

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 298-1999  
March 4, 1999**

**INQUIRY RE: BC Transit's refusal to grant access to the Sea Bus Engineering Log Books for 1993 and 1994, and its further refusal to grant a fee waiver for copying those Log Books**

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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 October 27, 1998 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 BC Transit to withhold records and to refuse a fee waiver.

**2. Documentation of the inquiry process**

The applicant believes that there was an oil spill from a 40,000 litre diesel fuel supply tank on a BC Transit Sea Bus on September 16, 1994 that was not properly documented or reported to the relevant authorities. He also believes that his wife, who was previously employed as a Marine Officer for BC Transit's Sea Bus operation, was dismissed, in part because she disclosed that there had been an oil spill.

On March 20, 1998 the applicant submitted a request to BC Transit for records relating to the following:

- “fuel readings from the Dip Chart from August 1993 to August 1994 on the supply fuel tank by the Sea Bus Administration Building;”
- “purchase orders for the hose that shafted and caused the September 16<sup>th</sup> oil spill (from 1977 to October 1994);”
- “measurements and manufacturing specifics for the hose that shafted and caused the September 16<sup>th</sup> oil spill;”

- “the BC Transit Sea Bus procedural manual used for maintaining and checking the hose that shafted and caused the September 16<sup>th</sup> oil spill;”
- “the 1997 and 1998 investigation of the September 16<sup>th</sup> oil spill and all follow-up investigations;” and
- “all inter-office memos, communications, reports, follow-up, investigations among BC Transit management with each and to any individual outside BC Transit, and to all political persons concerning this September 16, 1994 oil spill.”

In addition, the applicant asked to examine the originals of the following records:

- the original Sea Bus Engineer’s Log for 1993 and 1994; and
- fuel readings from the Dip Chart for February and March 1998, 1993, 1994, 1995, 1996, and 1997.

On April 15, 1998 BC Transit responded by providing the applicant with an estimate of the fees for providing the information sought. The estimate was \$1,050.25, and a \$525.00 deposit was required to trigger the processing of the request.

On April 21, 1998 the applicant responded in part:

... I only wish to examine the “books” that contain the missing documents and the other “books” that contain the other documentation from the dip chart reading of the 40,000 L diesel fuel supply tank. I am not interested in examining the actual numbers or documents inside the “books” but only the “books” themselves. I hope that this has made it clearer.

I am requesting under Section 75 for a fee waiver as the nature of my requests falls under Section 25 and I am unable to have the funds. BC Transit has filed an Affidavit which asserts that I have no funds. My wife while she was six-months pregnant with our sixth child and on long-term disability was fired by BC Transit. I find myself on limited funds.

Under Sections 7, 25 and 75(5) and Order No. 160-1997, No. 157-1997 and No. 156-1997, I am pursuing an inquiry into the fee estimation that was given to me by your office regarding FOI 98/364 and FOI 98/366.

The applicant also provided more specificity with respect to the records that he wished to examine.

By letter dated April 22, 1998 the applicant made additional submissions with respect to his fee waiver request including submissions that Engineer’s Logs are official records under the federal *Canada Shipping Act* and should therefore be readily accessible to him.

Before BC Transit responded to either letter, the applicant asked me to review its fee estimate as well as its “denial for ... access to examine the Engineer’s log books” in a letter dated April 24, 1998. In that letter, the applicant also asked me to review another fee estimate decision of BC Transit made in respect of different access requests. He also makes reference to an earlier access request:

My earlier FOI-98/346 request was not completely answered by BC Transit: key documents concerning the daily fuel readings from the 40,000 L diesel-fuel supply tank went missing from the possession of BC Transit. Had BC Transit provided me with the necessary information, my FOI-98/364 request [which is the subject of this inquiry] would not be necessary.

My FOI requests are in the public safety and interest. BC Transit Sea Bus has carried over 63 Million passengers. Each Sea Bus Vessel can carry at any time 400 passengers with 4 crew members. My requests concern the BC Transit Sea Bus September 16, 1994 oil spill ... From previous FOI requests, this oil spill was never reported to the governing authorities and the amount of spillage was never documented. I have enclosed the *Spill Reporting Regulations*, under the *Waste Management Act*, that if this spillage was 100 L or more, it would be in violation of the *Waste Management Act*.

By letter dated April 28, 1998 BC Transit responded to the applicant’s April 21, 1998 letter, in part, as follows:

I am responding to your letter of April 21, 1998 requesting a waiver of fees in relation to your recent request for copies of records...

We have carefully reviewed the rationale in your letter and have decided that we are not satisfied that there is sufficient evidence to support a fee waiver on either of the grounds set out in section 75(5) of the *Freedom of Information and Protection of Privacy Act*.

In relation to your request concerning inspection, of the Engineering Logs, please be advised that we are unable to provide you with access directly, as they contain personal information about other individual third parties – and to provide them to you would unreasonably interfere with the personal privacy of those individuals. This access is being denied pursuant to section 22 of the *Freedom of Information and Protection of Privacy Act*. Furthermore, in relation to your questions concerning the location and nature of the missing book, please see attached copies of two memos ... which answer the questions you posed to me.

During the course of mediation, the applicant modified his request for access to information. The applicant says that the only records he now wishes to have access to are

the Sea Bus Engineer Log Books (the Log Books) for the years 1993 and 1994. As noted above, the applicant has not requested copies of these Log Books but rather seeks to have access in order that he can examine the records.

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

There are three issues in this inquiry. The first is whether BC Transit properly applied section 75 of the Act to the applicant's request for a fee waiver. Section 75(5) of the Act provides that the head of a public body may excuse an applicant from paying all or part of a fee if, in the opinion of the head:

- (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.

BC Transit says that this is the only issue raised in this inquiry.

Section 57 of the Act, which deals with burdens of proof, is silent with respect to a review of the exercise of a public body's discretion to refuse to grant a fee waiver under section 75(5) of the Act. For reasons expressed in Order No. 90-1996, March 8, 1996, I find that the burden of proof is on the applicant to demonstrate that BC Transit's decision is wrong and should not be confirmed.

The second issue is whether BC Transit was required by section 22 of the Act to refuse to allow the applicant to inspect the 1993 and 1994 Sea Bus Engineering Log Books (the Log Books). Section 22 requires a public body to refuse to disclose information that would lead to an unreasonable invasion of a third party's personal privacy. Sections 22(2), (3), and (4), which have been raised by the parties in this inquiry, provide in part:

- 22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
  - (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
  - ...
  - (c) the personal information is relevant to a fair determination of the applicant's rights,
  - ....

- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
  - (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,  
...
  - (d) the personal information relates to employment, occupational or educational history,  
....
  
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
  - (c) an enactment of British Columbia or Canada authorizes the disclosure,  
....

BC Transit claims that the section 22 issue is not properly before me in this inquiry:

The issue raised in this inquiry is whether the decision of BC Transit to deny a fee waiver requested by the applicant should be upheld or whether the fee should be varied or set aside. This characterization of the issue in this inquiry is as set out in the portfolio officer's fact report in this inquiry. BC Transit takes the position that the only issue before you is whether the decision to deny the applicant's fee waiver request in respect of the access to information request numbered FOI-98/364, which decision was made and communicated to the applicant on April 28, 1998, should be upheld.

It should be made clear to you at the outset that, since BC Transit's fee waiver decision was made in this matter, the applicant has received many of the records covered by the Request from BC Transit through the union of which the applicant's spouse was or is a member. BC Transit wishes to emphasize, very strongly, that despite this subsequent disclosure through other means, it is BC Transit's April 28, 1998 decision in respect of the fee waiver that is in issue in this inquiry. Subsequent events leading to partial disclosure of records through other means in the manner described above are, in BC Transit's submission, irrelevant to the issue before you, i.e., whether or not the decision made by BC Transit last April on the fee waiver request should be confirmed or set aside. BC Transit submits that **even if the applicant purported to 'modify' his access request during the course of mediation**, the issue that is technically before you is BC Transit's April 28, 1998 decision to deny the applicant's requested fee waiver. Again, BC Transit submits that subsequent events are irrelevant

to that issue. (BC Transit's Initial Submissions, paragraphs 2 and 3 (emphasis added))

See also BC Transit's submission that:

The applicant's initial submissions in this inquiry deal with matters that are not in issue before you. As is set out in paragraphs 2 and 3 of BC Transit's initial submissions, the only issue before you in this inquiry is BC Transit's decision not to grant the applicant a fee waiver in respect of the Sea Bus engineer's logbooks for 1993 and 1994. Since there are no other issues before you in this inquiry, BC Transit respectfully requests that you not account for any of the applicant's submissions regarding other issues that are not before you. (BC Transit's Reply Submissions, paragraph 2)

I note that the Amended Portfolio Officer's Fact Report provides in part:

... prior to and during mediation the applicant's request was reduced/modified to requesting access to the 1993-1994 Sea Bus Engineer's Log Books as some material was provided through the Labour Relations process ...

At the inquiry, the Information and Privacy Commissioner will review BC Transit's application of section 22 to the Engineer's Logs for the period in question and the applicant's request for a fee waiver.

I do not accept BC Transit's submissions that its refusal under section 22 of the Act to grant access to the Log Books for 1993 and 1994 is not in issue. The April 24, 1998 letter from the applicant that triggered this inquiry asked me to review both the fee estimate decision and the denial of access to the Log Books. Because BC Transit fully canvassed the section 22 issue in its written submissions, I am able to deal with this issue in my Order. I am also of the view that, based on all of the information before me, the applicant did not merely "purport to" but did in fact modify his access request. I will say more about this later.

Section 57(2) of the Act provides that the burden of proof is on the applicant to prove that providing him with access to the 1993 and 1994 Log Books would not give rise to an unreasonable invasion of a third party's personal privacy under section 22 of the Act.

The third issue is whether BC Transit is required to disclose the documents without delay under section 25 of the Act. Again, the burden is on the applicant to demonstrate that this section applies to the records in dispute. See Order No. 162-1997, May 7, 1997.

#### **4. The records in dispute**

The records in dispute consist of the Sea Bus Engineer Log Books (the Log Books) for the years 1993 and 1994.

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

As noted above, the applicant wishes to examine the Log Books as he feels this will provide him with information respecting the September 16, 1994 oil spill. His intention is to hold BC Transit accountable and to subject it to public scrutiny. I have discussed below his submissions on various sections of the Act. I have also discussed separately below the applicant's request for a fee waiver.

#### **6. BC Transit's case**

As noted above, BC Transit believes that the only issue in this inquiry is the fee waiver. I have discussed its detailed submissions below.

BC Transit emphasizes that it has investigated the oil spill of September 16, 1994 that concerns the applicant. It further states that it has supplied the applicant with memoranda with respect to the nature of the missing log books. (Submission of BC Transit, paragraphs 11, 12)

#### **7. Discussion**

At one point in his reply submission, the applicant suggests that the "main question" presented to me in this inquiry is whether BC Transit broke the law in its reporting and handling of an oil spill from a Sea Bus. (Reply Submission, p. 7) With due respect, I need to remind the applicant that I have no other authority than to decide whether he has a right of access to records in dispute and whether he should have been granted a fee waiver.

#### ***Section 22: Disclosure harmful to the personal privacy of third parties***

For reasons that will become clear, I will deal with the section 22 issue first.

As noted, the applicant has not asked BC Transit to provide him with copies of the Log Books but instead seeks only to examine them. BC Transit says this cannot be done, because the Log Books contain personal information about third parties which, if disclosed, would unreasonably invade the third parties' personal privacy. BC Transit thus reasons that it could therefore only provide the applicant access to the records in dispute by copying and severing them. If BC Transit is required to copy and sever the records in dispute, then BC Transit says that the applicant must pay BC Transit fees for doing so.

Having reviewed some of the records in dispute, I am satisfied that the Log Books in fact contain third party personal information. That being the case, the applicant is only entitled to examine unsevered versions of the records in dispute, if he can demonstrate that, under section 22 of the Act, disclosure of the third party personal information to the applicant would not give rise to an unreasonable invasion of the personal privacy of the third parties.

The applicant submits that BC Transit has not established that the records in dispute contain the personal information of independent third parties; in fact, they are workers at BC Transit. His point is that a third party must be an independent person and not an employee of BC Transit. With respect, there is no basis in the Act for such a position. (See Schedule 1 of the Act, “third party”)

BC Transit notes that the Log Books “contain personal information of identifiable individuals, which means that the applicant cannot be allowed to have access to the originals.” The type of information contained in the Log Books includes log entries about specific individuals being on sick leave or otherwise absent, employment-related disputes, and other personal matters. (Submission of BC Transit, paragraphs 22, 23). BC Transit relied on sections 22(3)(a) and (d) of the Act to say that disclosure of this information is presumed to give rise to an unreasonable invasion of third party personal privacy.

I find that sections 22(3)(a) and (d) apply to the third party personal information in the Log Books, which I described above. Accordingly, the disclosure of this information is presumed to give rise to an unreasonable invasion of the third parties’ personal privacy.

The applicant seeks to overcome the presumption against disclosure by relying on the factors provided for in section 22(2)(b), “the disclosure is likely to promote health and safety or promote the protection of the environment,” and (c) “the personal information is relevant to a fair determination of the applicant’s rights.” I fail to see how the disclosure of the third parties’ *personal* information would likely promote public health and safety or the protection of the environment. Section 22(2)(b) does not apply to the personal information at issue.

The applicant argues that he has a right of access to the Log Books because “he is married to a Seabus Marine Officer who was terminated by BC Transit. BC Transit fired her because the Applicant’s wife made remarks of near misses that were not reported.” The applicant suggests that his wife needs access to various Log Books and entries with respect to a forthcoming arbitration hearing:

By not allowing the Applicant to protect and to maintain a healthy relationship with the Applicant’s wife and family, this prevention by BC Transit in not allowing the Applicant access to the log books would be unfair. Also, the Applicant’s wife’s Arbitration hearing would not be fair or in justice if the log books and entries are not made to support the



Applicant's wife's Affidavit and to assist the Applicant's wife to have her job and reputation back. (Applicant's Initial Submissions)

BC Transit advises that some access to the Log Books was ordered by an arbitrator in the context of the arbitration proceedings. To the extent that the applicant's wife requires this information to further a fair determination of her rights in the arbitration proceedings, that matter appears to have been satisfactorily resolved for her.

In any event, section 22(2)(c) requires that the personal information at issue be relevant to a fair determination of the *applicant's* rights, not his wife's. Also, I fail to see how the *personal* information at issue would advance a fair determination of his wife's rights in the arbitration proceedings. Section 22(2)(c) is not a relevant circumstance in this inquiry.

I therefore find that the applicant has not provided me with compelling and relevant circumstances that would overcome the presumptions provided for in sections 22(3)(a) and (d) of the Act.

The applicant also argued that the Log Books should be disclosed because section 22(4)(c) of the Act applies to them. Section 22(4)(c) provides that the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy, if "an enactment of British Columbia or Canada authorizes the disclosure." The applicant relies on section 261 of the *Canada Shipping Act*, Stats. Can., 1989, c. S-9, as supporting the proposition that a federal enactment authorizes disclosure of the log books:

Under section 22(4)(c), an enactment of Canadian authorities gives the Applicant the right to examine the log books. In the *Canada Shipping Act*, Section 261(1)(6), the log books are admissible as evidence. That is, the Engineer's log books, with or without the personal information of third parties are evidence. The purpose of the log books is to present evidence in a court of law and to put the operation of the vessel under public and legal scrutiny. In fact, the operations of the vessel dictate that all the information in the log books is by definition not personal information but legal entries for the sole purpose for the safe running and operation of the vessel. The existence of having such regulations with oil spills and near-misses defines public interest. These regulations are in existence for safety and to promote public safety. (Applicant's Initial Submissions)

Section 261(6) of the federal Act simply provides that "[e]very entry made in an official log-book in the manner provided by this Act is admissible in evidence." Even if I assume that section 261 of the *Canada Shipping Act* applies to the Log Books in issue (i.e., that they come within the meaning of "official log-book"), this provision does not authorize disclosure for purposes of section 22(4)(c) of the Act. I agree with BC Transit that section 261 is irrelevant to this inquiry.

I note that, as an aside, with respect to another access request from this applicant, BC Transit provided him, free of charge, with “log entries for the Seabus vessels for specific dates, as opposed to a broad range of two years. The log entries provided to the applicant were copied and severed to remove personal information.” (Affidavit of Chris Harris, page 16) This is a useful precedent in support of what BC Transit proposed to do in the current inquiry.

I note as well that the applicant argued that, if I decided that he could not examine the records, his Union Shop Steward could examine them because “the information would not be new, as the Union Shop Steward is quite aware and had close association with the other workers with the personal information.” I find this line of argument to be without merit.

I therefore find that the applicant has not met his burden of establishing that the disclosure of the third party personal information in the Log Books would not give rise to an unreasonable invasion of personal privacy under section 22 of the Act. I further find that the inclusion of personal information of third parties in the records in dispute necessitates the copying and severing of the Log Books before disclosure to the applicant.

***Section 25: Information must be disclosed if in the public interest***

The applicant also argued that BC Transit is required to disclose the Log Books to him under section 25 of the Act. Section 25 provides, in part, that a public body must, without delay, disclose “to the public, to an affected group of people or to an applicant, information”

- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
- (b) the disclosure of which is, for any other reason, clearly in the public interest.

As I have stated in previous decisions, it is a rare occasion that an individual can appoint himself or herself as the guardian of the public interest on the basis of section 25 of the Act, especially, as in this inquiry, where the appointee has a direct relationship with a key party to the matter, i.e., his own spouse. Although one may admire the applicant’s general concern for public safety in BC Transit’s operation of Sea Buses, the concern is too closely tied to the interests of his spouse to rise to the level that would mandate disclosure of records on the basis of the actual language of section 25 of the Act.

I find that there is no public interest at stake in the request for disclosure in this inquiry. (See also the reply submission of BC Transit, paragraphs 14 to 18)

***Section 75(5): The Request for a Fee Waiver***

As I concluded above, the only way information in the Log Books can be provided to the applicant is if BC Transit copies the Log Books and severs from them all of the third party personal information. BC Transit argues that “the fee estimate prepared by BC Transit in respect of the Request covered all aspects of that Request,” so that its fee waiver decision would apply to the cost of copying the 1993 and 1994 Log Books for the applicant.

The information before me confirms that the fee estimate was based, in part, on the estimated cost of copying the Log Books. (Affidavit of Chris Harris, Exhibit “C”)

The applicant, who is a part-time teacher, argues that he cannot afford to pay the fees for copying the records because he does not own any real property, his wife is unemployed, and he has a large number of children. Thus he states that he cannot afford to pay the fees that BC Transit has proposed to charge. As previously noted, he also submits that his request is in the public interest, because it involves an investigation of an oil spill; the applicant wishes to determine whether BC Transit is in violation of various regulations on spill reporting.

BC Transit has relied on a series of previous Orders to set out the legal principles applicable to public interest fee waivers. See Order No. 55-1995, September 20, 1995, pp. 8-9; Order No. 90-1996, March 8, 1996, pp. 10, 12; Order No. 154-1997, March 18, 1997; and Order No. 259-1998, August 31, 1998, p. 4.

BC Transit submits that it made its decision on the fee waiver in accordance with the relevant legal criteria. (Submission of BC Transit, paragraphs 18 to 27) It further argues that the information in dispute concerns an oil spill that occurred several years ago and is largely of historical value: “Because of the fact that this information is old news, it does not relate to a topical issue and is not part of public debate or discussion.” (Submission of BC Transit, paragraph 29) BC Transit further submits as follows:

BC Transit respectfully submits that no evidence can be adduced to show that BC Transit acted in anything other than a reasoned manner and in good faith. BC Transit further respectfully submits that deference should be accorded to the decision by BC Transit regarding this fee waiver. (Submission of BC Transit, p. 31; and the Affidavit of Chris Harris, Exhibit H)

Having considered the various submissions on the issue of the fee waiver, I am persuaded that the applicant has not met his burden of proof in this regard. I confirm BC Transit’s decision on a fee waiver under section 75(5)(b) of the Act.

## **8. Order**

For the reasons given above, I have decided that BC Transit was required, under section 22 of the Act, to refuse the applicant access to the records in dispute for the purposes of examination of those records, and that section 25 of the Act does not apply to

those records. Under section 58(2)(c) of the Act, I therefore require BC Transit to refuse access to the records in dispute in other than a severed form.

I have also decided that BC Transit appropriately exercised its discretion when it refused to grant the applicant a fee waiver under section 75(5) of the Act. I therefore confirm BC Transit's fee estimate decision under section 58(3)(c) of the Act, subject to terms and conditions imposed on BC Transit under section 58(4). The terms and conditions are that BC Transit modify the fee to reflect the fact that the original estimate was based on the provision to the applicant of both the Log Books as well as other records which the applicant no longer requires.

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David H. Flaherty  
Commissioner

March 4, 1999