

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 118-1996
August 27, 1996**

INQUIRY RE: The adequacy of a search by the Ministry of Transportation and Highways for records responsive to an applicant's request

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 5, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This request for review arose from an allegation by the applicant that the Ministry of Transportation and Highways (the public body) had failed in its duty to the applicant to carry out a thorough search for records responsive to the applicant's request.

2. Documentation of the inquiry process

This inquiry arose out of a request for review submitted to this Office on December 29, 1995.

On September 30, 1995 the applicant requested from the Ministry "all written correspondence/fax/recorded telephone conversations between [Chief] Allen Stager or the Mount Currie Band [of the Lil'Wat Nation] or the Mount Currie Band Council or the law firm of Mandell Pinder or lawyers working for the firm of Mandell Pinder and Ministry of Transportation & Highways or individuals working for Ministry of Transportation and Highways in regard to roads on the Mount Currie Indian Reserve lands including the Lillooet Lake road (also ref. to as Highway 99 through the reserve and/or Duffy Lake Road) all records between January 1, 1994 to date."

The Ministry located eleven records in response to the applicant's request, three of which it released to the applicant immediately. The remaining eight records were withheld pending consultations with third parties. On December 1, 1995 the Ministry released these eight records to the applicant.

On December 29, 1995 the applicant submitted a request for review to this Office, stating that the Ministry had not completed his request for all the information he sought. He also stated that he was seeking the assistance of the Office to determine whether the Ministry had conducted a reasonable search for the records.

The Ministry subsequently carried out a further search of its Pemberton/Whistler Sub-Office, its Howe Sound District Office, and its South Coast Regional Office, and in the process of that search succeeded in locating five additional records which met the applicant's request criteria. It notified the applicant of that fact on February 7, 1996. These records were withheld pending consultation with third parties. The Ministry assured the applicant that a decision on whether it would release the records would be communicated to him by February 27, 1996.

On February 26, 1996 the applicant sent this Office, with a copy to the Ministry, detailed reasons why he believed that there should be more than 16 records located as a result of the Ministry's search efforts.

On March 6, 1996 the Ministry released the five additional records referred to above. It was unsuccessful in locating any additional records which met the applicant's precise request criteria. The applicant asked for an inquiry on the issue of the adequacy of the Ministry's efforts in locating records under the original request criteria.

3. Issue under review at the inquiry

The issue under review is whether the effort by the Ministry in searching for records responsive to the applicant's request was adequate in light of the Ministry's duty to assist the applicant set out in section 6 of the Act. The relevant portion of the section reads as follows:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

4. The burden of proof

Section 57 of the Act, which establishes the burden of proof on parties in an inquiry into a decision to refuse an applicant access, is silent with respect to the adequacy of a search. However, as a public body is in a better position to address the issue of an adequate search, I have determined, in this and other cases, that the Ministry of Transportation and Highways has the burden of proving that it conducted an adequate search for the records that the applicant requested

5. The applicant's case

The applicant is a Band Member of the Mount Currie Indian Band and an elected member of the Lillooet Lake Road Task Force established by Band Council resolution. (Reply

Submission of the Applicant, pp. 20-22) He is seeking “all information pertaining to the negotiations that occurred between the parties involved in the paving project of the roads on the Mount Currie Indian Reserve Lands.” As indicated in his request for review, he is of the view that more records must exist for “an issue as complex and lengthy as the negotiations between the parties mentioned above concerning the roads on the Mount Currie Indian Reserve Lands including the Lillooet Lake Road (also referred to as Highway 99) through the reserve and/or Duffy Lake Road”

Based on internal analysis of the 16 documents that he has received to date from the Ministry, the applicant is persuaded that evidence exists of the need for a more complete search for documents: “The major project of negotiating with the Mount Currie Band and the [federal] Department of Indian Affairs would have heavily involved the three governments in much paper work, communications verbal and hard copies.” He is of the view that at various times the Ministry misled the Portfolio Officer handling the mediation process as to the extent of its search for relevant records. He believes that at times he was “confused and misdirected.” (Submission of the Applicant, pp. 2, 3, 6)

The applicant’s basic position is that the Ministry did not comply with the entirety of its obligations under the full language of section 6(1) and wants me to order it to comply fully with such terms. (Reply Submission of the Applicant, pp. 5-7, 8-11)

Where I have found it appropriate to do so, I have referred below to evidence and arguments advanced by the applicant in his detailed submission.

6. The Ministry’s case

The Ministry’s position is that only the “adequacy” of its search for records is at issue in this inquiry. Thus it argues that it has made “every reasonable effort” to assist the applicant within the meaning of section 6(1) of the Act under the criteria that I accepted and set out in Order No. 30-1995, January 12, 1995. (Submission of the Ministry, pp. 4-6) It searched the regional, district, and sub-district offices in the geographical area in which the subject matter of the applicant’s request is situated. The Ministry also searched the Minister’s Correspondence Unit, the Aboriginal Relations Branch Headquarters, and relevant Ministry files from offsite storage. In each of these offices, Public Body staff conducted searches that were thorough and comprehensive, and that were entirely consistent with the scope of the applicant’s request. (Submission of the Ministry, pp. 4, 5) This argument is supported by detailed affidavit evidence (Affidavit of Marni Fedoruk). Further, the Ministry instructed staff to conduct their searches on the basis of the parameters set out by the applicant.

7. Discussion

The context for this case

I conclude on the basis of records submitted to me that the context for this case is the desire of the Mount Currie Band to be involved in asphalt surfacing of various roads on its lands

and/or differences of views among members of the Band about the paving of the Duffy Lake road.

The contents of the applicant's submissions

The applicant made detailed submissions on the Portfolio Officer's fact report, alleging, for example, that differences among the parties in the dating of various events in the mediation process somehow indicated a failure to assist the applicant adequately. He also attacked aspects of the procedure followed by the Ministry in its submission. (Submission of the Applicant, pp. 2-4; see also the Reply Submission of the Applicant, *passim*; and the Reply Submission of the Ministry, paragraph 1) I find such minor matters irrelevant to the appropriate focus of this review on the specific requirements of section 6(1). I would caution all applicants that seeking to discredit public bodies (or vice versa) in the course of submissions on section 6 is neither a fruitful nor a productive approach to achieving their stated goals under the Act.

The effort to assist the applicant

The Ministry has submitted, by way of a detailed affidavit, a description of the standard process by which it searches for records responsive to an access request in its decentralized operations. It also documented its specific search efforts in this case according to the exact parameters set out by the applicant. I am satisfied that a systematic process exists in the Ministry to seek to be responsive to the needs of applicants under the Act and conclude that, overall, it made a reasonable effort to assist the applicant openly, accurately, and completely in the present matter. (Affidavit of Marni Fedoruk and accompanying exhibits) In drawing this conclusion, I have carefully considered the very detailed submissions of the applicant. (See Reply Submission of the Applicant, pp. 11-23) I should add that I am not persuaded by his efforts to impugn the integrity of the Ministry official who swore the affidavit in this case.

I note, however, that the Ministry only located additional records after the applicant had requested a review by my Office. The explanation offered by the Ministry for the additional records then uncovered is that unfiled records were not searched in the initial phase and that other additional records were not in a sub-district office when it was first searched. There is no explanation of where they were, but presumably they were in the custody and control of the Ministry (subject to the qualification advanced in the next paragraph) and could have been located earlier. (Affidavit of M. Fedoruk, paragraph 11; see also the Reply Submission of the Applicant, pp. 13-15)

The Ministry also advances the argument that some of the additional records found were ones that it "initially regarded as outside the scope of his request" as "it was worded and understood when received by the Public Body." In addition, its further search "also included records that are outside of the Public Body's custody but that may be under its control." (Reply Submission of the Public Body, paragraph 2.3) It should have searched for the latter category of records from the very start, because of the language of section 4(1) of the Act.

My primary concern is that this applicant had to make a request for review in order to receive a fully-responsive search. The process of requesting reviews would collapse of its own weight if such an “additional search” had to occur with respect to every request for records. I am encouraged that this is the first case of this sort that I have directly encountered, which I take as a positive sign of general compliance with section 6(1) by public bodies.

I expect the staff of public bodies to make a reasoned assessment of whether records uncovered after an initial search are adequately responsive to an applicant’s interests, depending presumably on their experience with the record-keeping practices of the Ministry in comparable matters. In particular, public bodies should, if practical, ensure that unfiled records are routinely searched and that records that may be in transit during the processing of a specific request are found and searched. I trust that this particular inquiry will serve as a wake-up call for this particular Ministry in these regards, especially given the detailed critique of the adequacy of its search processes advanced by the applicant. (See Reply Submission of the Applicant, pp. 1-23)

I also note the explanation of the Ministry that a number of its contacts with the Mount Currie Band on the issue of roads and paving were oral communications, which did not produce any written records subject to the Act. (Reply Submission of the Ministry, paragraph 2.2) If any public body maintains any kind of taped or written records of an oral communication, whether in person or by telephone, then such records are subject to the Act.

I am of the view that the Ministry has met its burden of proof under section 6(1) of the Act.

8. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section.

Under section 58(3)(a), I require the Ministry of Transportation and Highways to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, while I found that the Ministry’s initial search did not meet the standard under section 6(1), its subsequent efforts to locate further records were reasonable. Thus, I find that the Ministry of Transportation and Highways has complied with this Order and discharged its duty under section 6(1) of the Act.

David H. Flaherty
Commissioner

August 27, 1996