



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 02-51

MINISTRY OF WATER, LAND AND AIR PROTECTION

Mark Grady, Adjudicator
October 24, 2002

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Summary: The applicant requested Ministry records relating to proposals, or a specific designation, that concerned a wildlife management area in the East Kootenay region. The Ministry acknowledged that the records relate to a matter of public interest but it denied the request for a public interest fee waiver. The applicant's proposed use of the records would yield a public benefit. A full fee waiver is warranted in this case.

Key Words: fee waiver – public interest – dissemination of information – use of information – public benefit.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 75(5).

Authorities Considered: B.C.: Order No. 98-1996, [1996] B.C.I.P.C.D. No. 24; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45; Order 01-04, [2001] B.C.I.P.C.D. No. 4; Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order 01-35, [2001] B.C.I.P.C.D. No. 36.

1.0 INTRODUCTION

[1] In an April 11, 2001 letter, the applicant, a representative of the East Kootenay Chamber of Mines (“EKCM”), made a request for records to the Ministry of Environment, Lands and Parks (now the Ministry of Water, Land and Air Protection) (“Ministry”) under the *Freedom of Information and Protection of Privacy Act* (“Act”). The applicant was seeking copies of communications, related to proposals or designations about specific wildlife management areas, between an environmental group, the Ministry, the Land Use Coordination Office, the Minister and the Premier or the Premier’s Office.

The applicant identified types of records that he believed would contain these communications.

[2] The records relate to the Ministry's consideration, in 2000 and early 2001, of a proposal to designate a specific area in the Kootenay Land District as a conservation area. In early April 2001, through an Order-in-Council, Cabinet designated that area as a conservation area under the *Environment and Land Use Act*. The applicant contends that the April 2001 decision was made without proper or sufficient consultation with groups, organizations or businesses that would be affected by the decision. The applicant provided copies of letters and newspaper articles for the period January to May 2001 that confirm a number of organizations in the East Kootenay region voiced concerns about the government's consideration of, and the decision about, the designation of the conservation area. The conservation area designation was, the applicant notes, rescinded in March of this year.

[3] Section 75 of the Act permits the Ministry to charge fees. The Ministry told the applicant, in its May 1, 2001 letter, that it was charging "a fee in your case because of the volume of records requiring photocopies and time spent processing the records." The Ministry prepared a fee estimate of \$206.50 for photocopies, map reproductions, shipping and "1 hour processing" for providing the requested records. The letter also identified all of the circumstances listed in s. 75(5) of the Act in which the head of a public body may excuse an applicant from paying fees. On May 3, 2001 the Ministry wrote to the applicant to confirm a telephone conversation with the applicant about a fee waiver and to list "criteria that should be addressed in your request for a waiver in the public interest." Following the criteria suggested by the Ministry, the applicant provided written comments in support of a request for a fee waiver in a May 9, 2001 letter to the Ministry.

[4] In a May 16, 2001 letter, the Ministry told the applicant that, after considering his request, it had decided to deny the fee waiver. The Ministry gave no reasons or explanation for its decision. The Ministry also confirmed that it had lowered the fee estimate to \$133.50 because, after reviewing the material requested, it realized that some of the information was routinely available and the fee estimate therefore applied to "only documents that will not be duplicated by another source." The revised fee estimate included a charge of \$15.00 for "1/2 for processing @ \$30.00." On June 1, 2001 the Ministry received the applicant's \$66.00 fee deposit. The Ministry wrote to the applicant on July 12, 2001 to confirm that it had completed processing the access request and that the records would be sent immediately upon receipt of the fee balance owed. The Ministry received the applicant's final payment on July 26, 2001.

[5] In a September 4, 2001 letter to this Office, the applicant requested a review of the Ministry's denial of the fee waiver and its failure to provide a response to the access request despite payment of the fees.

[6] The Ministry responded to the applicant's request in an October 4, 2001 letter, in which it confirmed that certain information was being withheld under various exceptions to disclosure in the Act. The Ministry also apologized for the delay in responding to the

applicant's request and stated, "This Ministry had to consult with several other public bodies and it was this process that delayed our response."

[7] 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 ("Commissioner") under s. 49(1) of the Act.

2.0 ISSUE

[8] The issue in this inquiry concerns the applicant's assertion that the applicant is entitled to a fee waiver under s. 75(5) of the Act because the requested records relate to a matter of public interest. The burden of proving entitlement to a waiver of fees, in whole or in part, 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.

3.0 DISCUSSION

[9] **3.1 Preliminary Issues** – The applicant argues that the Ministry's delay in responding to the access request should be an issue in this inquiry. He challenges the statement in the Portfolio Officer's Fact Report that the issue of the Ministry's failure to respond to the request in time was resolved during mediation. The applicant writes, "The resolution to the matter has not been disclosed to me, as the applicant and complainant." He goes on to say that he is requesting clarification or an explanation for the delay in releasing the records.

[10] The Ministry's delay in responding to the applicant's request is not mentioned as an issue in the fact report and, as noted above, the Portfolio Officer stated that the issue was resolved during mediation. Also, it is not listed as an issue in the Notice of Inquiry this Office sent to the parties. Therefore, the Ministry's delay in responding to the request is not properly an issue in this inquiry. Consequently, I have not dealt with it in this decision. I note, however, that the Ministry does provide an explanation for the delay in its reply submission and acknowledges that it was three months late in processing the request and should have asked the Commissioner for a further extension of time to complete its consultations. Since the Ministry has responded to the request, there would in any case be no remedy available under the Act.

[11] The applicant also submits that the reasons identified in s. 75(5)(a) for granting a fee waiver (the applicant cannot afford the payment or for any other reason it is fair to excuse payment) should be considered in this inquiry. In his September 4, 2001 request for review, the applicant writes, "I would like to request a review of the decision to deny my request for a waiver of fees (dated May 9)." As noted above, the applicant's May 9, 2001 fee waiver request sent to the Ministry provided reasons related only to seeking a fee waiver where the responsive records relate to a matter of public interest. The circumstances identified in s. 75(5)(a) for granting a fee waiver are not mentioned as an issue in the fact report, nor are they listed as an issue in the Notice of Inquiry sent to

the parties. As the reasons identified in s. 75(5)(a) for granting a fee waiver are not properly an issue in this inquiry, I have not dealt with them in this decision.

[12] **3.2 Public Interest Fee Waivers** – The relevant portions of s. 75 read as follows:

Fees

75(1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:

- (a) locating, retrieving and producing the record;
- (b) preparing the record for disclosure;
- (c) shipping and handling the record;
- (d) providing a copy of the record.

(2) An applicant must not be required under subsection (1) to pay a fee for

- (a) the first 3 hours spent locating and retrieving a record, or
- (b) time spent severing information from a record.

...

(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,

...

- (b) the record relates to a matter of public interest, including the environment or public health or safety.

...

[13] The Commissioner described the two-step analysis for determining if a public interest fee waiver is warranted in Order 01-24, [2001] B.C.I.P.C.D. No. 25, at paras. 32 and 33:

[32] For convenience, I reproduce here the two-step process I set out at p. 5 of Order 332-1999:

1. The head of the Ministry 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 Ministry is allocating financial or other resources?

2. If the head of a Ministry, 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?

[33] 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).

[14] Regarding the second part of the above analysis, he said the following in Order 01-35, [2001] B.C.I.P.C.D. No. 36, at para. 46:

[46] 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?

Do the records relate to a matter of public interest?

[15] This matter can be addressed quickly. In its initial submission, the Ministry, citing decisions made by the Commissioner in Order No. 332-1999 and Order 01-35, says it is satisfied that the records requested by the applicant relate to the environment and that, therefore, the first part of the s. 75(5) test is met in this case (para. 4.24). In its reply submission, at para. 4, the Ministry confirms that it is satisfied that the records relate to a matter of public interest.

[16] I have examined the records at issue in this matter. Most of the records relate to the submissions made by various groups or organizations regarding the proposed designation of the specific area in the Kootenay Land District and various Ministry records, including drafts of Cabinet submissions, about the decision to be put before Cabinet. Having reviewed these records, and in light of their subject matter, I agree with the Ministry's conclusion that these records relate to the environment and therefore to a matter of public interest.

Should the fee be waived?

[17] If the head of the public body decides a record relates to a matter in the public interest, the head must then decide whether the applicant should be excused from paying all or part of the fee.

[18] Although the Ministry acknowledges that the records requested by the applicant in this case relate to a matter in the public interest, it “submits appropriate circumstances do not exist for a fee refund in this case” (para. 4.25, initial submission). The Ministry appropriately refers to the factors, identified in Order No. 332-1999 and Order 01-35, which the head of the public body should consider when deciding whether or not an applicant should be excused from paying all or part of the fee.

[19] The head should first focus on who the applicant is and on the purpose for which the applicant made the request. In his May 9, 2001 request for a fee waiver, the applicant identifies his purpose for seeking access to the records. In that letter, he wrote,

Once we (the EKCM) have reviewed the requested information, we will send our conclusions to the Chair of the Inter-Agency Management Committee for a review of the designation, specifically, our belief that the required process by which the designated *Unscheduled Amendment* was achieved.

[20] In his initial submission (p. 3), the applicant writes,

The information was requested in an attempt to identify the manner in which the designation was achieved and determine if there had been a public process to include concerned stakeholders... As a recognized stakeholder, I believed we would be included in any process which might result in the change in land use designation or, at the very least, be invited to make a submission.

[21] The applicant also writes, at p. 8 of his initial submission, that the information was not requested for the personal use or the private use of the East Kootenay Chamber of Mines but to provide substance for a challenge to the designation of the conservation area on the basis there was no widespread public involvement of interested stakeholders. Finally, in his reply submission, at p. 5, the applicant writes:

My request for the materials... was in an attempt to ascertain the extent to which (specific other organizations) were involved with a secretive and exclusionary process with the Ministry. 'Discussions' with one or more of these groups most certainly does not constitute public consultations regarding a change in land use designation in any meaningful way.

[22] The Ministry says the applicant is a representative of the EKCM which, according to the Ministry's reading of information on the applicant's web site, "represents the mining industry in the East Kootenays of south eastern British Columbia (and) one of the roles of the EKCM is to protect and preserve the future of the mining industry in the East Kootenays". The Ministry submits that the applicant represents private interests, not public interests, in seeking the records responsive to his request.

[23] At p. 4 of his reply submission, the applicant challenges the Ministry's position that the EKCM represents only private interests in seeking the records:

I honestly do not know where the boundary is legally drawn between a private company or a private individual and 'the public'. However... One of our roles is representing the interests of the mining industry. Another role is acting in a public service role as a liaison between the interests and activities of the mining industry and public interest and/or concern in those activities.

[24] Even if one assumes for discussion purposes that the EKCM's primary role is to represent the interests of the mining industry in the East Kootenay region, I conclude that the applicant's primary purpose in seeking the records was to gather information about

the consultation process that preceded the April 2001 decision to approve the designation of the conservation area. The applicant contends that the consultation process was flawed and, as a result, the interests of the EKCM, but also several other organizations and sectors, were not considered. Therefore, in this case I believe the applicant intended primarily to use the information in a way that could reasonably be expected to benefit a public interest.

[25] Concerning the issue of the applicant's ability to disseminate information in the responsive records to the public or to a segment of the public, the applicant writes that, had the information been supplied in a timely manner, the EKCM could have supplied the information in summary form, in whole or in part, to meet requests for information by a local municipality, a regional district, a specific organization and others. I note that, on the day the April 2001 designation decision was announced, the applicant is quoted in a local newspaper as expressing his concerns about the consultation process. Shortly thereafter, he wrote to a local municipality and regional district about the EKCM's concerns with the consultation process. After receiving the records in early October 2001, the applicant gave copies to a local MLA and two local companies. Finally, he writes, at p. 6 of his initial submission,

With information in hand, the EKCM would have been in a position to challenge environmental rhetoric voiced by (an environmental organization), identified in the process (or lack thereof) and publicize that shortcoming, supplied copies to the Ministry of Energy and Mines (representing the Crown's mineral and mining interests) and/or the Ministry of Forests.

[26] The Ministry did not directly address this issue in its submissions. It did, however, write that the April 2001 Order-in-Council designating the conservation area provided that there must be public consultations in the course of developing a wildlife management plan for the conservation area and "as such, there was to be public discussion, regardless of whether or not the requested records were to be released" (para. 4.35, initial submission). As well, the Ministry said that some of the groups mentioned in the applicant's May 9, 2001 request for a fee waiver had already been engaged in discussions concerning the conservation area.

[27] The applicant challenges the Ministry's assertion that one of the reasons for refusing to waive the fee was that the April 2001 Order-in-Council required consultations with the public in developing and managing plans related to the designation of the conservation area. The applicant confirms that the concern was with the lack of consultations leading up to the designation decision, not whether there would be public consultations following and flowing from that decision.

[28] I appreciate that the EKCM was not alone in raising concerns about the consultation process before the April 2001 designation decision was made and that, as the Ministry confirms, other consultation would follow the decision. I conclude, however, that the applicant has demonstrated he was able to disseminate information about what he considered to be a "flawed" consultation process to the public.

[29] Another factor is whether the public body met the time limits in the Act in responding to the request. The applicant writes that the records were not released in a timely manner and that he did not receive the records until almost six months after he made his request. The Ministry has acknowledged that its response was three months late, mostly as a result of delays in the consultation process for records containing information subject to possible severing under s. 12(1) of the Act (Cabinet confidences). I believe this delay is a relevant consideration that favours a decision that the fee should be waived, but it does not appear that the Ministry considered this factor before disclosing the records to the applicant.

[30] The Ministry also submits that it is relevant that it already reduced the original fee charged to the applicant and supplied a number of records without a fee, including records routinely available in paper format or on the Ministry's website. The Ministry reduced the original fee from \$206.50 to \$133.50. The applicant responds to this as follows, at p. 5 of his reply submission:

The Ministry states they generously reduced the charge levied by not including material that was in the public domain and readily available. However, this material was not requested. The request was specifically and clearly for material that would not normally be available and, in fact, probably denied to the Applicant by any other means except a request under the *Freedom of Information and Protection of Privacy Act*.

[31] I believe the Ministry made a sincere attempt to meet its duty to assist the applicant under s. 6(1) of the Act because, soon after sending its original fee estimate, it realized that a number of responsive records were available without a fee. It then notified the applicant of the reduced fee. I believe it was reasonable for the Ministry to consider this factor in deciding whether to waive the remaining fee.

[32] Although cited by the Commissioner in Order 01-35 as a relevant factor for consideration by the head of the public body in making the decision about a fee waiver, the parties did not provide any information about discussions they may have had about the applicant considering the Ministry's suggestions for narrowing or clarifying the request or other proposals for reducing the costs for responding to the access request.

[33] Finally, the Ministry believes a refund of the fee in this case would shift an unreasonable cost burden for responding to the request from the applicant to the Ministry. The Ministry only seeks to recover the costs of copying the requested records and shipping those records to the applicant. The Ministry says it did not charge the applicant for the 30-35 hours (@ \$30.00 per hour, between \$900.00 and \$1,050.00) of staff time for "processing" the request. Although the Ministry confirms this does not include the time needed to consult other public bodies, it does not explain what "processing" the request means. I note s. 75 does not identify "processing a request" as a service or activity for which a fee may be assessed. Also, the original fee estimate included a charge for "one hour processing @ \$30.00" and, in the revised estimate, "1/2 for processing @ \$30.00".

[34] The applicant responded by saying that although the fee is not large, it is significant relative to the limited budget of the EKCM.

[35] If the Ministry decided to not charge a fee of up to \$1,050.00 for “processing the request”, then I believe it cannot say that waiving a fee of \$133.50 would place an *unreasonable* cost burden for responding from the applicant to the Ministry.

[36] I have carefully considered the parties’ arguments, and the circumstances of this case, in light of all the criteria set out above. Bearing in mind the second-stage criteria set out in Order No. 332-1999 and Order 01-35, I have decided that a full fee waiver under s. 75(5)(b) is appropriate in this case. In arriving at this conclusion, I have particularly noted that the applicant’s primary purpose in seeking access to the records was to use the information to prepare a submission regarding, in his opinion, the inadequacy of the consultation process that preceded the April 2001 Order-in-Council. The EKCM intended to send its submission to the appropriate provincial government authorities. I believe this use of the information primarily serves a public interest rather than one that would only serve the interests of the EKCM or of private interests. Also, the applicant has described how and to whom he intended to disseminate information in the responsive records.

4.0 CONCLUSION

[37] For the reasons given above, under s. 58(3)(c) of the Act, I order the Ministry of Water, Land and Air Protection to refund the \$133.50 fee paid by the applicant regarding his request.

October 24, 2002

ORIGINAL SIGNED BY

Mark Grady
Adjudicator