

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 299-1999
March 4, 1999**

INQUIRY RE: A decision by BC Transit to refuse to grant a waiver of fees

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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 deny an applicant's request for a fee waiver for an access to information request under the Act.

2. Documentation of the inquiry process

On February 22, 1998 the applicant submitted a request to BC Transit for all records related to the proposed rapid transit bus route along south Granville. BC Transit responded by sending some of the requested information to the applicant and a fee estimate for the rest. The notice of the fee estimate, which was provided to the applicant pursuant to section 75 of the Act in a letter dated April 9, 1998, estimated the total fee to process the applicant's request to be \$3,878.25.

On April 15, 1998 the applicant wrote to BC Transit requesting a fee waiver. The grounds on which the applicant made such a request were that: (1) the proposed RapidBus route is a matter of public interest; (2) the request is made for the benefit of the community; (3) there are environmental and safety issues that need to be disclosed; and (4) the purpose of the request is to assist the applicant to participate in BC Transit's own proposal in a meaningful way. The latter ground is described, in part, this way:

The purpose of our request is to assist our participation in B.C. Transit's own Proposal. B.C. Transit has readily stated that the Proposal sets out the best programme from B.C. Transit's point of view. B.C. Transit has invited the participation of the public and this Committee has accepted that

invitation. B.C. Transit's desire to implement the Proposal and its expectation that others will intervene to protect their interests require the delivery of all relevant records.

The Committee is already hampered in its ability to participate. The limited time available to us is a severe limitation. Our inability to obtain professional help is a further serious limiting factor, and B.C. Transit has stated that it has no funds available to enable us (or other interested parties) to obtain that help. The withholding of the records which B.C. Transit has, through the imposition of charges which we cannot pay, would breach B.C. Transit's obligation to seek informed participation and would obstruct our efforts.

The public interest ground articulated by the applicant is summarized in its fee waiver request as follows:

The Proposal is clearly a matter of public interest. It has the capacity to adversely affect the South Granville Neighbourhood and the businesses there, some of which will surely die from lack of business. It will have an impact on the amenities of the neighbourhood. It will inevitably drive down the value of residential and commercial properties.

On April 21, 1998 BC Transit denied the application for a fee waiver. I have elaborated below on the reasons given for its refusal.

The applicant requested a review of this decision on April 29, 1998. An extension notice was forwarded to the parties on July 28, 1998 and, with the consent of the parties, the inquiry date was adjourned to September 29, 1998. After a request for an extension from the applicant, the Director of my office authorized an adjournment of this inquiry to October 6, 1998.

After initial submissions were received and forwarded to the parties, the applicant requested a further extension of the inquiry date in order to have more time to prepare his reply submissions. After considering the submissions of the parties on this issue, on October 2, 1998 I authorized the extension of this inquiry to October 27, 1998.

3. Issue under review and the burden of proof

BC Transit, in its submissions, described the issue raised in this inquiry as whether the refusal of BC Transit to waive payment by the applicant of a fee for access should be confirmed, or whether the fee should be excused or reduced.

Section 75(5) of the Act gives a public body the discretion to 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 58(3)(c) gives me the power to “confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances,” where the inquiry is into a review of a public body’s refusal to excuse an applicant from paying all or part of a fee under section 75(5).

Section 57 of the Act deals with burdens of proof in an inquiry. However, it 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). 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 the public body’s decision is wrong and should not be confirmed.

4. Preliminary objections

BC Transit raised three procedural objections in its letters of November 2, 1998 and December 1, 1998 to my office. I have summarized these objections as follows:

BC Transit learned that the applicant made an *in camera* submission, which disclosed, by way of affidavit, details of the applicant’s personal financial situation. Counsel for BC Transit wrote to my office to indicate that BC Transit had no wish to see this financial information. To the extent that the applicant’s *in camera* submissions comprised written argument that was not personal financial information, BC Transit should be given a copy of those *in camera* submissions. Counsel also requested an opportunity to respond to any submissions made by the applicant *in camera* that do not deal strictly with the ability to afford payment of the fee in issue, including any submissions that might be contained in the *in camera* material on new issues. My response on this first objection was to assure myself that the *in camera* material is solely financial information of the applicant and not further argument. That is indeed the case.

With regard to what the applicant described in his reply submissions as an “off-the-record” telephone conversation with a BC Transit employee, counsel for BC Transit has submitted that the telephone conversation was not raised for the first time in BC Transit’s initial submissions, and that a portion of a letter dated April 9, 1998 from the BC Transit employee to the applicant specifically dealt with that telephone conversation, “thereby putting it very much on the record.” BC Transit contends that if the applicant had wished to deal with that telephone conversation, he had the opportunity to do so in his initial submission and should not have raised the matter in his reply submission. I do not regard the applicant’s submissions on this point as material to the decision I have to make in this inquiry and I have, accordingly, not relied on them.

Counsel for BC Transit also rejected the applicant’s contention that “reliance on this telephone conversation as one reason for denial of the requested fee waiver shows ‘disregard for due process’ on the part of BC Transit.” BC Transit disagreed with the applicant’s contention that the conversation in question “must have” caused the BC

Transit representative handling the request to prejudge the request, or that it “pre-disposed” him to reject the request. Counsel for BC Transit submitted that there is no evidence of prejudgement or impropriety in the process leading to its decision. Again, I do not regard this issue to be material to the decision I have to make in this inquiry and have found it unnecessary to have regard to the applicant’s submissions on this point for purposes of making my order.

In its December 1, 1998 response to a second reply submission by the applicant, BC Transit objected to the submission of “further arguments” by the applicant. Counsel for BC Transit submitted in this latest objection that only paragraphs 1 through 4 of the applicant’s November 27, 1998 “further reply” actually purport to respond directly to the minor points made in BC Transit’s November 2 reply submission. Counsel for BC Transit asserted that paragraphs 5 through 39 of the applicant’s “further reply” address issues raised in BC Transit’s reply submissions, which responded to arguments made by the applicant in his initial submissions. Counsel for BC Transit submitted that these further submissions, with the exception of paragraphs 1 through 4, gave the applicant a further opportunity of argument not made available to BC Transit, and that they should therefore not be admitted for my consideration. My view is that the applicant’s reply submission was acceptable in that it elaborated on his earlier submission and responded to points raised by BC Transit in its initial submission. That, in my view, is the purpose of a reply submission. I was obviously capable of recognizing the repetitive elements in the respective reply submissions of both parties in this inquiry and the replies to the reply.

5. The applicant’s case

The focus of this inquiry is BC Transit’s proposal for a rapid bus route to Richmond through the South Granville area of Vancouver. The applicant made his initial request for records of BC Transit and its consultants in his own name; his subsequent correspondence with BC Transit is as Chair of the Save South Granville Neighbourhood Committee (SSGNC). The SSGNC is an unincorporated group of residents in the South Granville area who are concerned about the impact of BC Transit’s proposed RapidBus system. The SSGNC has joined seven other local groups and associations of residents and merchants to form the Granville Community Association (GCA). The GCA and the SSGNC support the applicant in this inquiry. The applicant has made it clear that information he receives from BC Transit as a result of his access request will be shared with these two groups, as has the information he has already received. (In his reply submissions, the original applicant identified the Save South Granville Neighbourhood Committee as the “true applicant,” and himself as the “individual applicant,” but I have continued to call him the applicant for purposes of stylistic consistency.)

The applicant has kindly provided me with considerable background to the RapidBus proposal, which I have reviewed. (Initial Submission of the Applicant, paragraphs 13 to 20)

The applicant submits that BC Transit has erred in calculating its allowable fees and has overstated them. Further, BC Transit has not properly considered his requests for a fee waiver. He asks me to waive these fees under the Act.

I have discussed further below the applicant's detailed submissions on the appropriate grounds for granting him a fee waiver.

6. BC Transit's case

BC Transit states that there are about 8,000 pages of records responsive to this applicant's request. After reading the description of its efforts to assist the applicant, I agree that BC Transit has dealt openly, accurately, and completely with this applicant in its efforts to assist him and to narrow his request. (Initial Submission of BC Transit, paragraphs 5 to 15) BC Transit has also disclosed a number of records to him free of charge.

I have discussed below BC Transit's submission with respect to its handling of the fee waiver issue.

7. Discussion

This inquiry turned into a paper war with substantial submissions and resubmissions on either side with, from my perspective, considerable repetition and reiteration of similar points. While I have reviewed all of this material as carefully as possible, I have concentrated on the key points pertaining to the grounds for a fee waiver and have avoided reconstituting the detailed submissions of the parties in all of their subtlety (and repetition). Much of this consisted of procedural objections by the applicant and BC Transit's responses to them, which largely characterized the reply submissions of both sides and the further replies to them.

The applicant's arguments for a fee waiver

In summary form, the applicant submits that the circumstances set out in section 75(5) of the Act apply as follows to his request:

1. The records requested relate to BC Transit's RapidBus proposal, and that proposal is a matter of public interest;
2. The RapidBus Proposal raises matters of public interest in relation to the environment, public health, and public safety;
3. The applicant, Save South Granville Neighbourhood Committee and Granville Community Association, cannot afford the payment of the fees requested; and
4. It is fair to excuse payment. (Initial Submission of the Applicant, paragraph 34 and paragraphs 35 to 41; these points are also elaborated on at considerable length in the Reply Submission of the Applicant, paragraphs 41 to 78)

The public interest in the RapidBus project

Vancouver City Council required BC Transit to conduct a program of public consultation, which is occurring. A considerable number of individuals made public submissions to City Council on this issue. Community groups were formed to respond to BC Transit's proposal, including two which the applicant chairs. More than 2,200 persons have subscribed to the "membership list" of one of them. Others have posted signs and participated in a protest demonstration against the project. (Initial Submission of the Applicant, paragraph 35)

The applicant has also provided me with an exhaustive list of issues arising in relation to the proposal, which is of concern to many residents and merchants living or carrying on business on or near Granville Street: "The issue is not whether BC Transit can offer answers to these issues that may satisfy the Commissioner or the City, but whether the public may examine the relevant records in relation to these issues, and determine what other issues may exist which are not yet known to the public." (Initial Submission of the Applicant, paragraph 36)

The applicant has also outlined a series of "circumstances [that] demonstrate that the RapidBus proposal raises matters of public interest in relation to the environment, public health and public safety." In his view:

BC Transit has not made public [or?] obtained any impact reports as to environmental matters, economic matters, social matters or health matters in relation to the Rapidbus proposal. The members of the public who may be prejudiced by the Proposal should know why not and what information BC Transit has on those issues. (Initial Submission of the Applicant, paragraphs 37, 38; see also the Reply Submission of the Applicant, paragraphs 50 to 61)

The applicant submits that neither he, nor his supporting organizations, can afford to pay the fees of more than three thousand dollars requested by BC Transit. Any funds that do become available are required in order to distribute information, inform the public, and retain consultants. (Initial Submission of the Applicant, paragraph 39) I find the following statements of the applicant especially compelling:

It is unfair that residents and merchants must bear the cost of obtaining from BC Transit the material required to understand what is proposed, why it is proposed, how it will affect them, what rights and remedies they may have, whether matters have been properly handled in accordance with all relevant statutes, procedures and policies; and whether suitable environmental standards, engineering standards, safety standards and health standards are being met. (Initial Submission of the Applicant, paragraph 40(e))

It is surely to be considered that the request for the records in question does not arise simply from the interests of the applicant [meaning here SSGNC] but because BC Transit has brought forward a proposal which will clearly have significant impacts on the communities along Granville Street. It is the intent of the FOI Act that the public should be able to obtain documents in this instance so that the public does not need to rely upon the public body for full disclosure of matters relating to its proposal. (Reply Submission of the Applicant, paragraph 73)

BC Transit's views of the fee waiver

Since BC Transit has set out the same set of legal principles applicable to a public interest fee waiver that I have reviewed in Order No. 298-1999, March 4, 1999, I am not repeating this material here. (See the Initial Submission of BC Transit, paragraph 16)

BC Transit has reviewed in detail the process by which its delegated head made the decision not to grant a fee waiver to this applicant. (Initial Submission of the Applicant, paragraphs 17 to 19; the factors listed below are developed at greater length in the affidavit of Chris Harris, which I have also reviewed and considered.) Of the eight factors that BC Transit considered, I regard the following six to be problematic for the reasons noted in each parenthesis:

- the records that were the subject of the request were not of concern to a significant number or group of citizens, since the issue was of concern to only a portion of the public located within one neighbourhood within the City of Vancouver; [The Act does not establish minimum numerical or geographical sizes of groups that represent the public interest; the interest groups represented in this inquiry are more than adequate to establish a public interest, as set out in the submissions of the applicant.]
- the full set of records as requested by the applicant in his very broad request were not of concern to a significant number or group of citizens; [I regard the applicant and the two groups associated with him as amounting to a significant number or group of citizens within the concerned area of South Granville.]
- the information in question did not relate to realistic or genuine health and safety issues; [Without attempting to quantify the amount of evidence required for this purpose, or reaching some kind of amateur technical judgement of my own, I regard the submissions and affidavits of the applicant as sufficiently establishing health and safety issues that rise to the level of public interest under the Act. See also the Affidavit of George P. Reilly, Exhibit 1, which is a letter to the Granville Community Association from the president of Entech Environmental Consultants Ltd.; and Exhibit 6.]
- the applicant did not have the ability to ensure that any public interest concerns would be addressed; [Although the meaning of this statement is somewhat opaque to me, I

am of the view that an activist member of the public and two associated interest groups have the ability to try to ensure that public interest concerns are addressed by City Council and BC Transit. See also the Reply Submission of the Applicant, paragraphs 86 to 88, which details his efforts and SSGNC's to inform the public.]

- the applicant could not be held accountable for ensuring that all relevant information reached the public; [I take the applicant's submissions on this point at face value, that is, that he and his associations would try to inform the public, which is all that can be reasonably expected in the circumstances. In my view, he and the interest groups are acting as surrogates for the public in questioning aspects of the RapidBus proposal. (See also the Reply Submission of the Applicant, paragraphs 89 to 91)]
- the applicant's access request was not the only route by which the requested information would be disseminated to the public in a timely fashion, not least because the records to which the fee estimate related contained no new information beyond that contained in records disclosed to the applicant for free by BC Transit in response to the access request, and because public meetings had at that time already been held and more were to be held. [I regard this consideration as extraneous to the processing under the Act of this specific access request. The fact that this applicant may learn nothing new is not a reason to deny him access to requested records. The applicant has the right, in a public interest case of this kind, to find out this result for himself. Accountability under the Act is not served by executives of BC Transit deciding that the records that were the subject of the fee estimate "added little if anything to the records that had been disclosed for free to the applicant." They are entitled to their opinions on this point, as expressed in affidavits submitted to me, but the most relevant judgement remains that of the applicant (who in this case is an individual with a professional background that promotes his capacity to make such a decision on his own). (Initial Submission of the Applicant, paragraph 23) (See also the Reply Submission of the Applicant, paragraphs 81 to 84, and 92 to 94)

In connection with my decision below on the fee waiver, I have carefully reviewed the various submissions of BC Transit, including the detailed affidavits of Chris Harris. I admire the efforts at compromise that were attempted in order to satisfy the applicant's apparent need for records but, at the end of the day, these failed, leaving BC Transit with no choice but to address the full request for access to records. (See the Initial Submission of BC Transit, Affidavit of Chris Harris, paragraphs 5 to 14)

The information before me clearly and overwhelmingly indicates that the records to which the applicant seeks access are related to matters of public interest. In addition, it is clear from the evidence that the applicant is in a position to disseminate the information to the public. In the circumstances of this inquiry, I also find it is fair to excuse the payment of fees. For these reasons, I find these constitute appropriate circumstances to waive the payment of fees as set out in BC Transit's fee estimate.

8. Order

For the reasons given above, I find that the head of BC Transit failed to exercise proper discretion under section 75(5) of the Act. I therefore excuse the applicant from the payment of fees for his access request under section 58(3)(c) of the Act.

David H. Flaherty
Commissioner

March 4, 1999