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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 154-1997
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INQUIRY RE: A decision by the Ministry of Forests to deny a request for a fee waiver from an applicant seeking records related to Clayoquot Sound

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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 on January 23, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Forests (the Ministry) to refuse a waiver for fees levied in connection with preparation and copying of records for Professor Warren Magnusson, Department of Political Science, University of Victoria (the applicant).

2. Documentation of the inquiry process

By letter dated June 20, 1996, the applicant requested from the Vancouver Regional Office of the Ministry copies of that office's files relevant to land use in Clayoquot Sound. The applicant stated in his request that these files would be catalogued for academic and archival (public) use and would as well be possibly used in an academic workshop and accompanying book. In responding to the applicant's request, the Ministry, by way of letter dated August 7, 1996, assessed a fee of $1,890.00 under section 75 of the Act for preparing the records for disclosure and supervising the viewing.

By letter dated August 23, 1996, the applicant narrowed the scope of his request and requested a waiver of all fees on the basis that this request for records was being made in the public interest. In response the Ministry, by return letter dated September 11, 1996, assessed a reduced fee of $1,410.00 for preparation of records and supervision of viewing. The Ministry declined to grant a waiver for any portion of the fees.

On September 25, 1996 the applicant wrote to my Office to request a review of the Ministry's refusal to grant a fee waiver.

3. Issue under review at the inquiry

The issue in this case is whether the applicant, representing the University of Victoria, should be excused from paying all or part of the fees requested by the Ministry under section 75(5)(b) of the Act, which reads as follows:

> ***Fees***
>
> 75(5) The head of a Ministry may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>
> ...
>
> (b) the record relates to a matter of public interest, including the environment or public health or safety.

The Ministry estimates that 33 hours of staff time will alone be required for the task of preparing the records for disclosure, which includes the time required to remove staples, copy pages for severing, and put the files back together so that the requested files can be made available for viewing. It has also estimated 14 hours of staff time as necessary to supervise the viewing of the records. Thus 47 hours of staff time are estimated for a total fee of $1,410.00. Photocopying costs are not included in this estimate, since the applicant and the Ministry agreed that the applicant would request copies of specific records as necessary after he had viewed them.

4. The burden of proof

The Act provides no specific guidance on the burden of proof to be applied in a request for a waiver of fees. However, I note that fees may be assessed by a Ministry in accordance with the Act and its regulations. To be excused from paying a fee under the Act is to receive a discretionary financial benefit; conversely, the province foregoes revenue to which it would otherwise be entitled under the Act. Thus it appears logical that the party seeking the benefit should prove its entitlement on the basis of the criteria specified in the Act. This places the burden of proof on the applicant in this inquiry. (See Order No. 90-1996, March 3, 1996, p. 3)

5. The applicant's case

The applicant points out that the "underlying issue in this case is access to information for scholarly purposes .... [I]t is one of the implicit purposes of the *Freedom of Information and Privacy Act* to facilitate legitimate scholarly research." He emphasizes that scholars "are involved in a non-profit activity, and normally cannot expect any 'return,' in a financial sense, for access to fuller and more accurate

information .... Scholarly research and scholarly publications are - almost by definition - 'in the public interest,' because they are intended for the public benefit. Their purpose is to advance knowledge, not to secure commercial or partisan advantage." The applicant's access requests are being made on behalf of the scholarly community in general.

The applicant emphasizes that he is "a well-established and reputable scholar" at a public university in this province. The main purpose of his several access requests (only one of which is at issue in this inquiry) is "to facilitate development of a public archive of materials that would be useful not only to scholars, but also to ordinary citizens in and out of the Clayoquot Region." In his view and that of other academic scholars, the land use disputes in and around the Sound are of great public significance for the present and the foreseeable future. Hence the need for a public research facility of the type that he and his colleagues are designing and promoting:

> The purpose of the prospective archive is to make *all* relevant materials about this matter of public interest available in a timely fashion and to ensure that these materials [are] organized and catalogued in a fashion that makes public use feasible. If, in these circumstances, scholars cannot expect a waiver of fees from the agencies concerned, it is difficult to understand when fee waivers would ever be granted to facilitate scholarly research ....
>
> Public access to information is essential for good government, and access by disinterested *scholars* is particularly important for ensuring that the quality of information available to the public is as high as possible.

The applicant is especially concerned that the Vancouver Forest Region of the Ministry of Forests has been "so insensitive to the value of scholarly research." He further points out that the conduct of this agency in particular "has been at issue in the complicated disputes over Clayoquot Sound."

6. The Ministry's case

The Ministry submits that the issue in this inquiry is whether it has complied with section 75(5)(b) of the Act with respect to the proper exercise of its discretion in declining to grant a total fee waiver to the applicant. (Submission of the Ministry, paragraph 3.01) Thus, in its view, the issue is not access to information for scholarly purposes but the appropriateness of the exercise of discretion. (Submission of the Ministry, paragraph 5.01)

The Ministry further submits that there are two steps in making a determination under section 75(5)(b): 1) deciding whether any of the requested records relate to a matter of public interest, and 2) whether or not to waive all or part of the fee if the answer to the first question is yes. (Submission of the Ministry, paragraph 5.02) The Ministry states:

> The head of a public body is clearly not *required* to excuse all or part of a fee. Therefore, even if an applicant cannot afford to pay an estimated fee or a record relates to a matter of public interest, the head of a public body can still exercise his or her discretion to refuse to waive part or all of the fee. (Submission of the Ministry, paragraph 5.03)

The Ministry further interprets my previous Orders to mean that I will not interfere with the discretion of the head of a public body to deny a fee waiver so long as the head has exercised his or her discretion in good faith.

The Ministry concludes that "there is no reason to interfere with the Public Body's decision not to waive all of the fees in this matter." (Submission of the Ministry, paragraph 5.09; Affidavit of Vander Beesen, Exhibit D)

7. Discussion

I wish to state for the record that I remain a professor of history and law at the University of Western Ontario.

I accept the argument of the Ministry that the crux of this inquiry is its exercise of discretion not to grant a partial fee waiver. However, evaluating the appropriateness of such a decision is an appropriate activity for me to undertake. I have said in previous Orders that the public body has the authority to determine what, in the head's opinion, is in the public interest under section 75(5)(b), subject to my oversight of any alleged failure to act in a reasoned manner on the issue. I have the authority to monitor suspected abuses of this section, particularly under section 42(2)(c). (Order No. 55-1995, September 20, 1995, pp. 7-9) My role is to ensure that the public body has exercised its discretion under section 75(5) in an appropriate manner. (Order No. 98-1996, April 19, 1996, p. 5)

The discretion of the head of the public body to grant a fee waiver is permissive and not mandatory. (Order No. 90-1996) Thus I agree with the Ministry that there are two steps involved in properly exercising discretion under section 75(5)(b). The first is for the head of the public body to form an opinion about whether all or part of the requested records relate to a matter of public interest. If they do, then the head must decide whether the applicant should be excused from paying all or part of a fee.

However, I disagree with the Ministry's narrow interpretation of the nature of the head's permissive discretion. If the head decides that the records do relate to a matter of public interest, he or she must be guided by proper considerations in deciding whether or not to grant a fee waiver. My previous Orders do not support the Ministry's argument that only an absence of good faith will justify an interference with the discretion of the head of the public body. While I endeavour to defer to the judgment of a public body, I am authorized under section 58(3)(c) of the Act to excuse or reduce a fee. I may do so in a number of instances, in addition to an absence of good faith, such as where the head has

taken into account irrelevant or improper considerations or acted with a purpose contrary to the Act.

The actual exercise of a public body's discretion

In this case, the Ministry did not apply the two-step process described in its submission. In its reasons to the applicant, the head combined the issue of the public interest with the discretion to waive fees. It appears that the head was of the opinion that at least some of the records related to a matter of public interest, and he waived fifty percent of the fees on this basis.

The two-step process should be applied as follows:

1. The head must consider the records requested and decide whether, in his or her opinion, they relate to a matter of the public interest. The focus should be on the nature of the information. To give some guidance to public bodies, I suggest that the following kinds of factors should be considered:

- has the information been the subject of recent public debate?
- does the subject matter of the record relate directly to the environment, public health, or safety?
- would dissemination of the information yield a public benefit by
    - disclosing an environmental, public health, or safety concern,
    - contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or
    - assisting public understanding of an important policy, law, program, or service?
- do the records show how the public body is allocating financial or other resources?

2. If the head decides that the records do relate to a matter of public interest, then he or she must then determine whether the applicant should be excused from paying all or part of the estimated fees. The focus here should be on the applicant and the purpose for making his or her request. Factors that should be considered would include:

- is the applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public, or to serve a private interest?
- is the applicant able to disseminate the information to the public?

If the applicant's primary purpose is to serve a private interest, then the head may be justified in refusing to waive fees, even where he or she is of the opinion that the records do relate to a matter of public interest.

The factors described above are not intended to be exhaustive. I have relied to some extent on established criteria in Ontario, as set forth in the leading Ontario case on fee waivers: Information and Privacy Commissioner/Ontario, Order P-474, Ontario

Hydro (Irwin Glasberg, Assistant Commissioner, June 10, 1993, pp. 1-3), taking into account the differences in the Ontario legislation. I understand that B.C. Information Management Services has been developing criteria for waiving fees in the public interest. I encourage it to continue this process.

The Ministry's reasons for its decision

The main evidence for understanding the Ministry's decision is its letter to the applicant, dated September 11, 1996, which I will now proceed to analyze in detail. (Submission of the Ministry, paragraph 5.09)

First, I wish to summarize the applicant's refutation of the Ministry's position, in this matter, in his initial request for review dated September 25, 1996. In the latter, the applicant pointed out, among other things, that he has "no means of paying the assessed fees out of my present research funds." Thus the Ministry's decision not to grant a fee waiver means that the information he seeks will not be released, which, he argues, is not in the public interest. It is perhaps worth noting here that universities and colleges do not normally fund the research costs of its faculty; this necessitates fund raising of the sort that the applicant is undertaking to fund the Archive Project. There is no evidence before me that he has in fact secured such funding to date.

In his September 25, 1996 letter the applicant further pointed out that the general policy guidelines for a fee waiver point out that the case for a waiver is strongest when the applicant can show that:

> he or she has the ability to disseminate the information concerned;
> a large proportion of the public will be affected by the information;
> the impact of the information will be immediate and significant;
> the issue is topical and included in public debate or discussion;
> the issue is specific and definable.

I agree with the applicant that his request meets all of these criteria. As he submits:

> We have a clear, credible, and practical plan for dissemination of the information concerned. Anyone interested in forestry or environmental issues in the province will be affected by the information. If something is being hidden, the impact of the information will be immediate and significant, because the Clayoquot dispute continues to be both topical and a matter of public debate and discussion. Moreover, the issue is specific and definable. If the people of British Columbia do not have a right to all the relevant information about Clayoquot decisions, I really do not know what the point of FOI might be. How big does an issue have to be before it becomes a matter of public interest. Is the Nanaimo Commonwealth scandal just a Nanaimo issue because the events happened in that town?

Finally, the applicant argues that it is not for Ministry officials to decide what should remain secret about Clayoquot-related material:

> In my professional judgment, there is substantial interest in this *particular set of land-use issues* among the public at large, within the research community, and among immediately affected groups. Only if fees are waived, will it become possible to make this information widely available. (Letter of September 25, 1996)

The Ministry itself advanced six reasons for not granting a fee waiver.

1. Responding to even the applicant's narrowed request would require review and possible severing of records prior to the applicant being invited to view them. Since this condition is true for any access request under the Act, I do not find it especially relevant to deciding this request for a fee waiver.

2. The applicant stated that he would use the requested material for a projected Clayoquot Archive Project, a projected book, a workshop, and an undergraduate course, which the Ministry considered to be "revenue generating endeavours."

The Ministry's judgment of the applicant's research proposal as a whole appears to indicate a misunderstanding of the nature, character, and funding of academic research activities in this province. As the applicant has suggested, the notion that such activities are "revenue generating" is risible in an academic setting, where fees for participants are normally set at a level to at best recoup the expenses of particular activities such as a workshop. The revenues from writing and publishing a scholarly book in Canada are minimal. In addition, there are no revenues generated from preparing and teaching courses. Essentially, the overhead costs for all of these projected research and teaching activities are such as to render the Ministry's argument about revenue generation untenable. As the applicant specifically stated, "my assistants and I are not involved in revenue-generating activities." They are non-profit ventures. It is clear, on the evidence in this case, that the applicant's primary purpose in making his request is not to serve a private interest, but to respond to a public one.

3. The Ministry's third reason for refusing a full fee waiver is that "a significant volume of information surrounding the issues within Clayoquot Sound has already been made public ...."

Again, I am of the view that the Ministry has misinterpreted and misapplied the concept of public interest in this respect. I do not accept the view that anything to do with Clayoquot Sound is not still a matter of considerable public interest in the broadest sense of the term, which includes the kind of academic analysis, research, and teaching that the applicant is proposing to undertake. It is self-evident from the media, even in 1997, that issues remain to be settled in this controversial domain that much affect the public interest, such as forest renewal and forestry jobs. Moreover, the kind of public attention to these issues in this decade has been primarily in the popular press and not the kind of

careful social scientific analysis, after the immediate passage of events, that is ultimately required for public policy debates in this province. As the applicant argued:

> The fact that a great deal of Clayoquot-related material has been made public is no excuse for keeping the rest private. The two ministries may have their own reasons for keeping certain matters secret; however, it is not for ministerial officials to decide what researchers may or may not need for their work. In my professional judgement, there is substantial interest in *this particular set of land-use issues* among the public at large, within the research community, and among immediately affected groups. Only if fees are waived, will it become possible to make this information widely available. I hope that the Information and Privacy Commissioner will support this effort.

4. The Ministry further indicated that the minutes of meetings of the Clayoquot Sound Central Region Board are open to the public and may be copied for a fee. Perhaps it is adequate for refutation of this point to refer simply to the letter from this public body supporting the applicant's proposal to establish an Archive.

5. The Ministry sought to refute the applicant's proposal to use the Internet to make information available from the Archive as establishing a public interest, because so much is already available to the public: "we feel that it is more likely that the specifics of your request will be of interest to researchers, students and perhaps some members of the public localized to Vancouver Island." Whatever the merits of this point, it seems to be sufficient, at least, to establish a true public interest in the requested records among these categories of relevant parties.

I view the academic research community as broadly representative of the interests of the public in their teaching, research, and communication roles. Moreover, as the applicant points out, researchers and students around the world will be able to use the Internet to learn about the Clayoquot Archive project and to then make plans to acquire their own copies of relevant materials for appropriate scholarly purposes. Such activities clearly involve records in the public interest in the sense in which that term is used in the Act.

6. Finally, the Ministry suggests that the requested information will be transferred to the University of Victoria Archives, which charges $.25 for each copy of available material. Again, I find this information of little relevance to determining whether an access request is for records in the public interest in the language of the Act.

In terms of establishing the extent of public interest in the proposed Archive Project, which is at the heart of the applicant's proposal, I have examined carefully letters submitted by the applicant from, among others, the Clayoquot Sound Central Region Board; the District of Tofino; The Friends of Clayoquot Sound; the Pacific Rim National Park Reserve, Parks Canada; Professor R. Michael M'Gonigle, Eco-Research Chair of

Environmental Law and Policy, University of Victoria; and the President of the Canadian Anthropological Society (also, it should be noted, a professor at the University of Victoria). I have also benefited from a reading of a seven-page project description for the Clayoquot Archive Project. (Affidavit of Elizabeth Vander Beesen, Exhibit C)

It is my view that in this case, the Ministry failed to properly apply its own suggested two-step process for determining public interest and exercising the discretion to waive fees under section 75(5)(b) of the Act. While I do not question its good faith, the Ministry appears to have acted with a purpose contrary to the Act, given the evidence provided by the applicant. The head failed to exercise his discretion properly under section 75(5) by misinterpreting the applicant's primary reasons for making the request and by taking improper considerations into account in deciding whether the records relate to a matter of public interest.

During debates in the Legislature on June 23, 1992, then Attorney General Colin Gabelmann responded as follows to an Opposition question about the meaning of "public interest" in the context of a request for a fee waiver:

> The government and its agencies will develop policy and procedures in respect of this issue. If, in the commissioner's view, these policies are not appropriate, the commissioner will be able to provide advice on that and in the final analysis give direction. So it remains to be seen how this develops; there's not much more I can say than that. (British Columbia Debates, June 23, 1992, p. 2956)

In my reading of this statement, the Attorney General had a clear expectation that I might, and could, play a critical role on this matter, as I am doing in this Order. (Information and Privacy Commissioner/Ontario, Order P-474, June 10, 1993)

Section 42(2)(c): The appropriateness of a fee

The Ministry has reviewed several of my earlier decisions which set forth a standard of deference on my part to the head of a public body with respect to a fee waiver, since he or she is in possession of information and experience on the matter. (Order No. 79-1996, p. 4) I have already indicated in the preceding analysis that that is not the case in the present inquiry. I have also taken notice in other Orders of the limited circumstances (at least as set out by one party) in which a fee required under the Act may be inappropriate; these included bad faith or extraneous considerations. (Order No. 55-1995, September 20, 1995, p. 8) (Submission of the Ministry, paragraphs 5.07 and 5.08) However, none of these previous decisions involved requests for the kind of information sought in this case, and none involved requests by legitimate researchers whose primary purpose is to disseminate information in a way that could reasonably be expected to benefit the public interest.

I do not hold the view that any scholarly request for access to government records necessitates a fee waiver by a public body. As in the circumstances of the present inquiry, an applicant must make a reasonable and reasoned effort to demonstrate why a specific request merits a fee waiver for reasons such as the fact, to cite the Act itself, that "the record relates to a matter of public interest, including the environment or public health or safety." In this inquiry, I find that the applicant has met his burden of proof on this point. Establishing an Archive is a particularly useful way to serve the public interest, since such a variety of communities, from First Nations, to local communities, and forest companies, can use it.

Variations in fee waivers

The applicant is concerned about the lack of consistency among public bodies with respect to his application for fee waivers in three separate cases. With respect to his two major requests, one public body granted him a fifty percent fee reduction, while the Ministry of Forests allowed him nothing. (See Order No. 155-1997, March 18, 1997) While I take notice of this point and find it persuasive in the context of this inquiry and a related one, each public body has the right to exercise its own discretion on a fee waiver under the Act.

I recognize that the criteria set out above place a substantial burden on an applicant for a fee waiver in the public interest. I do not expect such a fee waiver to be granted very often. For example, this is the first time in more than three years that I have approved the waiver of a fee under section 75(5)(b) of the Act.

8. Order

I find that the head of the Ministry of Forests failed to exercise his discretion properly under section 75(5) of the Act. Under section 58(3)(c), I excuse the fee charged by the Ministry.

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David H. Flaherty March 18, 1997
Commissioner