OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 01-51

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner
November 30, 2001

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Summary: The applicant requested copies of court decisions relating to firearms matters and a copy of a file relating to a specific case under the *Firearms Act* (Canada). Applicant also requested a fee waiver relating to another access request. Court file copies of court decisions are not excluded from the Act under s. 3(1)(a) simply because originals or copies are in court files or as records "of a judge". The Ministry is entitled to withhold the portions of the firearms reference file that it withheld, and the case law collection, under s. 14. The Ministry also could refuse access to the copies of court decisions because they are available for purchase by the public within the meaning of s. 20(1)(a). The Ministry's refusal of a public interest fee waiver relating to policy records is also upheld, as is its denial of a waiver on the basis of inability to afford the fee.

Key Words: fee waiver – public interest – cannot afford – any other reason – dissemination of information – use of information – solicitor client privilege – litigation privilege – available for purchase by the public.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(a), 14, 20(1)(a), 75(5)(a) and (b).

Authorities Considered: B.C.: Order No. 79-1996, [1996] B.C.I.P.C.D. No. 5; Order No. 90-1996, [1996] B.C.I.P.C.D. No. 16; Order No. 91-1996, [1996] B.C.I.P.C.D. No. 17; Order No. 98-1996, [1996] B.C.I.P.C.D. No. 24; Order No. 152-1997, [1997] B.C.I.P.C.D. No. 8; Order No. 234-1998, [1998] B.C.I.P.C.D. No. 27; Order No. 235-1998, [1998] B.C.I.P.C.D. No. 28; Order No. 293-1999, [1999] B.C.I.P.C.D. No. 6; Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-14, [2000] B.C.I.P.C.D. No. 17; Order 01-04, [2001] B.C.I.P.C.D. No. 4; Order 01-27, [2001] B.C.I.P.C.D. No. 28; Order 01-35, [2001] B.C.I.P.C.D. No. 36. **Ontario:** Order 123, [1989] O.I.P.C. No. 86; Order M-191, [1993] O.I.P.C. No. 256; Order 170, [1994]

O.I.P.C. No. 32; Order M-773, [1996] O.I.P.C. No. 188; Order P-1316, [1996] O.I.P.C. No. 431; Order P-1388, [1997] O.I.P.C. No. 116.

Cases Considered: *Minister of Forests and the Attorney General of British Columbia* v. *The Information and Privacy Commissioner of British Columbia and The Sierra Legal Defence Fund* (13 August 1999), Victoria 99-1290 (B.C.S.C.); *Hodginkson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129.

1.0 INTRODUCTION

[1] The issues in this inquiry arise out of two access to information requests that the applicant made, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Ministry of Attorney General ("Ministry") in 1999 and 2000. The first request, dated November 18, 1999, contained six items. Only the second, third and sixth of that request's components are relevant here. The second item of that request sought the following:

> All caselaw and reasons for judgment regarding petitions before the Court, Reference Hearings pertaining to firearms, Appeals pertaining to F.A.C.'s, Registration Certificates, Permits, Carriage Permits, transfer and importing of firearms and ammunition. This information would encompass Provincial and County Courts and Supreme Courts. Also Appeals Court, both Provincial and Supreme Court of Canada.

[2] After considerable back-and-forth, the applicant eventually clarified this request to be for "non-circulated case law", his intent being that the Ministry should not "duplicate information to which a layperson has access." On August 17, 2000, the Ministry wrote to the applicant and said that it was withholding any copies of case law under ss. 3(1)(a) and 20(1)(a) of the Act.

[3] Items 3 and 6 of the applicant's first access request read as follows:

> 3. Past, present and future agendas and policy of the Attorney General regarding firearms and reasons for the policies.
>
> …
>
> 6. All guidelines, manuals, and policies of a Firearms Officer and the Chief Firearms Officer.

[4] In a January 13, 2000 letter, the Ministry gave an estimate of $2,720 in fees for access to records covered by these items of the request. By a letter dated February 29, 2000, the applicant requested a waiver of the estimated fee, which the Ministry denied on June 23, 2000. The applicant requested a review of the Ministry's decision to deny the fee waiver.

[5] On July 6, 2000 the applicant submitted his second access request, in which he requested "all information regarding" two court cases, which he specified by file or case number. The Ministry wrote to the applicant on July 24, 2000 and told him that records

regarding one of the cases had been destroyed in accordance with the *Document Disposal Act*. As for the second case, the Ministry wrote to the applicant on July 26, 2000 and, in relevant part, said the following:

> The records that are in the scope of your request are in the working file of the Ministry's solicitor with conduct of this case. I am advised that some of these records have been previously disclosed as exhibits during court proceedings.
>
> The remaining records contain information which is excepted from disclosure under section 14 of the Act (preservation of solicitor-client privilege) a copy of which is attached for your information.

[6] On August 1, 2000, the applicant requested a review of this decision. Because none of these issues was resolved during mediation by this Office, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

[7] The issues to be resolved in this inquiry are as follows:

1. Are copies of court decisions that are in the Ministry's custody excluded from the Act by s. 3(1)(a)?

2. Is the Ministry authorized by s. 14 of the Act to refuse to disclose records?

3. Is the Ministry authorized by s. 20(1)(a) of the Act to refuse to disclose copies of court decisions because they are available for purchase by the public?

4. Should the Ministry's decision to refuse a fee waiver under ss. 75(1)(a) and (b) be upheld?

[8] On p. 12 of his initial submission, the applicant refers, in passing, to s. 25(1)(b) of the Act. Although it is not clear, it appears this reference is related to his arguments about s. 20(1)(a). Having referred to s. 25(1)(b), the applicant says that he "would strongly suggest a recommendation be made" to the Ministry to publish a record that lists trials and other court proceedings "in main categories such as divorce, ICBC no-fault claims, firearms related hearings, murder, rape" and so on.

[9] I do not interpret the applicant's reference to s. 25(1)(b) to relate to the Ministry's decision to refuse to disclose records. Moreover, he did not raise s. 25(1)(b) in his request for review. Nor is it mentioned in the Portfolio Officer's Fact Report or the Notice of Written Inquiry issued by this Office. In my view, s. 25(1)(b) is not properly in issue before me. Even if it were, I am not aware of any basis on which it could persuasively be said to apply and I would almost certainly be inclined to conclude that it does not apply here.

[10] The Ministry accepts that, consistent with a number of previous orders, it has the burden of establishing that its copies of court decisions are excluded from the Act by

s. 3(1)(a). Section 57(1) provides that the Ministry has the burden of proving that it is entitled to rely on ss. 14 and 20(1)(a) of the Act. Last, previous orders establish that the applicant has the burden of proving that the fee estimated by the Ministry should be waived, in whole or part, under s. 75(5)(a) or (b).

3.0 DISCUSSION

[11] **3.1 Are the Court Decisions Covered Under the Act?** – The Ministry relies on s. 3(1)(a) for the proposition that the copies of court decisions requested by the applicant are excluded from the Act's coverage. (I refer below to these copies as the "case law".) Section 3(1)(a) reads as follows:

> **Scope of this Act**
>
> 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> (a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts; … .

[12] The Ministry makes two points about s. 3(1)(a). First, it says that a decision written by a judge – *i.e.*, the judge's reasons for judgement – qualify as "a record of a judge" under s. 3(1)(a). Second, the Ministry argues that a court decision is "a record in a court file" and is therefore excluded under that aspect of s. 3(1)(a).

What is 'Case Law'?

[13] I will first describe the records that are referred to in this order as the "case law". These records consist of reasons for judgement. By reasons for judgement, I refer to a judge's written or verbal statement of findings of fact (based on the evidence produced for the court), the reasoning used in applying the law to those facts and deciding for one party and not the other, and the judge's reasoning in deciding on a particular remedy (*e.g.*, whether damages or an injunction should be awarded). Oral reasons for judgement are not always recorded, especially where the decision is an interim step in litigation.

[14] It is customary for a judge to give oral or written reasons for judgement. These reasons – which may be brief in the case of oral judgements – explain to the parties to the case how and why the judge decided the matter. Reasons for judgement also assist in developing the law, since our common law – *i.e.*, judge-made law – continues to build on principles expressed in reasons for judgement.

[15] Reasons for judgement, which are often referred to as 'decisions', are often published. A legal publisher will obtain a copy of a particular decision from the court. In

some cases, counsel involved in the case – or counsel who are aware of the decision – will bring it to the publisher's attention, to consider for publication. The publisher's legal editors edit and format decisions that are to be published. The company publishes the decision in print form, often after the judge has reviewed the draft. These published decisions are found in what are called law reports, which are in bound or loose-leaf volumes. Law reports are available for purchase by the public and can be found in law libraries and sometimes in other libraries.

[16] Court decisions are also, increasingly, published electronically. Electronically published decisions are available on-line for a fee or are available free. As I understand it, a for-profit electronic publisher follows much the same approach as a print publisher. Many courts also make their decisions available on-line for free. The British Columbia Court of Appeal and the British Columbia Supreme Court publish their decisions in this way, at www.courts.gov.bc.ca.

[17] If a decision is not selected by a legal publisher for publication, a copy of it is nonetheless available from the files of the registry of the court where the case was heard. (There may be some cases where a court file is sealed from the public, but these are relatively rare.) The court registry will charge a fee for providing a copy of a decision.

A Record of a Judge

[18] The Ministry relies on the following statement by my predecessor, in relation to s. 3(1)(a), in Order No. 152-1997, [1997] B.C.I.P.C.D. No. 8 at p. 5:

> A record of a judge is a record written by or to a judge about a matter that relates to his or her function as a judge.

Order No. 152-1997 does not assist the Ministry. That case dealt with a request for access to records created by judges who were members of the Rules Revision Committee for the *Rules of Court*. My predecessor did not say anything about a case such as this.

[19] The Ministry also refers to s. 3(1)(b), which excludes from the Act's coverage "a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity." At para. 5.05 of its initial submission, the Ministry says that, given the wording of s. 3(1)(b), "the Legislature intended in section 3(1)(a) to exclude from the Act records of judges in addition to their personal notes, communications and draft decisions."

[20] Section 3(1)(b) does not assist the Ministry in its argument that the Legislature intended s. 3(1)(a) to exclude from the Act reasons for judgement prepared by a judge. The difficulty for the Ministry is that s. 3(1)(b) only excludes from the Act a *draft* decision of any person acting in a judicial capacity. The Legislature clearly did not intend to exclude from the Act's scope, under s. 3(1)(b), a *final* decision of a person who is acting in a judicial capacity. Accordingly, s. 3(1)(b) actually cuts against the Ministry's position. Since s. 3(1)(b) only excludes draft decisions of a person acting

judicially, it is less likely, not more, that the Legislature intended, by referring to a record "of" a judge in s. 3(1)(a), to exclude final decisions under that section.

[21] In my view, the word "of" in the phrase "a record of a judge" in s. 3(1)(a) does not, in light of the meaning of s. 3(1)(b) and the purposes of the Act, carry the day for the Ministry. A judge's reasons for judgement are created by the judge, whether they are delivered orally and recorded by a court reporter or produced by the judge in writing. But I do not think that a record of a judge's reasons for judgement, however produced, is a record "of" the judge within the meaning of s. 3(1)(a). The record of the reasons is a record of the court, but it is not a record "of" the judge.

A Record in a Court File

[22] The Ministry then argues that, because reasons for judgement are found in court files, copies of those decisions in the Ministry's custody are excluded from the Act by s. 3(1)(a). It argues that s. 3(1)(a) "applies not only to records which are physically located in court files, but also to copies of those records" (para. 5.08, initial submission). In advancing this argument in its initial submission, the Ministry did not refer to Order No. 234-1998, [1998] B.C.I.P.C.D. No. 27. In his initial submission, the applicant argues that Order No. 234-1998 is determinative here. In its reply submission, the Ministry argues that, "despite what was found in Order No. 234-1998", s. 3(1)(a) "should be given a purposive interpretation" and be found to apply to the case law.

[23] Order No. 234-1998 is, as the applicant argues, determinative of this issue. So is Order 01-27, [2001] B.C.I.P.C.D. No. 28, which I issued after this inquiry was held. Section 3(1)(a) does not exclude records in the custody or under the control of the Ministry simply because the originals of those records, or copies of them, are physically located in a court file somewhere.

[24] For the above reasons, I find that s. 3(1)(a) does not exclude the case law from the Act's scope.

[25] **3.2 Solicitor Client Privilege** – The Ministry says the case law, and certain contents of the Ministry file that the applicant specified in his access request, are protected by solicitor client privilege under s. 14 of the Act. That section authorizes the Ministry to refuse to disclose "information that is subject to solicitor client privilege".

[26] The Ministry says that Brian Young, the Ministry lawyer who acts in all firearms matters in British Columbia involving the provincial government, is in a solicitor-client relationship with the province. The Ministry says, at para. 5.20 of its initial submission, that the Chief Provincial Firearms Officer is the government official to whom legal services – which include the conduct of litigation and the provision of legal advice – are provided by that Ministry lawyer. The Ministry says both kinds of privilege encompassed by s. 14 apply to the disputed records.

[27] Citing the 1987 report of the Parliamentary Standing Committee on Justice and Solicitor General, entitled *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, the applicant argues that s. 14 should not be used to thwart the spirit of the Act. He argues that it should be used only if disclosure of the requested record would truly injure the confidential relationship between lawyer and client. He also argues that once “the case, trial or hearing is concluded, s. 14 would not apply.”

[28] I will note here that some of the contents of the Ministry’s lawyer’s file are copies of court pleadings, exhibits filed in court and correspondence between Brian Young and the applicant’s lawyer. The Ministry declined to disclose these file materials – in respect of which it did not claim privilege – on the basis that the applicant already had copies of those materials. The applicant did not dispute this in this inquiry and I consider the issue of those materials is not properly before me. They need not be considered here.

Litigation Privilege

[29] I am satisfied that the collection of case law maintained by the Ministry is privileged. The reasons for this finding follow.

[30] Neil Reimer, the Ministry Information and Privacy Analyst who dealt with the applicant’s request for the case law, deposed in an affidavit that, based on telephone conversations with the applicant, he interpreted item 2 of the first access request to refer to copies of whatever cases the Ministry lawyer who handles firearms matters had copied and kept for potential use in litigation. That lawyer had agreed, it is clear, to disclose to the applicant copies of all of the cases on which the he intended to rely in the *Firearms Act* proceeding that involved the applicant.

[31] Litigation privilege protects from disclosure any record that has been created for the dominant purpose of preparing for, advising on or conducting litigation that was under way at the time the record was created or that was in reasonable prospect at that time. See, for example, Order 00-08, [2000] B.C.I.P.C.D. No. 8. In this light, the Ministry says (at para. 5.25 of its initial submission) that the case law is protected by the litigation branch of solicitor client privilege

> … because it is a collection of records the disclosure of which would reveal the results of the professional skill, knowledge, and judgement of Attorney General counsel responsible for firearms matters, which were applied in aid of the client.

[32] The Ministry relies on the following passage from pp. 103 and 104 of R. Manes et al., *Solicitor Client Privilege in Canadian Law* (Butterworths: Toronto 1993):

> Although the individual items in a collection of records may be non-privileged documents, the collection as a whole may be privileged, being the result of the professional knowledge, skill and research of the solicitor, if the collection of records is made for the dominant purpose of contemplated litigation.

> The rationale for holding privileged the collection as a whole would seem to be that the assembly of the collection represents the **sum** total of the solicitor's professional skill in aid of the client in contemplation of litigation. The principle was well stated in *Lyell* v. *Kennedy* (1884), [27 Ch.D. 1, at p. 31] where Bowen L.J. stated that:
>
> > A collection of records may be the result of professional knowledge, research and skill … and even if the solicitor had employed others to obtain them…It is his mind which has selected the materials … and you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them.
>
> In essence, there is a separate head of privilege for a collection of documents as a whole, even where some of those documents individually would not meet the test for privilege. The key is that the lawyer's knowledge, skill and research went into the formation of the collection. The rationale for the privilege attaching to a collection of documents is therefore similar to the work product/lawyer's brief rule attaching privilege to the materials, notes, etc. of the solicitor's brief. In *R.* v. *Board of Inland Revenue* [[1988] 3 All E.R. 248 (Q.B.)] it was suggested that given the review process undertaken by the lawyer or client as to what should be selected *for copying*) and submitted to counsel) "it would seem to follow that the product of that review is also privileged" [at p. 256]. [emphasis in original]

[33] In *Hodginkson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129, the British Columbia Court of Appeal dealt with what is often called the 'solicitor's brief privilege rule'. In that case, the plaintiff's lawyer had, for the purpose of preparing his case, made copies of records that were not privileged. The defendants could not find copies of the same records and sought to compel their production from the plaintiff's lawyer's file. The majority of the Court of Appeal held that the copies in the lawyer's file were privileged. They reflected the lawyer's exercise of skill and judgement in preparing his client's case.

[34] The Ministry argues that the case law collection was compiled and kept "primarily for the purpose of preparing for, advising on, and/or conducting reasonably contemplated litigation". This is supported by the affidavit sworn by Brian Young, the Ministry lawyer who acts in all firearms matters. I am satisfied, on the basis of Brian Young's evidence and the other material before me, that existing and reasonably contemplated litigation was the dominant purpose for the compilation of the case law. The collection reflects the skill and judgement applied by Brian Young in preparing cases for his client, the provincial government. The case law collection is privileged under the litigation privilege branch of s. 14.

[35] The Ministry litigation file that the applicant specifically requested – a file that involves him – is also protected by litigation privilege. That file is maintained by Brian Young, the Ministry's firearms lawyer, for the purpose of the specified legal proceeding, including an appeal arising from that proceeding. That appeal was still outstanding at the time of the request and this inquiry. Brian Young deposed in his affidavit filed in this inquiry that his file contains his notes for the purposes of conducting the litigation, case law gathered for use in the case and correspondence with his client. He deposed that these materials were prepared or came into existence for the dominant purpose of the

litigation. I find that these materials are, applying the test for litigation privilege, protected under s. 14.

Legal Professional Privilege

[36] The Ministry argues that, in addition to being compiled and kept primarily for the purpose of preparing for, advising on and conducting litigation, the case law was also obtained "with a view to informing legal advice to be provided on firearms law generally" (para. 5.27, initial submission). In light of my finding that litigation privilege applies to the case law, I need not consider this point.

[37] **3.3 Available for Purchase by the Public** – The Ministry says that, in any case, it is authorized to deny access to the case law because it "is available for purchase by the public" within the meaning of s. 20(1)(a) of the Act. In light of my decision that the Ministry is authorized by s. 14 to refuse to disclose the case law collection, I need not consider the s. 20(1)(a) issue. Because this provision does not often arise for consideration, however, I have decided to address it here.

The section reads as follows:

> **Information that will be published or released within 60 days**
>
> 20 (1) The head of a public body may refuse to disclose to an applicant information
>
> (a) that is available for purchase by the public, or … .

[38] This section has been mentioned in three previous decisions under the Act, all of them decisions of my predecessor. In Order No. 235-1998, [1998] B.C.I.P.C.D. No. 28, he found that the public body had "established by affidavit evidence that the [magazine] article is available for purchase by the public" and confirmed the public body's decision to refuse access under s. 20(1)(a).

[39] In Order No. 91-1996, [1996] B.C.I.P.C.D. No. 17, my predecessor dealt with s. 20(1)(a) in more detail and his decision is worth examining at some length. That case arose out of a decision by what was then the Ministry of Environment, Lands and Parks ("MELP") to refuse to give the Western Canada Wilderness Committee ("WCWC") access, at a reduced cost, to MELP digital map data that was available for purchase by the public. WCWC in effect sought a review of the MELP's pricing of digital map data. My predecessor declined to interfere with the MELP's pricing. Instead, he held that, once a public body has established that requested information "is available for purchase by the public", the only remaining question is whether the public body has exercised its s. 20(1)(a) discretion to refuse access in good faith and considering all relevant circumstances. Relying on the MELP's affidavit evidence, my predecessor found that the

MELP had exercised its discretion in good faith, and not for an improper purpose or based on irrelevant considerations, in refusing access and upheld its decision under s. 20(1)(a).

[40] The applicant did not cite Order No. 91-1996. He relied, instead, on a number of Ontario decisions dealing with s. 22(a) of the Ontario *Freedom of Information and Protection of Privacy Act.* That section authorizes an institution to refuse to disclose a record where "the record or the information contained in the record has been published or is currently available to the public." The applicant relies, in particular, on Ontario Order 170, [1994] O.I.P.C. No. 32, Order M-191, [1993] O.I.P.C. No. 256, Order M-773, [1996] O.I.P.C. No. 188, and Order P-1316, [1996] O.I.P.C. No. 431. He says these decisions establish that the Ontario commissioner will interfere with an institution's decision to deny access under s. 22(a) only "where the balance of convenience" favours requiring the requester to obtain access through other means if the information is currently available to the public.

[41] The applicant's characterization of the Ontario approach is accurate, as the following passage from p. 2 of Ontario Order P-1388, [1997] O.I.P.C. No. 116, demonstrates:

> This exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the Act (Orders P-1114, P-1316 and P-1387).
>
> In order for a record to qualify for exemption under section 22(a), the record, or the information contained in it, must either be published or available to members of the public generally, through a regularized system of access, such as, for example, a public library or a government publications centre (Orders P-327, P-1316 and P-1387).
>
> Once an institution establishes that section 22(a) applies, the fee structure of the Act, including the provisions for fee waiver, is no longer operative (Orders 159, P-1316 and P-1387).

[42] At p. 3 of Order P-1388, Commissioner Tom Wright added the following observations:

> In Order P-1316, I stated that in order to establish that a regularized system of access exists an institution must demonstrate that there is a system, that the record or information is available to everyone and there is a pricing structure which is applied to all who wish to obtain the information.

[43] He went on to find, in that case, that the statutes and regulations of the Ontario Legislature were available, through a "regularized system of access", in both print and electronic form. Section 22(a) therefore applied and the balance of convenience favoured requiring the applicant to use that method of access.

[44] The Ministry's submissions on s. 20(1)(a) mention only Order No. 235-1998. It argues that this case cannot be distinguished from Order No. 235-1998 and that s. 20(1)(a) applies. In its reply submission, it says that, because the case law is available through on-line commercial services such as Quicklaw and "other sources at public libraries", the case law is "sufficiently publicly available to fall within the section" (para. 3.08, reply submission).

[45] The Ministry also argues that, contrary to Ontario decisions such as Order 123, [1989] O.I.P.C. No. 86 and Order M-191, s. 20(1)(a) does not require public bodies to inform applicants of the specific location, and identity, of records that contain requested information. It notes that, in responding to the applicant, the Ministry identified for the applicant various sources of court decisions. The Ministry's December 15, 1999 letter to the applicant did refer him to the relevant website for British Columbia Court of Appeal and British Columbia Supreme Court decisions. It also referred him to Quicklaw and the Vancouver Courthouse Library. It appears from the applicant's own materials in this inquiry that he has made use of all of those sources in an attempt to gather relevant case law.

[46] As for the balance of convenience approach taken in the Ontario decisions, the Ministry says in its reply submission that convenience is "not the only public interest" that can properly be considered in exercising its discretion under s. 20(1)(a). In this case, it says the case law in its hands is privileged under s. 14 and it was appropriate for the Ministry to have considered this in declining to waive the benefit of s. 20(1)(a).

Is the Case Law Available for Purchase?

[47] I have no doubt the case law is "available for purchase by the public" within the meaning of s. 20(1)(a). If a record is made available to anyone who is prepared to pay the price charged by the seller – or a price negotiated by seller and purchaser – it is available for purchase. (It does not matter whether the price paid includes a profit element or only covers the seller's costs of production and sale.) A record will, for example, be "available for purchase by the public" where it is produced by a privately or publicly owned publisher or entity and can be acquired at a bookstore or similar facility – whether traditional or on-line – or be obtained directly from the publisher or entity or an agent. A record will also be available for purchase by the public where a public body has formally decided – in accordance with any applicable law or any policy or rules applicable to the public body – that particular records, or kinds of records, are available for purchase by the public and are held out to the public, in some way, as being available for purchase. This may include cases where a public body tells people that records are available for purchase at the time they inquire about obtaining them – it is not necessary to publicly advertise their availability for purchase in advance. These examples of how a record may be available for purchase by the public do not exhaust the meaning of "available for purchase by the public".

[48] As I noted above, and as the Ministry pointed out in its December 15, 1999 letter to the applicant, copies of court decisions are available for purchase by the public in a

number of ways. An unpublished court decision can be acquired from the relevant court registry. A published court decision can be bought from its publisher (print or on-line) by subscribing to the appropriate law report service.

[49] The fact that a particular court decision may be held in a court registry that is not geographically accessible to the applicant does not get around the fact that the decision is available "to the public" for purchase. Geographic and other barriers only come into the picture in relation to the public body's exercise of discretion under s. 20(1)(a). I will turn to that issue now.

Balance of Convenience

[50] The applicant argues that, consistent with the Ontario approach, the 'balance of convenience' means the Ministry should not be allowed to rely on s. 20(1)(a), since it can readily give the applicant access to the case law. In the British Columbia context, I prefer to approach the issue by asking whether the public body has considered the exercise of its discretion to disclose records despite the fact that it is authorized to refuse access under s. 20(1)(a). This is consistent with the approach I have taken to the exercise of discretion in relation to other of the Act's permissive exceptions. See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, and Order 00-14, [2000] B.C.I.P.C.D. No. 17. It is also consistent with Commissioner Flaherty's approach to this issue in Order No. 91-1996.

[51] In Order No. 91-1996, my predecessor considered whether the public body had exercised its discretion under s. 20(1)(a) in good faith and not for an improper purpose or based on irrelevant considerations. In Order No. 325-1999, at p. 5, I set out the following non-exhaustive list of factors to be considered by a public body in exercising its discretion to withhold or disclose records under a permissive exception:

> In exercising discretion, the head considers all relevant factors affecting the particular case, including:
>
> - the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;
> - the wording of the discretionary exception and the interests which the section attempts to balance;
> - whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
> - the historical practice of the public body with respect to the release of similar types of documents;
> - the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
> - whether the disclosure of the information will increase public confidence in the operation of the public body;

- the age of the record;
- whether there is a sympathetic or compelling need to release materials;
- whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and
- when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.

[52] In light of the first factor, especially, a public body should consider whether the Act's objective of accountability favours giving the applicant access to a requested record under the Act even though it could, technically, rely on s. 20(1)(a). If a record can only be purchased with difficulty – *e.g.*, because it is difficult for a purchaser to locate copies – the public body should give access to it despite s. 20(1)(a). In such a case, the public body may choose to rely on s. 20(1)(a) because it reasonably considers that to give access under the Act would, despite its ability to charge fees, unreasonably burden it. Further, if the public body can easily provide a copy of a requested record under the Act, and doing so will not unreasonably burden the public body even if it charges fees, it should do so.

[53] Another factor to consider is whether the records the public body has declined, under s. 20(1)(a), to disclose are otherwise protected under the Act. Here, the Ministry has, as the above discussion indicates, correctly applied s. 14 of the Act to the case law collection sought by the applicant. The individual cases are not privileged, but the collection is. The Ministry exercised its discretion under s. 20(1)(a) against disclosure because the material was, in its view, privileged under s. 14. There is no basis for my interfering with what the Ministry has done under s. 20.

Duty to Assist

[54] As a final point, I note that whether or not the Ministry has a duty to identify publicly available records that may contain requested information, or a duty to tell an applicant where such records may be obtained, can arise only under s. 6(1). Ontario cases address this issue under s. 22 of the Ontario legislation, which is similar to s. 20. Section 6(1) of the British Columbia Act contains a general duty to assist, but Ontario's Act has no such general provision.

[55] The applicant suggests that he may not know which court files to search in order to find unpublished decisions, while the Ministry knows about unpublished decisions through its involvement in the cases themselves. The applicant has not, however, formally raised the issue of duty to assist, under s. 6(1) or otherwise. Although the Ministry has referred to it here, s. 6(1) is not properly before me. How far the duty to assist extends in the context of s. 20(1)(a) will have to be left to another day. I would expect, however, that a public body's duty to assist in such cases includes an obligation to tell an applicant where a requested record can be purchased if the public body is readily aware that such a record can be bought and is aware of where it can be bought. To its credit, the Ministry's December 15, 1999 letter to the applicant gave the applicant this kind of information.

[56] **3.4 Ministry's Fee Waiver Decision** – As I indicated earlier, the applicant asked for a waiver of the Ministry's estimated $2,720 fee for access to items 3 and 6 of the applicant's request, as described above. Section 75(5) of the Act authorizes the Ministry to waive a fee, as follows:

> 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.

[57] The applicant sought a fee waiver because, he says, he is "fiscally bereft" and is unable to work at his "chosen profession", whatever that may be. He also asks for a fee waiver on the basis of the "public interest". In that respect, he relies on a letter from the National Firearms Association, addressing the public interest in the Association being able to use the "uncirculated case material" for a variety of purposes. The Ministry's response to the fee waiver request reads, in relevant part, as follows:

> The Ministry has now had an opportunity to review your letter and attached submissions. Please be advised that the fee estimate will stand. Our letter of January 13th, 2000 indicates that the records which we have considered to be within the scope of your request are all Ministry policies regarding firearms. The case law records you seek do not form part of the fee assessment as we have judged them to be publicly available through the courts.
>
> The reasons you have submitted do not meet our test for public interest in the records. Regarding your ability to pay, as we have previously advised you, narrowing the scope of your request would reduce the fee assessment. This option is still available to you.

[58] In his affidavit filed in this inquiry, Neil Reimer, of the Ministry, deposed that he had assessed the applicant's request for a fee waiver "against the following considerations":

- that the amount of the fee could cause financial hardship to the Applicant if he were to pay it all himself;
- that items 3 and 6 were broad-ranging, covering a large volume of records, all of which would have to be reviewed for possible severing;
- that the Applicant had declined to narrow and focus items 3 and 6 when told that doing so would likely result in a fee reduction;
- that it was my understanding, from the wording of the Request and from my conversations with the Applicant, that the Applicant's motivation for requesting the records encompassed by items 3 and 6 was to assist him in the litigation of action number 100840 (i.e., that it was to serve a private interest);

- that the organizations which later supported him in his request for a fee waiver were not representative of the broad public, but only of a particular segment;
- that there appeared to be no reason why those organizations could not assist the Applicant in paying the fee, and that it seemed to me that the fee would not be too much for them, in conjunction with the applicant, to afford;
- that, although the subject matter of firearms regulation relates to public safety, the records, or at least the overwhelming majority of the records, encompassed by items 3 and 6 of the Request do not;
- that the records encompassed by items 3 and 6 of the request do not relate to public health or the environment;
- that disclosure of information from the records encompassed by items 3 and 6 would not add to any public debate because:
  - a) public debate on the establishment of a firearms registration regime occurred prior to the passage of the Federal firearms legislation; and
  - b) probably a significant portion of the information would be subject to severing.

[59] Debra Barr, the Ministry's acting manager of information and privacy matters based her decision not to waive the fee on Neil Reimer's analysis.

[60] As the Ministry pointed out in its decision to deny the fee waiver, the fee estimate related only to items 3 and 6 of the request, not to the case law aspect of the request. The National Firearms Association's letter does not, therefore, have any bearing at all on that issue.

[61] Before turning to the merits of the Ministry's fee waiver decision, I must dispose of the Ministry's contention that I should, even if I am "inclined to disagree with a head's determination, accord a measure of deference to the head before deciding whether" to substitute my own decision (para. 5.50, initial submission). The Ministry says, at para. 5.49 of its initial submission, that my predecessor "held that the head of a public body is entitled to some leeway in determining what is in the public interest" and

> … deferred to the judgement of the head, recognizing that it is the head who is most familiar with the contents of the requested records, and who is in possession of expertise, knowledge, information and experience on the matter.

[62] The Ministry cites Order No. 79-1996, [1996] B.C.I.P.C.D. No. 5, Order No. 90-1996, [1996] B.C.I.P.C.D. No. 16, and Order No. 98-1996, [1996] B.C.I.P.C.D. No. 24, for these propositions. The Ministry cites no more recent authorities than these.

[63] As I pointed out two years ago – in Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45 – my predecessor's approach to his review of public body fee waiver decisions evolved over time. I have noted this evolution in David Flaherty's thinking in a number

of decisions since Order No. 332-1999. He began by giving public bodies some deference, as in Order No. 79-1996, but at the end of the day he acknowledged, in Order No. 293-1999, [1999] B.C.I.P.C.D. No. 6, that the commissioner has the authority to substitute his or her decision regarding a fee waiver for the head's decision. Order No. 293-1999 was upheld on judicial review by the British Columbia Supreme Court, in *Minister of Forests and the Attorney General of British Columbia* v. *The Information and Privacy Commissioner of British Columbia and The Sierra Legal Defence Fund* (13 August 1999), Victoria 99-1290 (B.C.S.C.). As the *Minister of Forests* decision confirms, the Act gives the commissioner the authority to substitute her or his decision, "in the appropriate circumstances", respecting a fee waiver or other fee-related decision of a public body.

Ability to Afford the Fee

[64] The amount of the Ministry's fee estimate is not in issue here, since the applicant did not seek a review of the estimate itself. On the ability to pay issue, the Ministry says the applicant did not provide it with any evidence that he is unable to afford the estimated fee. As Neil Reimer's affidavit also indicates, the Ministry considered the fact that, although items 3 and 6 of the request were broad-ranging and covered a large volume of records, the applicant refused to narrow those items, even though he had been told that doing so would likely result in a fee reduction.

[65] The applicant has submitted evidence in this inquiry, which I received on an *in camera* basis, to support his contention that he has a very limited income and cannot afford the estimated fee. That evidence goes to the source of his income and at best suggests, without giving any details, that it is modest. Nor does the applicant offer any evidence as to his assets or other sources of income (or the lack thereof). There is no indication the applicant gave any such evidence to the Ministry when he asked for a fee waiver.

[66] I place little weight on the Ministry's contention that, because the National Firearms Association and the Responsible Firearms Owners Coalition of British Columbia wrote letters of support for the applicant, the applicant should have explained why these two organizations could not assist in paying the fee. Again, the National Firearms Association supported the request for the case law, which is not covered by the applicant's fee waiver request. Its letter is irrelevant to both fee waiver issues before me. Further, the person who signed the Coalition's letter merely speaks to the fee waiver request being in the public interest and to the fact that the applicant is a member of that organization. That letter addresses the public interest issue, not the applicant's alleged inability to afford the fee.

[67] The applicant refused the Ministry's request that he narrow, or sharpen, the focus of items 3 and 6 of his request. Those items certainly appear to be very broad, perhaps over-broad. This is a factor the Ministry appears to have assessed in deciding whether it was for any other reason fair to excuse payment of part or all of the fee.

[68] In the final analysis, I decline to interfere with the Ministry's decision to deny a fee waiver under s. 75(5)(a). Applicants should not be held to high standards of proof, but they cannot, by the same token, expect a public body to waive a fee simply because they assert an inability to pay. An applicant who wishes a fee waiver on this basis, as on any other, has every reason to provide the public body with evidence to support the waiver request. In this case, the applicant does not claim to have given the Ministry any evidence and there is no indication he did. I decline to interfere with the Ministry's decision under s. 75(5)(a).

Public Interest Fee Waiver

[69] Again, the applicant also sought a public interest fee waiver. The Ministry acknowledges that the s. 75(5)(b) analysis has two steps, as outlined (for example) in Order 01-04, [2001] B.C.I.P.C.D. No. 4. It says the applicant has not satisfied the Ministry that the requested records relate to a matter of public interest. It also argues that the factors set out in Order 01-04 "are not necessarily the only factors to consider" (para. 5.37, initial submission). That is true. Certainly, nothing in Order 01-04 indicates that the two-step process articulated there is intended to be exhaustive. This is confirmed in Order 01-35, [2001] B.C.I.P.C.D. No. 36, in which I said that the criteria articulated in the first part of the two-step process set out in Order 01-04 and other decisions are not exhaustive.

[70] Here, Neil Reimer deposed that, in deciding that the requested records do not relate to a matter of public interest, he accounted for the fact that the applicant had told him that the policy-related records were being sought in relation to the proceeding in which he was involved with the Ministry under the *Firearms Act*. I agree with the Ministry that this supports the conclusion that the applicant's request is being pursued for a private purpose and not in the public interest. That does not, of course, mean that the records themselves do not relate to a matter of public interest.

[71] At para. 7 of his affidavit, Neil Reimer deposed that he learned that the so-called policy records date back to 1995 "in respect of the current firearms legislation" and include earlier records "in respect of the previous firearms legislation." He also learned that the records include

> … information provided by stakeholder groups during consultations; studies related to volumes of potential clients; information generated during Federal/ Provincial/ Territorial discussions; records received from the Federal Government; and numerous briefing notes on a wide range of particular issues.

[72] In the circumstances, I am satisfied that the requested records do not relate to a matter of public interest. The applicant's intended personal use of the records also favours the Ministry's decision to deny a public interest fee waiver. Accordingly, I decline to interfere with the Ministry's denial of a public interest fee waiver under s. 75(5)(b).

4.0 CONCLUSION

[73] For the reasons given above, I make the following orders:

1. Under s. 58(2)(b) of the Act, I confirm the Ministry's decision that it is authorized to refuse access to the case law and the other records that it withheld under s. 14 of the Act.

2. Under s. 58(2)(b) of the Act, I confirm the Ministry's decision that it is authorized to refuse access to the case law under s. 20(1)(a) of the Act.

3. Under s. 58(3)(c) of the Act, I confirm the Ministry's decision, under s. 75(5) of the Act, not to excuse the applicant from paying the fee estimated by the Ministry.

November 30, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia