



Order F22-28

SUNSHINE COAST REGIONAL DISTRICT

Jay Fedorak
Adjudicator

June 6, 2022

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Summary: A property owner (complainant) submitted a request to the Sunshine Coast Regional District (SCRD) for records relating to alterations to district property abutting his property. The SCRD responded with a fee estimate of \$490. After the complainant paid the required deposit of \$245, the SCRD issued a revised fee estimate of \$2790. The complainant protested that the revised fee was not in compliance with s. 75 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that the revised fee estimate was not authorized by s. 75 of FIPPA. The adjudicator reduced the fee to the amount of the original estimate and excused the complainant from paying the remaining \$245. The adjudicator also ordered the SCRD to complete the processing of the request.

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

INTRODUCTION

[1] A property owner (complainant) submitted a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Sunshine Coast Regional District (SCRD) for records relating to alterations to district property, as he alleged it posed a risk of damage to his property. The SCRD responded to the complainant almost three weeks later seeking greater specification with respect to a part of the request. In providing the additional information, the complainant provided the clarification and expanded the time frame of the request by six years.

[2] The SCRD responded five weeks later indicating that fees were payable for the request. It estimated the fees at \$490 and required the complainant pay a deposit of \$245. The complainant paid the deposit immediately, but the SCRD failed to respond to the request by the date it indicated that it would respond. When the complainant contacted the SCRD about its failure to respond, the SCRD issued a revised fee estimate of \$2790.

[3] The complainant contacted the Office of the Information and Privacy Commissioner (OIPC) to complain about the revised fee. As a result of mediation, the SCRD reduced the fee to \$2335 and requested an additional deposit of \$922.50. Mediation failed to resolve the matter and the complainant requested the matter proceed to an inquiry.

ISSUES

[4] The issues to be decided in this inquiry are:

1. Whether the fee estimate of \$2335 is authorized by s. 75 of FIPPA; and
2. If not, what the appropriate remedy would be.

[5] Section 57 of FIPPA, which establishes the burden of proof for inquiries, is silent respecting fee matters. Previous decisions have held that, in such cases, as a practical matter, it is in the interests of each party to present argument and evidence to justify its position.¹

DISCUSSION

[6] **Background** – The applicant is a homeowner within the SCRD, whose property is affected by changes that the SCRD had made to adjacent public property. The SCRD was considering taking action to minimize the risk to the applicant's property. The applicant was concerned that certain remedial action might also negatively affect his property. He requested copies of studies on the issue affecting his property and copies of the approval of the Ministry of Environment for any proposed work, as well as copies of records relating to the entire project.

[7] While the applicant has yet to pay the increased deposit, the SCRD has provided the applicant with copies of some of the records in a three-part phased release. It has delivered the first two phases. Its position is that it will not provide the remaining records until the applicant pays the revised fee.

[8] **Are the fees authorized by s. 75?** – Section 75 permits public bodies to charge fees as follows:

- 75 (1)** The head of a public body may require an applicant who makes a request under section 5 to pay to the public body the following:
- (a) a prescribed application fee;
 - (b) prescribed fees for the following services:
 - (i) locating and retrieving the record;

¹ See for example, F09-05, 2009 BCIPC 8 (CanLII), para. 7.

- (ii) producing the record;
 - (iii) preparing the record for disclosure, except for time spent severing information from the record;
 - (iv) shipping and handling the record;
 - (v) providing a copy of the record.
- (2) Subsection (1) (b) (i) does not apply to the first 3 hours spent on a request.
- (3) Subsection (1) does not apply to a request for the applicant's own personal information.
- (4) If an applicant is required to pay fees for services under subsection (1) (b), the head of the public body
- (a) must give the applicant a written estimate of the total fees before providing the services, and
 - (b) may require the applicant to pay a deposit in an amount set by the head of the public body.

[9] The SCRD provided its first estimate of the fees almost two months after receiving the access request and over a month after contacting the applicant to clarify certain aspects of his request. It estimated the fees as follows:

Locating, retrieving and reviewing for responsiveness	\$270
Producing and preparing the records for disclosure	\$150
Scanned pages (700)	<u>\$ 70</u>
Total	<u>\$490</u>

[10] The SCRD issued a revised estimate two months later as follows:

Producing, organizing and preparing records	\$1200
Administrative processes	\$1170
Searching for records	<u>\$ 420</u>
Total	<u>\$2790</u>

[11] As a result of the mediation process with the OIPC, the SCRD issued a third fee estimate seven months later as follows:

Locating, retrieving and reviewing for responsiveness	\$ 960
Producing and preparing the records for disclosure	\$1305
Scanned pages (700)	<u>\$ 70</u>
Total	<u>\$2335</u>

[12] The SCRD submits that it calculated the original fee estimate in good faith and explains that the discrepancies between the estimates are as a result of the complainant changing the time frame of the request and “unusually complex groups of inter-related records from multiple programs and departments requiring extensive hours to assemble into one package.” The SCRD asserts that it had to retrieve many records that it had stored as links in electronic documents. Once it commenced the search, it located additional records and many of them were duplicates that it had to sort and remove. It also took time to assemble the records in a comprehensible manner.²

[13] The SCRD submitted a series of worksheets to demonstrate the number of hours its employees have spent on processing the request.³ It notes that the fee estimate covers only a portion of the costs that it has incurred. It asserts that it has worked hard to process the request as timely and efficiently as possible and to provide fee estimates that are appropriate and reasonable.⁴

[14] The complainant submits that the purpose of the request was to find out: (1) what the SCRD knows about the threat to his property, (2) what the SCRD was going to do about it, and (3) whether the Ministry of Environment was aware of what the SCRD was planning. He contests the SCRD’s argument that the change in time frame of the request caused the increase in responsive records and a subsequent increase in fees. He points out that he made this change prior to the SCRD issuing its first fee estimate. Therefore, the first estimate already incorporated this increase in the timeframe. The complainant also expresses concern about the SCRD consistently missing its time limits for responding to him. He suggests that this is grounds for expecting the SCRD to waive the remaining fee. He believes that it is unfair for the SCRD, despite failing to meet its timelines, to increase the amount of the fee he must pay by five times the original estimate.⁵

[15] He also submits that it is unfair for the SCRD to provide him with an estimate and, after taking his money, to require a further deposit prior to completing the work. He also points out that the information that he has received in the first two phases of the release consists of pages of records severed entirely or almost entirely. He asserts that the information that he has received so far is meaningless and of no value. He summarizes his experience as,

An FOI is met with contempt for Legal Timelines, outrageous fees, and two phases of documents that include zero meaningful information. Just a lot of blacked out pages. The FOI fee is both unreasonable and unauthorized.⁶

² SCRD initial submission, p. 1.

³ SCRD’s initial submission, Item 2, Item 4, Item 12, Item 13.

⁴ SCRD’s initial submission, p. 3.

⁵ Complainant’s response submission, second page.

⁶ Complainant’s response submission, p. 4.

[16] He submits that an appropriate remedy would be for him to receive records and the fee to be reduced to the amount he has already paid.⁷

Analysis

[17] The purpose of s. 75 of FIPPA is to permit public bodies to recover a small portion of the costs incurred legitimately while processing requests, but only for the time spent on certain activities. The provisions of s. 75 require public bodies to provide an estimate of the fees they propose to charge to ensure that applicants have a reasonable expectation of the costs that they likely will incur.

[18] It is important for public bodies to calculate these estimates as quickly as possible to ensure that there is no undue delay to the processing of the request. FIPPA does not require public bodies to commence the search for records while generating the estimate. Public bodies need only make an informed guess, based on what it would be reasonable to expect as to the time spent searching for records and the approximate number of pages of responsive records.

[19] Given that public bodies must generate fee estimates prior to commencing the work, it is reasonable to expect that there may be divergence between the original estimate and the actual costs payable. While there might be a need for minor adjustments, the increasing of fees far beyond original expectations could raise questions about whether a public body has handled a request properly.

[20] The provisions in s. 75 allow public bodies to require the applicant to pay a deposit before they commence the work of processing the request. Once an applicant has paid a deposit, the public body must comply with the timelines of FIPPA in producing the records to the applicant. When the records are ready to be disclosed, the public body may require the applicant to pay the remainder of the fee prior to disclosure.

[21] Section 75 permits public bodies to charge fees for the follow activities:

1. Locating and retrieving a record
2. Producing a record
3. Preparing a record for disclosure
4. Shipping and handling a record
5. Providing a paper or scanned copy of a record

[22] I will examine how the SCRD has calculated its fees in accordance with these categories.

⁷ Complainant's response submission, pp. 1-4.

Locating and retrieving a record

[23] Public bodies may charge for staff time spent locating and retrieving a record. This involves identifying possible physical or electronic files where responsive records may reside and the act of examining those files and extracting the responsive records. Public bodies need search only those file locations where it is reasonable to expect that responsive records may reside. There is no requirement to search every file location just in case responsive records may be there.

[24] In its initial fee estimate, the SCRD projected that locating and retrieving the records (as well as reviewing the records for responsiveness) would take about nine hours. Its revised fee estimate did not calculate time for the activities of locating and retrieving records. Instead, it issued an estimate of 14 hours for searching for records. It is unclear whether “searching for records” incorporates all of the activities involved in locating and retrieving records. The SCRD indicates that the increase in the amount of time required was a result of the need to search for a greater number of records because the complainant increased the scope of request in terms of the dates of the responsive records. I note that this is inconsistent with the facts as I find them, as the first fee estimate already incorporated the increased time frame of the request. The SCRD also noted that the way it stores some of its electronic files made it more difficult and time consuming than originally anticipated to retrieve records in those files.

[25] In its third estimate, it projected locating and retrieving the records at 302 hours. While SCRD has provided tracking sheets indicating the number of hours spent, it has not provided a sufficient explanation as to why it needs the equivalent of more than 40 working days just to locate and retrieve the records. The timesheets include one that estimates locating and retrieving time to be 12 hours.⁸ Another tracking sheet indicates 32 hours for searching and retrieving. The tracking sheet for “Actual times spent on chargeable tasks” does not clearly indicate where staff were searching or why.⁹ These tracking sheets do not directly reflect the specific categories of activities in the way that s. 75 identifies them. They do not clearly indicate the amount of time estimated or spent on each of the eligible categories separately.

[26] I note that the request relates to environmental concerns with respect to a very specific location. It includes records of studies relating to the threat to the complainant’s property, confirmation of which remediation option the SCRD had decided to implement and copies of records indicating the approval of a Ministry of the government of BC. These are all very specific documents. Given the environmental issue at stake, it is reasonable to expect that there would be

⁸ SCRD’s initial submission, Item 4.

⁹ SCRD’s initial submission, Item 2.

a project file that would contain most of these records that would not take long to locate. The portion of the request relating to notes, memos and correspondence about the issue and the project is of a broader scope. Nevertheless, a public body is only required to search files where it is reasonable to expect that responsive records would reside. It is surprising that a public body the small size of the SCRD would have responsive records stored in the number of disparate files that would take 302 hours to search. The SCRD has not explained why this is the case.

[27] I also note that the first fee estimate projected that the number of pages of responsive records would be 700 pages and the third fee estimate is for the same. This brings into question why the amount of search time should increase from 9 hours to 302 for roughly the same number of pages of records. The only explanation that SCRD has provided is that it stored some of the records in electronic files in a way that made it time consuming to retrieve.

[28] The explanation the SCRD provided is vague and lacks sufficient detail to persuade me that it has correctly calculated the fees for locating and retrieving a record.

Producing the record

[29] This activity commences after the public body has retrieved all of the responsive records. It involves creating a working copy of the records and returning them to their original file. A public body may not charge the per page cost of copying for producing its working copy of the record but may charge for the time involved by the employees engaged in these activities. The per page cost of copying applies only to the copy to be delivered to the applicant.

[30] The SCRD has not provided a specific estimate for this activity. It has merged this activity with that of preparing the record for disclosure rendering it more difficult to discern whether the estimate complies with s. 75.

Preparing records for disclosure

[31] This activity involves the actions of preparing the applicant's copy of the records that the public body delivers. This includes the actions of creating the copy that the public body will disclose to the applicant. As some records in the public body's working copy may be stapled or joined by paper clips, this involves the time the employee spends preparing the records for the photocopier or scanner and the time returning those records to their original state.

[32] The SCRD originally estimated that the combined activities of producing the record and preparing the record for disclosure would take five hours. It increased this to 40 hours for the revised estimate and 43.5 hours for the final

estimate. It has not explained the reasons for this increase. While the SCRD has indicated that the way it stores electronic records creates obstacles to the searching and retrieving of the records, it would have no affect on the producing of the records or preparing them for disclosure. Producing and preparing records for disclosure relates mostly to volume of pages involved, which was largely unchanged from the first estimate. The SCRD has not explained why the time to copy the same number of records increased by such a considerable extent.

[33] By way of comparison, I note that, in Order 04-10, the District of West Vancouver estimated the charges for producing and preparing 394 pages of similar records to be six and a half hours. The adjudicator found this estimate to comply with s. 75.¹⁰ The SCRD has not explained why it requires 43.5 hours to produce and prepare 700 pages, when the District of West Vancouver can produce and prepare more than half the number of pages in only 6.5 hours.

[34] Therefore, the SCRD has not persuaded me that it has correctly applied the fees for producing the record or for preparing the record for disclosure.

Shipping and handling the record

[35] The SCRD has not indicated that it has estimated fees for shipping and handling.

Providing a scanned copy

[36] The SCRD has estimated charges for providing scanned copies of 700 pages of records to be \$70. This estimate conforms to the Schedule of Maximum Fees in Schedule 1 of the *Freedom of Information and Protection of Privacy Act* Regulation, which permits charging \$0.10 per page.¹¹ However, the SCRD has already provided the complainant with responsive records, and the copies the complainant has provided to me consist of blank pages and pages containing no meaningful information because the SCRD has withheld it all in accordance with the exceptions to disclosure.

[37] FIPPA is silent about charging applicants for blank pages, but a reasonable person would conclude that applicants should not pay when they receive nothing in return. This also would apply to charging for pages that contain merely headings. I note that the SCRD indicated that there were duplicates of some records. I do not know whether the SCRD has disclosed duplicate records to the complainant and is proposing to charge him for multiple copies of the same information. However, a reasonable person would conclude that applicants should not pay twice for the same information.

¹⁰ Order 04-10, 2004 BCIPC 34265 (CanLII), paras. 14-16.

¹¹ B.C. Reg. 155/2012.

Other charges

[38] The revised fee estimate included fees assessed for “Administrative processes”, which it appears from documentation before me included charges for severing the records and consulting with third parties about the disclosure of information. FIPPA does not permit public bodies to charge for these activities. From the correspondence before me, it appears that, once the OIPC commenced its review, the SCRD removed the charges for these activities. However, the fact that the SCRD originally charged fees for activities that are clearly unauthorized by s. 75, brings into question the soundness of the other portions of its fee estimates.

[39] In summary, the SCRD has failed to persuade me that it has correctly applied s. 75 in calculating its fee estimates. Its evidence is vague and confusing in places, and it fails to estimate the fees in accordance with the discrete activities as s. 75 describes them. Two other considerations bring its estimates into doubt. The first is that it originally charged for activities contrary to FIPPA. The second is the considerable discrepancy between the original estimate and the later estimates despite the fact that they all related to the same number of pages of records.

[40] Based on the evidence before me, it appears that the first fee estimate was the most accurate reflection of the authorized charges in this case.

[41] Therefore, I find that the fee of \$2335 is not authorized by s. 75 of FIPPA.

[42] **What is the appropriate remedy?** – Section 58 of FIPPA gives me the authority to dispose of the matter in this inquiry. The relevant passage reads as follows:

58 (1) On completing an inquiry under section 56, the commissioner must dispose of the issues by making an order under this section.

...

(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:

...

(c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;

[43] One of the relevant considerations for a decision to confirm, excuse or reduce a fee is whether the public body processed the request within the time limits of FIPPA. Along with the first fee estimate, the SCRD provided notice that it was extending the timelines for responding by 30 days in accordance with s. 10(1)(b) of FIPPA and informed the complainant of the new due date. Public bodies may only take such extensions prior to the expiration of the original

30-day time limit. FIPPA does not permit public bodies to take an extension after the expiration of that time limit. When it applied to the OIPC for a further time extension under s. 10(2), the OIPC denied the request on the grounds that the SCRD had already exceeded the time limits that FIPPA required.¹² I rely on this finding of the OIPC to conclude that the SCRD did not meet the necessary timelines.

[44] Another relevant consideration is that the complainant has requested information relating to a risk to his property resulting from the actions of the SCRD. He paid the deposit in person the day after receiving the first fee estimate. The information clearly is important to him. He appears from the evidence before me to have acted in good faith.

[45] On the other side, the SCRD took a considerable amount of time in responding to him with the first fee estimate. Several months later it issued a greatly increased fee estimate without providing sufficient justification. This estimate also included costs it was not authorized to charge. It has produced some records, but many are virtually blank or otherwise devoid of any meaningful information. SCRD submits that it has worked hard to process the request as timely and efficiently as possible and to provide fee estimates that are appropriate and reasonable, but the evidence before me does not support this conclusion.

[46] Weighing all of the relevant considerations, I find that it is appropriate to excuse all fees above the \$245 deposit the complainant has already paid.

[47] In summary, I have found that the first fee estimate was authorized and reduce the fee chargeable to the original fee of \$490. Furthermore, I excuse the complainant from having to pay the remaining \$245. I require the SCRD to complete the processing of the complainant's request and to respond with all remaining records by 30 days from the date of this Order.

CONCLUSION

[48] For the reasons given above, pursuant to s. 58:

1. I find that the fee of \$2335 is not authorized by s. 75 of FIPPA;
2. I reduce the fee chargeable to the original estimate of \$490 and excuse the complainant from paying the outstanding balance of \$245; and
3. I order the SCRD to complete the processing of the complainant's request and to disclose the outstanding records to the complainant within 30 days of the date of this Order.

¹² SCRD's initial submission, Item 5.

[49] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **July 19, 2022**.

June 6, 2022

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F21-87097