessive, that it had refused to waive the fee and that it had failed to provide reasons for its refusal. The City asked that the OIPC order BCUC to refund the fee. During the OIPC’s mediation of the complaint, BCUC confirmed that the final fee was \$26,940. Mediation did not resolve the complaint and the matter proceeded to inquiry in early 2022.

ISSUE

[6] The issue to be decided in this inquiry is whether the City is entitled to a fee waiver under s. 75(5)(a) or (b), or both, of FIPPA.

[7] FIPPA does not say which party has the burden of proof in inquiries regarding s. 75(5). However, previous OIPC orders have established that access applicants (here, the City) have the burden of establishing that a fee waiver or reduction should be granted under s. 75(5).⁴ I agree with this approach.

² Section 3(3)(e) of FIPPA states that FIPPA does not apply to a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity. Section 61(2) of the *Administrative Tribunals Act* states that (other than ss. 44(1) (b), (2), (2.1) and (3)) FIPPA does not apply to a personal note, communication or draft decision of a decision maker.

³ BCUC later disclosed 950 of the approximately 30,000 responsive pages for Request 4. It withheld the vast majority under s. 3(3)(e) of FIPPA. (Exhibit I, Affidavit of BCUC’s Commission Secretary). I do not know what if any records BCUC disclosed in response to the other seven requests.

⁴ See, for example, Order F20-14, 2020 BCIPC 16 (CanLII), at para. 8, and Order F21-10, 2021 BCIPC (CanLII), at para. 24.

DISCUSSION

Background

[8] Under the *Utilities Commission Act* (UCA), BCUC regulates “public utilities”.⁵ The definition of “public utility” excludes a “municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries.” The City is one of many local governments in BC that provide energy utility services within its boundaries. In August 2019, BCUC established the Inquiry to examine the regulation of energy utilities affiliated with municipalities and regional districts.⁶

[9] On completion of the Inquiry, BCUC will consider if it is necessary to

1. Seek advance approval from the Government of BC to offer a “class of cases exemption” to municipalities and regional district energy systems in certain circumstances; and/or
2. Make a recommendation to the Government of BC to review the definition of “public utility” within the UCA as it relates to such entities.⁷

The requests

[10] The eight requests may be summarized as follows:

Request 1

All records related to the appointment of two named Commissioners (the Deputy Chair and Chair), including but not limited to, any assessments, evaluations, references, and records upon which any assessments and/or evaluations were made, as well as the criteria for the positions.

Request 2

All records related to the appointment of the Panel for the Inquiry including, but not limited to, records of deliberations and records that preceded the formal decision to appoint the Panel.

Request 3

For the period January 1, 2018 to present, all communications between the Deputy Chair, the Chair and any representative(s) or employees of

⁵ BCUC also regulates the Insurance Corporation of British Columbia's basic automobile rates, common carrier pipelines and the reliability of the bulk electrical transmission grid. BCUC is also the administrator of the *Fuel Price Transparency Act*; BCUC's response submission, para. 3.

⁶ City's initial submission, paras. 3-4; Affidavit of City's Director of Sustainability and District Energy (Director), paras. 3-4.

⁷ BCUC's response submission, para. 24.

any of the following entities: FortisBC Energy Inc., Fortis Inc. or FortisBC Alternative Energy Services Inc. (Fortis).

Request 4

For the period January 1, 2018 to present, all communications between the Deputy Chair, the Chair, BCUC’s Commission Secretary and the Inquiry panel members.

Request 5

For the period January 1, 2018 to present, all communications between a named City resident, the Chair, BCUC’s Commission Secretary and the Inquiry panel members.

Request 6

All records related to the establishment of the Inquiry, including, but not limited to the “questions and complaints from individual stakeholders regarding such entities and their need for regulation” referred to in Exhibit A-1 of the Inquiry and the “complaints related to matters of interpretation and paramountcy between the UCA and the Community Charter or Vancouver Charter” referred to in BCUC Order G-177-19.

Request 7

All communications with any representative of any BC Ministry related (1) to the Inquiry and (2) to the Request of the City of Richmond to the Lieutenant Governor in Council and to Executive Council referred to in the January 29, 2021 letter filed as Exhibit C12-5 in the Inquiry.

Request 8

For the period of January 1, 2018 to present, all records related to any meetings with private land and/or building developers about district energy utility services or municipal energy utilities, including meetings with industry.

[11] The submissions indicate that BCUC located upwards of 32,000 pages of responsive records. Approximately 30,000 pages relate to Request 4, of which BCUC disclosed 951 pages and withheld the remainder, mostly under s. 3(3)(e) of FIPPA.⁸ The final fee was \$29,640.⁹ It is not clear from the submissions if BCUC has responded to all of the requests.

[12] The parties did not provide me with copies of the records. They also did not describe the records’ contents.

⁸ The City’s fee waiver request of May 12, 2021 to BCUC; Exhibits H and I to the Affidavit of BCUC’s Commission Secretary.

⁹ BCUC’s reply submission, para. 18.

Section 75

[13] Section 75 of FIPPA allows a public body to require an applicant to pay a fee for access to records, subject to certain exceptions.¹⁰ Section 75(5) permits the head of a public body to waive a fee in certain 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.

Authority to intervene in fee disputes – s. 58(3)(c)

[14] As the Commissioner's delegate, under s. 58(3)(c), I have the authority to confirm, excuse or reduce the disputed fee in the appropriate circumstances. The jurisdiction to intervene under s. 58(3)(c) is broad and enables me, in appropriate cases, to substitute my decision for that of the head of the public body.¹¹

Fee waiver in the public interest – s. 75(5)(b)

[15] Previous orders have said that there is a two-step process for deciding if a public interest fee waiver under s. 75(5)(b) is warranted. The first step is to decide if the records relate to a matter of public interest. If so, the second step is to decide whether the applicant should be excused from paying all or part of the estimated fee.¹²

Do the records relate to a matter of public interest?

[16] The following is a non-exhaustive list of factors that public bodies should consider when deciding if 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?

¹⁰ A public body may not charge a fee for the first three hours spent locating and retrieving a record, severing information from a record or for an applicant's own personal information.

¹¹ Order F21-10, 2021 BCIPC (CanLII), at para. 28, and Order F20-14, 2020 BCIPC 16 (CanLII), at para. 14.

¹² See, for example, Order F21-10, 2021 BCIPC 14, at para. 32.

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?¹³

[17] The City began by setting out its concerns about BCUC's Inquiry, including BCUC's authority to conduct the Inquiry and its alleged lack of independence, accountability, transparency and bias. The City said that its requests relate to a matter of public concern, and thus the public interest, and that a fee waiver is therefore warranted. The City cited the following reasons for its concerns:

- in the City's view, the Inquiry intrudes into the exclusive jurisdiction of municipalities over district energy utility services;
- BCUC has not said what led to the Inquiry and has not disclosed any of the complaints it said it has received about municipal energy utilities; and
- there has been public concern that two Inquiry panel members [one of them, the Chair]¹⁴ are biased as they are former executives of Fortis, a potential competitor.¹⁵

[18] BCUC disputed the City's arguments on these points.¹⁶

[19] In arriving at my conclusion on this issue, I have borne in mind the City's concerns, as they provide helpful context to its requests. I will now go on to consider the factors in step 1.

Has the subject of the records been a matter of recent public debate?

[20] The City cited the following as evidence of recent public debate on the Inquiry:

¹³ See, for example, Order F21-10, 2021 BCIPC 14, at para. 33.

¹⁴ See BCUC's decision on Allegation of a Reasonable Apprehension of Bias, Inquiry Exhibit A-21, attached to City's reply submission.

¹⁵ City's initial submission, paras. 3-34; Director's Affidavit, paras. 3-39. The City's arguments set out here and below are all drawn from these paragraphs.

¹⁶ BCUC's reply submission, paras. 68-75.

- media coverage (two news articles and BCUC's news release on the Inquiry, all from August 2019);¹⁷
- discussion on social media (an incomplete extract from a Facebook exchange from November 2019);¹⁸ and
- local governments' submissions to the Inquiry.¹⁹

[21] BCUC disputed all of the City's examples.²⁰

[22] The City did not provide any other examples of media or other public debate on the Inquiry.

[23] I find that the City has not shown that there has been recent public debate on the subject of the records, for these reasons:

- the two news articles are dated; they essentially duplicate each other and BCUC's news release about the Inquiry;
- BCUC's own news release about the Inquiry²¹ is also dated and not, in my view, evidence of recent public debate;
- the Facebook exchange consists of incomplete, two and a half year old comments that mention the Inquiry only briefly; and
- the municipalities' own submissions to the Inquiry, as interveners, show that they are concerned about the Inquiry and its possible results but are not, in my view, evidence of public debate, recent or otherwise, as contemplated by s. 75(5)(b).

Does the subject of the records relate directly to the environment, public health or safety?

[24] The City said that the records themselves do not relate directly to the environment. However, it said, if the Inquiry arrives at a finding that infringes on municipal regulation of energy services, this might have a negative impact on the City's ability to reduce greenhouse gas emissions.²²

¹⁷ It provided two August 2019 articles about the Inquiry from online news services (Exhibit B and first attachment to footnote 13 of para. 29 of Director's Affidavit), as well as BCUC's news release on the Inquiry (second attachment to footnote 13, same affidavit).

¹⁸ It provided incomplete extracts from a November 2019 exchange on Facebook which mention the Inquiry: Exhibit C, Director's Affidavit.

¹⁹ Attachments to footnotes 5-12 of para. 28 of Director's Affidavit.

²⁰ BCUC's response submission, paras. 48-57.

²¹ Exhibit B, Affidavit of BCUC's Commission Secretary.

²² The City said that s. 473(3) of the *Local Government Act* requires municipalities to reduce greenhouse gas emissions, a principle that, it said, does not guide BCUC. BCUC disputed this argument at para. 61 of its response submission.

[25] BCUC said the records cover a variety of topics and that the City has failed to demonstrate that they relate directly to the environment, public health or safety.²³

[26] I accept the City's admission that the records do not relate directly to the environment, public health or safety. The City's example of a potential result of the Inquiry does not, in my view, assist it here. I find that the City has not shown that the records relate directly to the environment, public health or safety.

Could dissemination or use of the information in the records reasonably be expected to yield a public benefit?

[27] The City said that its dissemination of the records would yield a public benefit by contributing to the public's understanding of the following:

- the complaints that led to the Inquiry;
- BCUC's possible intentions to regulate municipal utility services;
- public concerns that two Inquiry panel members [one of them, the Chair] are biased as they are former executives of Fortis; and
- an important environmental issue, that is, the City's plan to reduce greenhouse gas emissions.²⁴

[28] BCUC said that the City's submissions on this point were allegations and suspicions and that the City had not explained how it would disseminate the records. BCUC also said that the City has not, to date, disseminated any of the information from the records while it, BCUC, posts all of its responses to access requests on its website.²⁵

[29] The City did not explain how the information in the records supports its position on this factor. As I do not have copies of the records or any information on their contents, I have no way of knowing if the information would reveal the complaints and concerns the City mentioned.

[30] The City also did not show how it might disseminate the information and did not explain how such dissemination could yield a public benefit. I find that the City has not shown that dissemination or use of the information could reasonably be expected to yield a public benefit.

²³ BCUC's response submission, para. 66.

²⁴ City's initial submission, paras. 31-33; Director's Affidavit, paras. 31-33.

²⁵ BCUC's response submission, paras. 77-82.

Do the records disclose how the public body is allocating financial or other resources?

[31] The City did not provide a submission on this question. I am unable to conclude that the records disclose how BCUC is allocating financial or other resources.

Conclusion on first step

[32] The City has not explained how its concerns about the Inquiry relate to a matter of public interest. Nor has the City shown that the records themselves relate to these concerns. The City has not persuaded me that the records relate directly to a matter of public interest for the purposes of s. 75(5)(b).

[33] I find that the City has not met its burden respecting the first step in the public interest fee waiver process. I need not, therefore, consider the second step. I will consider next whether it is fair to excuse the fee under s. 75(5)(a).

Would it be fair to excuse the fee under s. 75(5)(a)?

[34] Under s. 75(5)(a), the head of a public body may excuse a fee if she or he considers it fair to do so, based on what is fair and equitable in the circumstances.

[35] The City's arguments on this point were brief and essentially repeated those it made about s. 75(5)(b) regarding transparency and bias.²⁶ It added that

... it would not be fair to impose the fee because the City's taxpayers should not have to pay for information the disclosure of which is also in the public interest, and particularly so since the information can enable the public to make an informed assessment about whether confidence is warranted in BCUC as a tribunal, certainly in this matter given the concerns articulated in the City's submissions.²⁷

[36] BCUC disputed the City's transparency and bias arguments. It added that the requests were for tens of thousands of records about the Inquiry and the Inquiry will help BCUC in making non-binding recommendations to the BC government.²⁸

[37] I have already said that the City has not persuaded me that the records relate to a matter of public interest. The City also did not explain how its concerns about the Inquiry might negatively affect public confidence in the Inquiry. The City

²⁶ City's initial submission, paras. 39-41.

²⁷ City's response submission, paras. 5-7.

²⁸ BCUC's response submission, paras. 34-44.

also did not describe the contents of the small number of records it received or point to portions of these records in support of its fairness arguments.

[38] I also considered the fact that BCUC asked the City to pay almost \$27,000 and that the City only received a relatively small portion of the 32,000 pages. However, it is clear to me that, regardless of the small number of pages BCUC eventually disclosed, BCUC still had to expend resources to search and review many thousands of pages in responding to the requests.

[39] Moreover, the requests were broadly worded, with some covering several years. BCUC said that a quarter of its staff were involved in processing the requests and that they spent at least 200 hours doing so.²⁹ There is no indication that the City attempted to narrow the scope of its requests and thus lower the fees, and the burden on the City's taxpayers, not to mention on BCUC's staff.

[40] In conclusion, I find that the City has not established that it would be fair for BCUC to excuse the fee under s. 75(5)(a) of FIPPA.

CONCLUSION

[41] For the reasons given above, under s. 58, I confirm BCUC's decision to deny the City's request for a fee waiver under ss. 75(5)(a) and (b).

April 25, 2022

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F21-86484

²⁹ BCUC's response submission, paras. 22-23.