



Order F22-37

CITY OF VANCOUVER

Lynn Muldoon
Adjudicator

August 11, 2022

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Summary: The applicant, the Vancouver Dispensary Society (Society), complained about the City of Vancouver's (City) denial to waive their fee for an access request. The City estimated the fee would be \$28,432.50 to process the request. The adjudicator found the Society had not established a fee waiver was warranted under s.75(5)(a) (fair to excuse payment) or s.75(5)(b) (public interest) and confirmed the fee.

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

INTRODUCTION

[1] This decision resolves a fee dispute between the access applicant, the Vancouver Dispensary Society (Society), and the public body, the City of Vancouver (City).

[2] The Society requested the City, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), provide records related to the 4/20 cannabis protests and two storefronts operated by the Society that are current or former locations selling cannabis products.¹

[3] The City responded to the Society's request by issuing a fee estimate of \$28,432.50. The Society requested the City grant it a fee waiver under s. 75(5)(a) (fair to excuse payment) and s. 75(5)(b) (public interest) of FIPPA. The City denied the request stating that the Society's request is "excessively broad" and the Society is unwilling to narrow down the scope of the request.

¹ The City's response submission at para. 13 and the Society's Access Request dated June 25, 2021.

[4] The Society asked the OIPC to review the City's decision. Mediation failed to resolve the matter and the Society requested that it proceed to inquiry.

PRELIMINARY ISSUES

[5] In their submissions, the Society raises issues that fall outside the scope of s. 75(5)(a) or (b).

[6] First, the Society has argued that the City did not provide a justification or breakdown of the assessed fee. Section 75(4)(a) of FIPPA requires a public body to provide the applicant with a written estimate of the total fees before providing the services. Whether a public body provided a justification for charging a fee and a breakdown or explanation for how it determined the fee are separate issues than whether the fee should be waived under ss. 75(5)(a) or (b).

[7] Further, the Society has argued that the City's fee assessment is not proportionate to the work that needs to be done. In my view, this relates to the calculation of the fee as set out in ss. 75(1), (2) and (3) and the Freedom of Information and Privacy Regulation, rather than whether the fee, as calculated, should be waived under s. 75(5)(a) or (b).

[8] The Society, however, does not appear to raise these new issues in an attempt to expand the scope of the inquiry. Rather, the Society raises these issues to support their position on s. 75(5)(a) to argue why a fee waiver should be granted. Moreover, the only remedy the Society seeks from this inquiry is a fee waiver. The Society's fee complaint letter to OIPC dated September 7, 2021 contains these issues and the Society had opportunities to add them during the investigation and mediation phase of the FIPPA review process but it did not do so. For these reasons, I find that it is fair to limit the issues in this inquiry to whether the estimated fee for the June 25, 2021 request should be waived in whole, or in part, under s. 75(5)(a) or (b). To be clear, I will only address the parties' submissions as they are relevant to this issue.

ISSUES

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

[10] 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 have the burden of establishing that a fee waiver or reduction should be granted under s. 75(5).²

² Order F20-14, 2020 BCIPC 16 (CanLII), at para. 8, and Order F21-10, 2021 BCIPC (CanLII), at para. 24.

DISCUSSION

Background

[11] The Society operates a number of charitable organizations and offers a drug testing service under the name “Get Your Drugs Tested”.³ The Society is also the operator of the two storefronts included in the Society’s access request.⁴

[12] On June 25, 2021 the Society made the following access request to the City:

All records, documents, complaints, emails, notes, correspondence and reports (both internal and external) within the departments of the City of Vancouver; Board of Parks and Recreation; Finance and Risk and Business Planning; Development, Buildings and Licensing; Legal Services; Civic Engagement and Communications; and Real Estate and Facilities Management relating to the annual April 20th 4/20 cannabis protest, Vancouver Dispensary Society, storefronts at 880 East Hastings Street and 1182 Thurlow Street from January 2010 to June 2021.⁵

[13] The City acknowledged the request and issued a fee estimate of \$28,432.50 based on the anticipated 950.75 hours of work to complete the request. The Society asked for a fee waiver, but the City denied the Society’s fee waiver request.

The charging and waiving of fees under FIPPA – section 75

[14] Section 4(3) of FIPPA states that the right of access to a record is subject to the payment of fees, if any, 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 and retrieving the record;
- producing the record;
- preparing the record for disclosure;
- shipping and handling the record; and
- providing a copy of the record.

[15] However, those fees must not include the first three hours spent locating and retrieving a record or time spent severing information from a record.⁶ A public body also cannot charge a fee where an applicant requests their own personal information.⁷

³ The Society’s September 7, 2021 submission at p.16.

⁴ The City’s response submission at para. 13.

⁵ The City’s response submission at para. 24.

⁶ Section 75(2) of FIPPA.

⁷ Section 75(3) of FIPPA.

[16] 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.⁸ The head of a public body may excuse an applicant from paying all or part of a fee in accordance with s. 75(5)(a) or (b):

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)

[17] 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.⁹

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

[18] Under s. 75(5)(a), the head of a public body may excuse payment of a fee if, in the head of the public body's opinion, the applicant cannot afford the payment.

[19] The Society did not request a fee waiver on the basis that it could not afford to pay. Therefore, it is not necessary to consider if the City should excuse the Society from paying the fee because it cannot afford to pay.

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

[20] Under s. 75(5)(a), the public body may also waive a fee where they consider it fair to do so. As I mentioned above, the burden is on the party seeking a fee waiver to provide reasons and evidence to show that a fee waiver would be fair in the circumstances.¹⁰

[21] The Society provides several reasons for why it would be fair to excuse it from paying the fee. Firstly, the Society says the amount of the fee estimate, \$28,432.50, is not affordable by the average British Columbian thus it is a

⁸ Order 01-04, 2001 CanLII (BC IPC) 21558 at para. 25.

⁹ Order F21-10, 2021 BCIPC (CanLII), at para. 28, and Order F20-14, 2020 BCIPC 16 (CanLII), at para. 14.

¹⁰ Order F21-18, 2021 BCIPC 23 (CanLII) at para. 6.

“deemed refusal to comply”. The Society argues that the amount is not proportionate to the work that needs to be done by the City, and that the City has not provided any breakdown of the fee estimate despite the Society’s requests. The Society further argues that the fee should be waived for fairness because the Society significantly reduced the scope of their request as per the City’s request and they have already spent time and cost to communicate with the City to do so.¹¹

[22] In response to the Society’s submission, the City provides affidavit evidence from the City’s Director of Permitting Services explaining the record management systems and search processes it used to fulfill the Society’s access request.¹² The City also explains the challenges in gathering the records requested by the Society due to the type of business of the two storefronts and the lengthy timeframe for the request. The City submits that, because the records relate to cannabis retail stores, they involve multiple City departments and municipal and provincial licensing approval requirements. The City submits that, due to the fact that the Society is operating without a permit¹³, there are many records relating to enforcement actions.

[23] In reply, the Society says that the type of business and the contents and subject matter of a request should not be a reason to charge a higher fee. The Society also says that it “should not be punished by having to pay higher fees because of the [City]’s inability to conduct searches in an efficient manner.”¹⁴

[24] As I mentioned above, the Society’s submissions raise issues that are not relevant to whether the Society is entitled to a fee waiver under s. 75(5)(a) or (b), or both, of FIPPA. I will only discuss the relevant arguments below.

[25] For the reasons that follow, I find that circumstances and evidence do not support fee waiver on the basis that it is fair to excuse payment under s.75(5)(a).

[26] With regard to the Society’s argument that the fee is so large for the average British Columbians could afford, the Society says the fee is “essentially a deemed refusal to comply”¹⁵. However, the Society is not an average British Columbian. They are not a person - they are a corporate entity. They are a Society and they have not said they can’t afford to pay. The Society is not suggesting their inability to pay in this argument; rather, they suggest that the fee should be waived for fairness reasons because the fee is so high for other British Columbians that it prohibits access. In my view, whether someone else cannot afford the fee is irrelevant to whether it is fair for the Society to pay.

¹¹ The Society’s September 7, 2021 submission at p. 13-14.

¹² Affidavit of OC, the Director, Permitting Services for the City.

¹³ The City’s response submission at para. 21.

¹⁴ The Society’s reply submission at p. 3.

¹⁵ The Society’s September 7, 2021 submission at p. 13.

[27] Also, while my understanding of the term “deemed refusal” in this context is that the City is refusing to provide access to the records by setting a high fee, this term has a different meaning under s. 53(3) of FIPPA. The term “deemed refusal” means that a public body failed to respond within the legislative time frame. However, there is no evidence that the City has refused to respond to the access request. FIPPA allows the City, under s. 7(4) and (5) to hold the access request until the fee is paid or the Society’s dispute of it is concluded.

[28] Lastly, the Society argues that it would be fair to completely waive the fee because the Society had to spend time and money communicating with the City about the scope of the June 25, 2021 access request as well as its previous access requests. It appears that the Society is suggesting that the fact that the City contacted the Society to reduce the scope of current and past access requests demonstrates the City’s wrongdoing or that the City was acting in bad faith. The public body asking the access applicant to narrow the request or reduce the scope is not an unusual occurrence and it is a sound practice for a public body to use when a request is as broadly worded as the Society’s June 25, 2021 request. Former Commissioner Loukidelis states, in his Order 00-33¹⁶:

...public bodies in any case have an incentive to contact applicants to clarify requests. By doing this, it may be possible in some cases to reduce a request’s scope, thus promoting efficiency and reducing costs associated with request processing. It may also increase the applicant’s understanding of what the public body has done for the applicant, thus reducing the chances of a request for review being lodged under s. 52 of the Act respecting the public body’s discharge of its s. 6(1) duties.

[29] I do not accept that such communication took place means the City did something wrong and consequently that fairness requires excusing the Society from paying the fees.

[30] In conclusion, I do not find that the Society established a fee waiver is warranted under s. 75(5)(a) of FIPPA.

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

[31] Previous orders have set out a two-step process to determine 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.¹⁷ An applicant’s intention to use the records in a manner that relates to the public interest does not suffice. Nor does an applicant’s identification of public interest issues as the motivation for the access request.¹⁸

¹⁶ Order 00-33, 2000 CanLII 14398 (BC IPC) at p.6.

¹⁷ Order 03-19, 2003 CanLII 49192 (BC IPC) at paras. 36–37; Order F19-09, 2019 BCIPC 11 (CanLII) at para. 13.

¹⁸ Order F21-48, 2021 BCIPC 56 (CanLII) at para. 18.

[32] If the records do relate to a matter of public interest, the second step is to decide whether the applicant should be excused from paying all or part of the estimated fee.¹⁹

[33] 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?
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?²⁰

[34] I will now apply this test to the facts of this case.

Have the subjects of the records been a matter of recent public debate?

[35] The first factor is whether the records have been a matter of a recent public debate. It is clear from previous OIPC decisions that the relevant time frame to gauge whether the debate was “recent” is at the time of the access request and the public body’s response.²¹

[36] The Society argues that the 4/20 cannabis protests have attracted massive public attendance in the past, which shows that cannabis is a matter of public interest.²² The Society also submits that cannabis and cannabis dispensaries, over the past 26 years, have been a matter of public debate and received extensive media coverage.²³ For both arguments, the Society cites the 420 Vancouver website²⁴ (420 Website) and an external link²⁵, provided on the

¹⁹ Order F21-10, 2021 BCIPC 14, at para. 32.

²⁰ Order F21-10, 2021 BCIPC 14, at para. 33.

²¹ Order F19-09, 2019 BCIPC 11 (CanLII) at para. 26.; Order No 332–1999, 1999 CanLII 4202 (BC IPC) at p. 9.

²² The Society’s September 7, 2021 submission at p. 15.

²³ The Society’s April 5, 2022 submission at p.18 and the Society’s September 7, 2021 submission at p. 15.

²⁴ <https://420vancouver.com/>.

²⁵ https://www.huffpost.com/entry/420-meaning-the-true-stor_n_543854.

website, to an article related to the history of “weed day” (Cannabis History Article), as supporting evidence. Further, the Society says that public interest in cannabis and cannabis dispensaries resulted in various court cases, such as *Vancouver (City) v Karuna Health Foundation*²⁶ (*Karuna Health*).

[37] The Society says the City’s Board of Variance’s recent meetings on cannabis retail applications and appeals demonstrate the public interest in cannabis. These meetings, the Society says, “have been overwhelmed with the number of attendees and guest speakers.”²⁷ To support their claim, the Society references an article on the cannabislifenetWORK.com website dated April 21, 2016 (Cannabis Article).

[38] The City submits that none of the subjects of the records – the annual 4/20 cannabis protests and two storefronts related to the Vancouver Dispensary Society – have been the subject of recent public debate. In relation to the Society’s two storefronts, the City submits that there is no evidence that the Society itself has been a matter of recent public debate. While the City acknowledges that aspects of cannabis retail stores, in general, have been a matter of public debate, the two specific stores in the access request, or the Society, or the City’s involvement with them have not been a matter of public debate.²⁸

[39] With regard to the annual 4/20 cannabis protests, the City argues that it is a broad topic and there is no evidence that such a broad topic, as a whole, or as it relates to the City, has been a matter of public debate. The City acknowledges that there are specific issues related to the 4/20 cannabis protests, such as potential alternative sites or cost recovery, that have drawn public attention but not the 4/20 cannabis protests in general. The City also submits that the 4/20 events have been cancelled since 2020 due to Covid-19.

[40] For the reasons following, I find that the subject of the records has not been a matter of recent debate.

[41] The 420 Website and two articles, the Cannabis History Article and the Cannabis Article, do not, in my view, demonstrate that the subject of the records was a matter of recent public debate. The 420 Website does not contain much information that may be viewed as “public debate”. At the time of my review, the landing page of the 420 Website shows a few links to the organization’s social media posts and photos as described below:

- Instagram post stating that there will be no official gathering for 420 Vancouver 2021 due to Covid-19 (March 31, 2021).

²⁶ *Vancouver (City) v Karuna Health Foundation* 2018 BCSC 2221.

²⁷ The Society’s April 5, 2022 submission at p.19.

²⁸ The City’s response submission at para. 76.

- Instagram post stating that there will be no official event this year due to Covid-19 (June 29, 2020).
- Instagram posts inviting people to online live coverage of 420 Vancouver’s music and historical clips (April 20, 2020).
- Photos of past 420 Vancouver events.

[42] These posts are one-way announcements to the 420 Vancouver social media subscribers to provide updates on 420 Vancouver’s events. In my opinion, these kinds of post do not support the Society’s position that the subjects of the records have been a matter of public debate.

[43] In relation to the Cannabis History Article, at the time of my review, the page contains a link to a news article from April 2010, which was last updated in April 2017. This article is titled “420 Meaning: The True Story of How April 20 Became ‘Weed Day’”. This article was written about 11 years prior to the Society’s access request, or updated four years prior to the access request. I find that this is too dated to be considered a “recent” public debate.

[44] Similarly, the Cannabis Article regarding the City of Vancouver’s meetings was published in April 2016, which is about four years prior to the access request. Again, I find that the Cannabis Article is too dated and not evidence of recent public debate.

[45] Lastly, I am not persuaded that *Karuna Health* demonstrates that the subject matter of the records is a matter of recent public debate. This case was initiated by the City seeking injunctive relief against several respondents operating medical cannabis dispensaries without a business license. The hearing took place in September 2018 and the decision was made in favour of the City in December 2018. This matter was brought to the court not because of public interest, but rather because of cannabis retailers’ non-compliance with the City bylaws. This case was decided about two and half years prior to the access request and therefore I find it is not “recent”.

[46] In conclusion, I am not persuaded that the subject of the records has been a matter of recent public debate.

Do the subjects of the records relate directly to the environment, public health or safety?

[47] The Society’s submission does not provide evidence that the records related to the 4/20 cannabis protests or two storefronts relate directly to the environment, public health or safety. Instead, their submission includes the Society’s community contributions and how their contributions are related to public health and safety. I find that the Society’s community contributions are

unrelated to determining whether the records themselves are related to public health or safety.

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

[48] The next factor to consider is whether disseminating or use of the information in the records could reasonably be expected to yield a public benefit.

[49] The Society's submission contains background information about the Society and its contributions to the community. The purpose of their request, the Society says, is for public education and awareness. The Society also says that the request is to "[look] for insight on what the [City]'s position is on cannabis use for harm reduction tactics in order to promote public health and safety while staying within the [City] guidelines and policies."²⁹ The Society argues that "the requests made by our office would help to disseminate information and provide clarity to the public on why certain proceedings, policies, laws, programs, and services are continued or discontinued in and around Vancouver."³⁰

[50] The City describes the Society's access request as a "broad fishing expedition",³¹ and the broad scope of information cannot be expected to yield a public benefit. It argues that such a broad scope of information renders the public interest test meaningless. Further, the City submits that the Society does not show how the records, if disseminated, would provide clarity to the public on why certain proceedings, policies, laws, programs, and services are continued or discontinued in and around Vancouver. The City states that due to the nature of the protests, the records contain a wide variety of subjects from event logistics, to permitting and park maintenance.³²

[51] Based on the submissions made by the City and the Society, I am not persuaded the records related to the 4/20 cannabis protests or two storefronts could, if disseminated, provide clarity to the public on why certain proceedings, policies, laws, programs, and services are continued or discontinued in and around Vancouver. It is not clear how the records related to the protests and the protest organizations contribute to the public's understanding of the City's important policy, law, program or service.

²⁹ The Society's April 5, 2022 submission at p. 19-20.

³⁰ The Society's September 7, 2021 submission at p. 19.

³¹ The City's response submission at para. 85.

³² The City's response submission at para. 12.

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

[52] The Society's submission did not address this question. The City submits that there is "a small subset of the records relating to cost recovery for the 4/20 cannabis protest [that] could potentially disclose how the City is allocating financial or other resources."³³

[53] What the City says is vague. Without any other submissions or explanations on this point, it is unclear to me how the records relating to cost recovery would disclose how the City allocates financial or other resources.

Conclusion on first step of s. 75(5)(b)

[54] In conclusion, I do not find the records related to 4/20 cannabis protests and two storefronts have been a matter of recent public debate for the purpose of s. 75(5)(b). I conclude that the records do not relate directly to public health and safety, and disseminating the information in the records is not expected to yield a public benefit. Finally, I am not satisfied that the information in the records discloses how the City allocates financial or other resources. For these reasons, I do not find the first part of the public interest test is satisfied.

[55] Since the first part of the public interest test is not met, I need not consider whether the Society should be excused from paying all or part of the estimated fee.

Summary on s. 75(5)(a) and (b)

[56] In summary, I find that the Society has not established that it would be fair for the City to excuse the fee under s. 75(5)(a) of FIPPA. The Society does not argue that they are unable to pay. I also find that the Society has not met its burden under s. 75(5)(b) of establishing that the records relate to a matter of public interest.

³³ The City's response submission at para. 87.

CONCLUSION

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

August 11, 2022

ORIGINAL SIGNED BY

Lynn Muldoon, Adjudicator

OIPC File No.: F21-87980