

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 318-1999  
July 27, 1999**

**INQUIRY RE: A decision by the Ministry of Environment, Lands and Parks to charge a fee and its refusal to waive that fee**

**Fourth Floor  
1675 Douglas Street  
Victoria, B.C. V8V 1X4  
Telephone: 250-387-5629  
Facsimile: 250-387-1696  
Web Site: <http://www.oipcbc.org>**

**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 15, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's two requests for review: 1) of a decision by the Ministry of Environment, Lands and Parks (the Ministry) to charge a fee for reproducing the requested records, and 2) of its decision not to waive that fee.

**2. Documentation of the inquiry process**

On January 19, 1999 the applicant submitted a request to the Ministry for a complete and accurate copy of a hearing, including exhibits and appendices, held on January 3, 1995 in Cranbrook, under the *Wildlife Act*, involving a named guide outfitter. On February 8, 1999 the Ministry assessed a fee of \$396 in response to the request, as follows:

6 audio cassettes @ \$10/cassette	=	\$ 60.00
9 hours of recording time @ \$28/hr	=	\$252.00
200 pages @ \$0.25/page	=	\$ 50.00
1 hr @ \$30/hr to prepare records for disclosure	=	\$ 30.00
shipping	=	\$ <u>4.00</u>
		\$396.00

The applicant requested a fee waiver in early March 1999, which the Ministry denied on March 10, 1999. However, it offered to arrange for the applicant to examine the records in person at its Nelson office. It told the applicant that, if he chose this option, he need only pay for any photocopies he wanted at \$0.25 per page. Otherwise,

the original fee estimate of \$396 still stood. During mediation, the Ministry deleted the charge for nine hours of recording time from its fee offers.

On March 22, 1999 the applicant requested that the Office review the Ministry's two decisions. The Office opened two files, with the ninety-day review periods for both expiring on June 17, 1999. During mediation, the Ministry issued an explanation of the refusal to grant a fee waiver and reduced the fee estimate as follows:

- (1) If the applicant supplied his own blank tapes, the copying charges would be:

6 tapes copied at \$5/tape	=	\$30.00
GST & PST	=	<u>\$ 4.20</u>
		\$34.20

- (2) If the copying company supplied the blank tapes, the copying charges would be \$58.14.

In either case, the balance of the fee of \$84 (for photocopying 200 pages, preparing the records and shipping, as outlined in the original fee estimate above) would still be payable. Thus the total fee estimate was either \$118.20 (\$34.20 + \$84), if the applicant supplied his own blank tapes, or \$142.14 (\$58.14 + \$84), if the copying company supplied the blank tapes. I note that the \$252.00 fee for "recording time", while permissible under section 75, was not deleted but drastically reduced as a result of the Ministry employing the services of a company with high-speed tape duplication equipment.

The Ministry also again offered to arrange for the applicant to examine the records free of charge (excluding any photocopying charges), if he wished to attend either its Nelson office or its Cranbrook office in person. It provided the revised fee estimates and these viewing options to the applicant in a letter of April 16, 1999.

The applicant did not accept the Ministry's revised fee estimate and said he still wished a fee waiver. He told the Office that he wished the two matters to proceed to an inquiry before me. The Office sent the Notice of Inquiry to the parties on May 14, 1999, setting the inquiry for June 7, 1999.

The Ministry issued a letter to the applicant on May 19, 1999, during the inquiry process, providing the applicant with further viewing and payment options. In late May 1999, two days after the initial submissions were due, the applicant requested an extension of the deadline for initial submissions to June 11, 1999. The Ministry objected to this request on several grounds. I granted the applicant an extension to June 7, 1999. The inquiry date therefore changed to June 15, 1999.

### **3. Issues under review and the burden of proof**

This inquiry raises two issues for consideration: (a) the Ministry's application of section 75 in its calculation of a fee estimate for providing the requested hearing records; and (b) the Ministry's denial under section 75 of the applicant's request for a waiver of that fee.

Section 75 reads as follows:

*Fees*

- 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 fees for the following services:
- (a) locating, retrieving and producing the record;
  - (b) preparing the record for disclosure;
  - (c) shipping and handling the record;
  - (d) providing a copy of the record.
- (2) An applicant must not be required under subsection (1) to pay a fee for
- (a) the first 3 hours spent locating and retrieving a record, or
  - (b) time spent severing information from a record.
- ...
- (4) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.
- (5) The head of a public body may excuse an applicant from paying all or part of a fee 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.
- ....

Section 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to the burden of proof on the parties regarding a request for review of a fee estimate. As I decided in Order No. 137-1996, December 17, 1996, the burden of proof is on the public body.

Section 57 is also silent with respect to a request for review of a decision on a fee waiver under section 75 of the Act. As I decided in Order 90-1996, March 8, 1996, the burden of proof is on the applicant.

#### **4. Procedural objections**

The Ministry objected to any consideration of new evidence contained in the applicant's reply submission on the grounds that it contained new evidence that was not relevant to the issues in dispute and did not constitute proper reply.

I reviewed the contents of the applicant's reply submission. Although I found that much, but not all, of the material in the reply submission was of marginal relevance to the issues before me, I was not prepared to disregard the submission in its entirety.

#### **5. The records in dispute**

The records in dispute are the copies of the records of a hearing (audiotapes, exhibits, and appendices) held on January 3, 1995 in Cranbrook, under the *Wildlife Act*, involving a named guide outfitter. Since the inquiry centered on the Ministry's decisions to charge a fee and to deny a fee waiver, I did not find it necessary to examine the records for the purposes of this inquiry.

#### **6. The applicant's case**

The applicant is a partner in a company that distributes hunting supplies in Western Canada. He appears to be concerned with the integrity of the Wildlife Branch of the Ministry and thus wants a complete transcript of a particular hearing involving a certain guide outfitter. He argues that it is in the public interest for him to obtain access to the records that he is requesting: "Whenever there is a suspicion that justice has not been done, it is in the public interest that the complete records be given out." The applicant calls into question the enforcement of the *Wildlife Act* and the protection of the environment.

#### **7. The Ministry of Environment, Lands and Parks' case**

The Ministry points out that its regional manager in the Kootenay Region makes decisions regarding the annual allowable harvest with respect to the hunting of wildlife with quotas divided between guide outfitters and resident hunters in that area. It alleges that this applicant is "unhappy with the allotment of hunting opportunities (i.e., quotas) to guide outfitters," and over the years has made numerous allegations against the regional manager and his staff, none of which have been substantiated. (Submission of the Ministry, paragraphs 1.12 and 1.13)

I have discussed below the submissions of the Ministry with respect to the reasonableness of its fee estimate, and the basis upon which it refused to waive the fee.

## 8. Discussion

### *Section 75: Fees*

As noted below, the Ministry has made extensive efforts to reduce its fee estimate by alternative arrangements for duplication, for example. I agree that its revised fee estimate of under \$150 is reasonable and is expressly authorized by this section of the Act. In fact, the option of viewing the records, listening to the audiocassettes, and not requesting copies of them would have no direct costs to the applicant. (Submission of the Ministry, paragraphs 4.04 and 4.05) The Ministry has made considerable efforts to meet the information needs of the applicant while enabling him to reduce the fee payable by him. (Submission of the Ministry, paragraph 4.06)

With respect to its denial of the applicant's request for a fee waiver, the Ministry has referenced a number of my Orders, which seek to ensure that such a decision was made in good faith and that the head did not take into account irrelevant or improper considerations or act with a purpose contrary to the Act. (Submission of the Ministry, paragraph 4.08) (See Order No. 154-1997, March 18, 1997) The Ministry argues that my role is not to substitute my discretion for that of the head's discretion but to monitor suspected abuses of the Act:

If the Commissioner determines that the head has abused his or her discretion, then "appropriate circumstances" may exist to warrant a fee reduction or waiver. (Submission of the Ministry, paragraph 4.10)

The Ministry submits that the evidence in this inquiry "demonstrates that in this case the head of the Public Body exercised her discretion in a reasonable fashion and there is therefore no reason to interfere in the exercise of that discretion." (Submission of the Ministry, paragraph 4.13) I agree.

The Ministry also submits that the records in this inquiry do not relate to a matter of public interest and reviews, in detail, the appropriate factors that it took into account in reaching that conclusion. (Submission of the Ministry, paragraphs 4.14 to 4.21) I agree with the Ministry's argument that, on balance, the applicant is seeking access to the disputed records for essentially private purposes, not public ones. I have read, in this regard, the applicant's reply submission. And, at the end of the day, the applicant can review all of the records in dispute at no out-of-pocket costs to himself in the town in which he resides. See, in general, Order No. 154-1997.

### *Alternative Methods of Access to the Requested Records*

The Ministry offered the applicant an opportunity to view the records in dispute at its Nelson or Cranbrook offices, which would have reduced the access fee substantially. I think that this was a valuable effort (including many possible variations of such access), and one that the applicant should have accepted in his particular circumstances, where it seems to me to be somewhat tortuous for him to argue that he represents a significant

public interest. (Submission of the Ministry, paragraphs 1.09 and 1.10) In fact, it would have been in the public interest to avoid this inquiry by accepting the Ministry's practical solution.

**9. Order**

I find that the head of the Ministry of Environment, Lands and Parks exercised her discretion properly under section 75 of the Act with respect to the fee estimate and the decision to deny waiver of the fee. Under section 58(3)(c), I confirm the several fee options set out by the Ministry in its letter to the applicant of May 19, 1999.

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David H. Flaherty  
Commissioner

July 27, 1999