Order 02-28

RESORT MUNICIPALITY OF WHISTLER

Michael T. Skinner, Adjudicator
June 12, 2002

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Summary: Applicant requested copies of records detailing sources and impact of alleged pollution of water supplies in the Whistler area, focussing on 1991, as well as property files of certain individual property owners. Applicant asserted that records should be released to public under s. 25; alternatively, he sought a waiver of fees under s. 75(5). Section 25 found not to apply; decision of public body to deny request for fee waiver confirmed.

Key Words: failure to make submission – risk of significant harm – environment – public interest – fee estimate – fee waiver – inability to pay – fair to excuse payment.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 25(1) and (2); s. 75(5).

Authorities Considered: **B.C.:** Order No. 98-1996, [1996] B.C.I.P.C.D. No. 24; Order No. 162-1997, [1997] B.C.I.P.C.D. No. 20; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 01-04, [2001] B.C.I.P.C.D. No. 4; Order 01-20, [2001] B.C.I.P.C.D. No.21; Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order 02-11, [2002] B.C.I.P.C.D. No. 11.

1.0 INTRODUCTION

[1] In late June and early July of 2001, the applicant made a series of 14 requests to the Resort Municipality of Whistler ("Whistler") under the *Freedom of Information and Protection of Privacy Act* ("the Act"). The records sought related to an alleged sewage spill into Green Lake, a cross-connection of sewer and stormwater drains at Wildwood Lodge in 1991, the flooding of Fitzsimmons Creek and Green River in 1991 and alleged pollution of the water well supplying Emerald Estates for the period 1988 to 1992. In

addition, he requested complete property file materials pertaining to certain individual property owners in Whistler. For each request he sought "any and every file". I refer to the applicant's requests for records collectively as "the request".

[2] Whistler told the applicant, in a letter of July 10, 2001, that the records had to be gathered from a variety of locations both local and off-site and that the request "represented a large research undertaking". Whistler prepared a fee estimate of $360 under s. 75 of the Act for locating, retrieving, producing and preparing the records for disclosure. This estimate did not include the fees for photocopying of records and commercial copying of plans. Whistler informed the applicant it would be adding those fees later and in the interim requested a deposit of half of the amount of the initial estimate.

[3] The applicant responded to this on July 16, 2001 by requesting a fee waiver on the grounds of inability to afford payment and public interest considerations. On the following day, the applicant submitted an additional letter arguing that s. 25 of the Act applied to the records. One week later, Whistler issued its reply to the applicant, denying the fee waiver and providing a newly revised fee estimate of $758.26, for which a 50% deposit was requested prior to the commencement of work on the request. By way of letter of July 27, 2001 to the Office of the Information and Privacy Commissioner, the applicant requested a review of Whistler's denial of fee waiver. The request for review then proceeded, as contemplated by the Act, to mediation. The Portfolio Officer's Fact Report indicates that in the course of the mediation process, Whistler revisited the issue of records retrieval in the context of the scope of the applicant's request and on October 22, 2001 issued to the applicant a substantially revised fee estimate of $3,345. It also provided reasons supporting its denial of the fee waiver request.

[4] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUES

[5] The first issue is whether Whistler is required to disclose the requested records pursuant to s. 25(1)(a) or (b) of the Act. The relevant portion of s. 25 reads as follows:

> **Information must be disclosed if in the public interest**
>
> **25** (1) Whether or not a request for access is made, the head of 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.

(2) Subsection (1) applies despite any other provision of this Act.

[6] Previous orders of the Information and Privacy Commissioner have consistently held that the burden of proof to establish the applicability of s. 25 rests with the applicant: see Order No. 162-1997, [1997] B.C.I.P.C.D. No. 20 and Order 00-16 [2000] B.C.I.P.C.D. No. 19.

[7] The second issue relates to the applicant's entitlement under s. 75 of the Act to the requested fee waiver. This requires showing on reasonable and objective grounds that the applicant is unable to afford the requested fee payment or that the requested records relate to a matter of public interest. The relevant portion of s. 75 reads as follows:

Fees

75 (5) If the head of a public body receives an applicant's written request to be excused from paying all or part of the fees for services, the head may excuse the applicant 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.

[8] Again, the burden of proving entitlement to a waiver of fees, in whole or in part, under this section has been held to rest with the applicant: see Order No. 98-1996, [1996] B.C.I.P.C.D. No. 24 and Order 01-04, [2001] B.C.I.P.C.D. No. 4.

[9] It should be noted that I am adjudicating this inquiry without the benefit of a submission from the applicant. While I do not, in the circumstances of this inquiry, draw an adverse inference from the applicant's failure to participate fully in the process, the applicant certainly does himself no favours by limiting himself to the letters that he wrote earlier to the public body (and later copied to this Office) to argue his case. Those letters are properly before me in this inquiry.

3.0 DISCUSSION

[10] **3.1 Application of Section 25 –** It is appropriate to discuss this element first, since a positive finding on s. 25 would render the fee question moot. Section 25 is often referred to as a "public interest override" in that it allows for the disclosure of information despite any other section of the Act. The test for compliance with the requirements of this section is clear: in Order 01-20, [2001] B.C.I.P.C.D. No. 21, involving the University of British Columbia and Coca-Cola Bottling Ltd., Commissioner Loukidelis stated as follows at p. 7:

> … Section 25 applies despite any other provision of the Act, whether or not an access request has been made. It requires disclosure "without delay" where information is about a risk of significant harm to the environment or to the health and safety of persons or where disclosure is for any other reason clearly in the public interest. Although the words used in s. 25(1)(b) potentially have a broad meaning, they must be read in conjunction with the requirement for immediate disclosure and by giving full force to the word "clearly", which modifies the phrase "in the public interest".

[11] Certain public bodies, particularly police forces, employ s. 25 periodically to make public safety announcements. A risk to the public may also come from problems with utilities on which citizens rely. A "boil water advisory" issued by a public utility or regulator to residents of an area affected by temporary water contamination would likely meet the s. 25 standard for disclosure.

[12] The contaminated drinking water example bears some similarity to the incident underlying the records sought in this case. But one needs to remember that a "boil water advisory" due to contaminated water is characterized principally by its timeliness and the urgency of warning the public in order to avoid harm to health. The majority of the information that the applicant seeks, by contrast, is historical in nature and relates to contamination of local water supplies due to alleged sewage spills from a septic system, from a cross-connection of storm and septic sewer lines (whereby human waste would be introduced into a storm-water system intended to drain into domestic water supplies), and from flooding of Fitzsimmons Creek and Green River. The time-period for the records covered by the request is focused on 1991, with one reference to alleged sewage spills into Green Lake occurring between 1995 and 1998.

[13] The timeliness of the request for records is one factor to be considered in the application of s. 25: the section refers to the release of information, "without delay", about a "risk of significant harm". This language is prospective in nature, or at least current in terms of the public interest in compulsory immediate disclosure. Typically, it would not include a risk to which the public was exposed at some time in the past, but that is no longer present. This is not to say that s. 25 could not conceivably be applied to historical records; however, there would have to be a link between the historical records and a present or prospective risk of "significant harm to the environment or to the health or safety of the public or a group of people." The incident that is the subject of the bulk of what the applicant is after is over ten years old. In the absence of any evidence in the material before me that there is any question of an ongoing or prospective risk of significant harm within the meaning of s. 25(1)(a), the historical nature of the event is on its own sufficient for me to find that s. 25(1)(a) does not apply. This finding also applies

in a stronger degree to the requested property records, which come nowhere close to meeting s.25 disclosure criteria.

[14] In the access requests he submitted to Whistler, the applicant consistently sought records which would show "how the public was warned and protected from such a disaster". This suggests an argument that disclosure in the public interest is warranted under s. 25(1)(b). In Order 02-11, [2002] B.C.I.P.C.D. No. 11, the Commissioner considered a case involving an applicant's assertion that s. 25 required disclosure of information about a city contract with an alleged environmental polluter. On the question of accountability of public bodies in this context, the Commissioner stated as follows, at para. 16:

> These are general arguments for accountability and transparency as contemplated by s. 2(1) of the Act. Having thought about this with care, I cannot distinguish this case from others in which s. 25(1)(b) is said to be triggered by the general desirability of subjecting a public body's activities to scrutiny. As was the case in Order 01-20, I am not persuaded there is an urgent and compelling need for compulsory public disclosure despite any of the Act's exceptions. I do not see any particular urgency attaching to disclosure of this information. Nor is there a sufficiently clear and compelling interest in its disclosure. I find that s. 25(1)(b) does not require the City to disclose the disputed information.

[15] In the passage above, Commissioner Loukidelis has made it clear that the application of s. 25 requires, first, an urgent and compelling need for compulsory public disclosure and, second, a sufficiently clear and compelling public interest in immediate disclosure. Both elements must be satisfied for s. 25 to apply.

[16] In this instance, I find that the request fails the first part of the test (urgent and compelling need) and I therefore need not consider the second element. The applicant's wish to see records regarding how the public was or was not "warned and protected" several years ago focuses on public body accountability generally. This is not enough, in this case, to establish that it is "clearly in the public interest" for the records to be disclosed at once despite the rest of the Act.

[17] I should stress that my finding under s. 25(1) does *not* mean that, because s. 25 does not apply, a public body has no obligation to produce requested records. Nor does it mean that there are no public accountability issues to be considered or that the records sought are of little importance. What this finding *does* mean is that the public body is not obligated to release the records immediately, for dissemination to the public, without charge and despite any of the Act's exceptions to the right of access.

[18] **3.2 Request for Waiver of Fees** – Section 75 permits the head of a public body to waive all or part of a fee under s. 75 if, in the opinion of the head, the applicant cannot afford payment, or for any other reason it is fair to excuse payment, or if the record relates to a matter of public interest.

Unable to pay

[19] With respect to the first issue, whether the applicant is unable to afford payment, Whistler has submitted a detailed affidavit from Brenda Sims, Municipal Clerk. Exhibit “D” to that affidavit is a letter of July 16, 2001, in which the applicant sought a waiver of all fees under s. 75 as, in his words, “I am on welfare at the moment”. He also stated that his house had burned down a few months earlier. Losing a home is obviously a difficult if not traumatic circumstance for anyone, and it is hard not to feel sympathy for someone caught in such a position. However, sympathy alone cannot be an appropriate ground for applying fee waiver provisions. I return to the fact that the applicant has chosen not to provide any further level of detail or explanation of his financial circumstances in this inquiry by way of a written submission. In July of last year, the applicant stated that he was on welfare “at the moment”; he has provided no information to this inquiry as to whether that continues to be the case. It is also unclear what the impact of the loss of his home (a bare assertion in correspondence) had on his general financial circumstances, and whether that loss was mitigated by insurance or any other form of financial assistance.

[20] In Order 01-24, [2001] B.C.I.P.C.D. No. 25, Commissioner Loukidelis had this to say on the matter of evidence regarding inability to pay:

> In my view, the applicant has not established that it cannot afford to pay the estimated fee. General assertions, even in affidavit form, that the applicant has a “limited budget” or “extremely limited” financial resources, do not establish an inability to afford this particular fee. The applicant did not provide any details as to its financial situation that would allow one to conclude that it could not afford the fee. I find that the applicant has not established that it cannot afford to pay the estimated fee.

[21] For the foregoing reasons I am unable to conclude on the information before me that the applicant cannot afford to pay the estimated fee.

Fair for any other reason to excuse payment

[22] In s. 75, the words “or for any other reason it is fair to excuse payment” indicate that fairness considerations should apply to an assessment of whether the applicant “cannot afford the payment”. Even if the applicant can afford to pay, it may otherwise be “fair” that in the circumstances the fee or part of it be waived.

[23] To properly determine whether it is “fair for any other reason” to excuse payment requires, obviously, another reason. There may be occasions when the “other reason” presents itself from the circumstances of the request with compelling clarity; this is not such a case. I must look to the applicant to provide such an “other reason”, and he has failed to do so. Again, evidentiary considerations come into play; see the above quote from Order 01-24. I am therefore unable to find that it is fair for any other reason that the estimated fee, or part of it, should be waived.

Public interest

[24] The Legislature has made it clear that a waiver of fees may be appropriate if the record relates to a matter of public interest. Under the Act, public interest must be just

that: public, and not private. Commissioner Loukidelis articulated the following analysis of this basis for a fee waiver in Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45:

> 1. The head of the public body must examine the requested records and decide whether they relate to a matter of public interest (a matter of public interest may be an environmental or public health or safety matter, but matters of public interest are not restricted to those kinds of matters). The following factors should be considered in making this decision:
>
>   (a) has the subject of the records been a matter of recent public debate?;
>
>   (b) does the subject of the records relate directly to the environment, public health or safety?;
>
>   (c) could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
>
>   (i) disclosing an environmental concern or a public health or safety concern?;
>
>   (ii) contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue?; or
>
>   (iii) contributing to public understanding of, or debate on, an important policy, law, program or service?;
>
>   (d) do the records disclose how the public body is allocating financial or other resources?
>
> 2. If the head of a public body, as a result of the analysis outlined in paragraph 1, decides the records relate to a matter of public interest, the head must still decide whether the applicant should be excused from paying all or part of the estimated fee. In making this decision, the head should focus on who the applicant is and on the purpose for which the applicant made the request. The following factors should be considered in doing this:
>
>   (a) is the applicant's primary purpose for making the request to use or disseminate the information in a way that can reasonably be expected to benefit the public or is the primary purpose to serve a private interest?
>
>   (b) is the applicant able to disseminate the information to the public?

[25] As Commissioner Loukidelis pointed out at para. 29 of Order 01-35, [2001] B.C.I.P.C.D. No. 36, "[a] record that 'relates to the environment' by definition relates to a matter of public interest". In Order 01-24, at para. 33, the Commissioner added the following about the above public interest analysis from Order No. 332-1999:

> It should be emphasized here that the references in para. 1, above, to the environment and public health or safety do not exhaust the scope of what may be a matter of public interest. This is made clear by para. 1(c)(iii).

[26] Again, I am confronted by the fact that the applicant has chosen not to make a submission to this inquiry. However, in a letter dated July 17, 2001 to Whistler's "Acting Head for Freedom of Information", the applicant appears to allege that Whistler lied to the *Whistler Question* (a local newspaper) about contamination involving defective plumbing in certain condominiums, with resulting (alleged) pollution of Fitzsimmons Creek and Green Lake. The applicant also included photocopies of several articles from the *Whistler Question*, as well as what appears to be a memo to file by Whistler's senior plumbing inspector pertaining to a "cross connection incident" at Wildwood Lodge. The articles and file memo indicate that Whistler took corrective, investigative and legal enforcement action at the time of the incident.

[27] The materials that the applicant submitted with the letter of July 17, 2001 indicate that the matter was likely a source of intense interest to a very localized group of individuals over ten years ago. However, there is nothing to indicate that it has been a source of recent public debate. It also does not appear that dissemination of the materials requested would yield a public benefit of the type contemplated in the analysis quoted above. Nor would disclosure reveal how the public body is allocating financial or other resources.

[28] While the records sought appear to relate to the environment and public health, and therefore, on their face, appear to relate to "a matter of public interest", the fact remains that the records are historical in nature. The central thrust of the test articulated in Order No. 332-1999, exemplified by the reference to "a matter of recent public debate", is present or prospective utility. In other words, the environmental or public health issues should be matters of current or prospective, rather than historical, concern or relevance. As with s. 25, this is not to say that historical records could never meet the test; however, there would have to be a link between the historical records and a current or prospective public interest matter. I find on the evidence before me – or lack of it – that the applicant has not passed the public interest threshold for fee waiver as set out in the first half of the test in Order No. 332-1999 above. Since both parts of the test must be satisfied, I need not consider the applicant's compliance with the second part; however, I will offer an observation in the interest of a complete review.

[29] With respect to the considerations (see again the test from Order No. 332-1999 above) relevant to being excused from paying all or part of the estimated fee, I find that apart from a bare assertion in the July 17, 2001 letter that "it is time for the public to know the truth", there is nothing before me to indicate that the applicant's motivation for the request is anything other than personal. In his July 16, 2001 letter in which he sought a fee waiver under s. 75(5), the applicant states that "this is after all public information that is related to all the inconsistencies of my own building file. This information I believe is also related to parts of my building file that went missing". The applicant's motivation appears personal: there is no indication of a public interest purpose or an ability to disseminate the information to the public.

[30] This conclusion applies with greater force to the issue of individual property files requested by the applicant, where no argument whatsoever has been advanced as to how these could be matters of public interest. While the other records sought relate *prima*

facie to a matter of public interest (environment and public health), I am not satisfied that any of the records – environmental, public health, or property – are being sought for a public interest purpose.

[31] In Order No. 01-35, Commissioner Loukidelis offered some additional criteria relevant to the public body's exercise of discretion in fee waiver requests:

> Although the list of factors will never be exhaustive, I consider that the following criteria may, in addition to those described or referred to above, be relevant to a head's exercise of discretion:
>
> 1. As expressly contemplated by s. 58(3)(c) of the Act, whether "a time limit is not met" by the public body in responding to the request;
> 2. The manner in which the public body attempted to respond to the request (including in light of the public body's duties under s. 6 of the Act);
> 3. Did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested during the processing of the access request, including by narrowing or clarifying the access request where it was reasonable to do so?;
> 4. Has the applicant unreasonably rejected a proposal by the public body that would reduce the costs of responding to the access request? It will almost certainly be reasonable for an applicant to reject such a proposal if it would materially affect the completeness or quality of the public body's response;
> 5. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?

[32] Whistler addressed the above considerations in detail in its written argument and the affidavit of Municipal Clerk Brenda Sims. Evidence submitted to this inquiry establishes that Whistler attempted to assist the applicant in relation to this and previous requests for records, and provided to the applicant records relating to his requests concerning sewage spills into Fitzsimmons Creek, Green Lake and Emerald Estates. I accept that Whistler also was prepared to reduce the fee estimate if the applicant was willing to narrow or more clearly define his request; however, the applicant did not do so but maintained his desire to receive copies and to view originals of "any and every file."

[33] I accept Whistler's assertion that the granting of a fee waiver would shift an unreasonable cost burden from the applicant to the public body. In this regard, Ms. Sims deposes by reference to Whistler's letter to the applicant of October 22, 2001 that the fee estimate of $3,345 "is not a full recovery of the costs that the municipality incurs." The evidence shows that a large volume of records, many of which are stored off-site, would have to be located, retrieved and produced.

[34] For the foregoing reasons, I find no fault with the exercise of discretion by Whistler's head in concluding that a fee waiver was not, in whole or in part, warranted under s. 75(5) of the Act. The applicant has not met the burden of proving that a fee

waiver is warranted in the circumstances of this case. The applicant has not met the second part of the test in Order No. 332-1999.

4.0 CONCLUSION

[35] For the reasons given above, I find that s. 25 of the Act does not apply in the circumstances of this case and no order is required in that respect.

[36] For the reasons given above, under s. 58(3)(c) of the Act, I also confirm the decision of the Resort Municipality of Whistler pursuant to s. 75(5) of the Act not to waive fees payable, in whole or in part, in connection with the applicant's request.

June 12, 2002

ORIGINAL SIGNED BY

Michael T. Skinner
Adjudicator