



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

Order F05-21

LAND AND WATER BRITISH COLUMBIA INC.

Celia Francis, Adjudicator

July 12, 2005

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Summary: Applicant requested records related to a property. LWBC responded nine months later. LWBC found not to have fulfilled its duties under ss. 6(1) and 7. LWBC ordered under s. 58(3)(c) to refund fees applicant paid.

Key Words: duty to assist – respond without delay – respond openly, accurately and completely – every reasonable effort – confirm, excuse, refund or reduce fees.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7, 58(3)(c).

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 04-30, [2004] B.C.I.P.C.D. No. 31; Order 04-31, [2004] B.C.I.P.C.D. No. 32; Order 04-32, [2004] B.C.I.P.C.D. No. 33; Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order 03-06, [2003] B.C.I.P.C.D. No. 6; F05-22, [2005] B.C.I.P.C.D. No. 30; F05-23, [2005] B.C.I.P.C.D. No. 31.

Cases Considered: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, 2002 SCC 53.

1.0 INTRODUCTION

[1] This order is a companion to Orders F05-22¹ and F05-23² which I am issuing concurrently with this order. All three concern the same applicant and related records, although the public bodies are different.

¹ [2005] B.C.I.P.C.D. No. 30.

² [2005] B.C.I.P.C.D. No. 31.

[2] On February 18, 2004, the applicant requested records related to a specific property from Land and Water British Columbia Inc. (“LWBC”) under the *Freedom of Information and Protection of Privacy Act* (“Act”). On March 3, 2004, LWBC sent a letter to the applicant stating that it was charging a fee of \$1,140 for providing the records (stated to be 100 pages of records, requiring 40 hours’ search and preparation time) and that it was requesting a deposit of 50% before it would continue work on the request. The applicant paid the fee deposit on March 27, 2004.

[3] On April 14, 2004, LWBC told the applicant that it was taking a 30-day extension to process the request. On May 12, 2004, the public body wrote to this office to say that locating and processing the responsive records (now stated to be approximately 1,400 pages) was taking longer than expected. It said that it also needed to consult with three other public bodies, the Ministry of Attorney General, the Ministry of Public Safety and Solicitor General and the Office of the Premier. It therefore requested a 45-day extension in order to complete its work on the request. This office granted the extension, with a deadline of July 30, 2004 for a response.

[4] On September 16, 2004, the applicant wrote to this office to say that the deadline of July 30, 2004 had gone by and it had not yet received any records. On October 27, 2004 LWBC wrote to the applicant to say that it had almost finished its work on the request and that it had revised the fee estimate to \$1,420 (now for 1,100 pages of records, requiring 40.5 hours’ search and preparation). It acknowledged that the applicant had paid a deposit of \$570 in March and said it was waiving the balance of the fee (\$850) (apparently due to the lateness of the response, although the letter does not explicitly state this). This office scheduled an inquiry for December 1, 2004, by which time LWBC had disclosed the records in severed form (in mid-November 2004, during the inquiry process).

[5] 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

[6] According to the notice for this inquiry, the issues before me in this case are as follows:

1. Did LWBC make every reasonable effort under s. 6 to respond to the applicant openly, accurately, completely and without delay?
2. Did LWBC fail to respond in accordance with the timelines for a response set out in s. 7 of the Act?

[7] In its initial and reply submissions, the applicant asked for a remedy under s. 58(3)(c) of the Act, that is, that the fees be excused, refunded or reduced in this case. The public body asked for an opportunity to make representations on this matter, as it had

not been listed as an issue in the notice for this inquiry. I decided to consider the applicant's request and therefore gave LWBC an opportunity to provide additional representations on whether excusing, reducing or refunding the fee under section under s. 58(3)(c) was an appropriate remedy.

[8] Accordingly, the third issue is:

3. Is this an appropriate case under s. 58(3)(c) in which to excuse, reduce or refund the fees?

3.0 DISCUSSION

[9] **3.1 Compliance with Sections 6(1) and 7** – The Information and Privacy Commissioner has considered a public body's compliance with ss. 6(1) and 7 in numerous orders, for example, Order 02-38³, Order 04-30⁴, Order 04-31⁵ and Order 04-32⁶. I have applied here, without repeating it, the approach taken in those orders.

[10] The relevant parts of ss. 6(1) and 7 read as follows:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Time limit for responding

- 7(1) Subject to this section and sections 23 and 24 (1), the head of a public body must respond not later than 30 days after receiving a request described in section 5(1).
 - (2) The head of the public body is not required to comply with subsection (1) if
 - (a) the time limit is extended under section 10, ...
 - (4) If the head of a public body determines that an applicant is to pay fees for services related to a request, the 30 days referred to in subsection (1) do not include the period from the start of the day the head of the public body gives the applicant a written estimate of the total fees to the end of the day one of the following occurs: ...
 - (c) the applicant agrees to pay the fees set out in the written estimate and, if required by the head of a public body, pays the deposit required.

³ [2002] B.C.I.P.C.D. No. 38.

⁴ [2004] B.C.I.P.C.D. No. 31.

⁵ [2004] B.C.I.P.C.D. No. 32.

⁶ [2004] B.C.I.P.C.D. No. 33.

[11] The public body concedes that it failed to meet its s. 7 obligation to respond in time to the applicant's request and acknowledges that the Commissioner has previously found that a public body has breached its s. 6 obligations, where it has responded after the s. 7 deadline. It suggests however that, through inadvertence or because of circumstances beyond its control, it may fail to meet a s. 7 deadline, despite all its efforts. For example, it may make all reasonable efforts to respond without delay, such as immediately retrieving and reviewing records and conducting the necessary consultations, but still fail to meet its legislated deadline. Moreover, it may not receive input from its consultations until after its s. 7 deadline has passed.

[12] LWBC says that it should have sought a further s. 10 extension from this office and believes that it would have been entitled to an extension had it asked for one. (It does not explain why it did not seek an extension.) LWBC suggests that, in such cases, a breach of s. 7 does not necessarily mean it has breached s. 6 (paras. 4.13-4.18, initial submission). As the applicant notes, LWBC's arguments echo those the public bodies made in Order 02-38 and Orders 04-30 to 04-32 and which the Commissioner rejected.

[13] The Commissioner made his findings on ss. 6(1) and 7 in Order 02-38 in light of the circumstances of that case, where the Ministry said that it had done its best to meet its timelines given its workload and demands on its resources. I do not understand the Commissioner to mean that a public body would always have breached its s. 6(1) duty where, due to circumstances truly beyond a public body's control—such as loss of the records, earthquake or destruction of its premises by fire—it has not been able to meet its s. 7 deadline.

[14] Without suggesting it definitively, it is also possible that obtaining timely input from another public body during consultations might truly be beyond a public body's control. I note however that consultations with other public bodies are not statutorily mandated, although the Act contemplates such a process in providing for extensions under s. 10 for consultations with other public bodies. In such cases, a public body processing a request should establish reasonable time frames with the other public bodies for completing the consultations so that the first public body may meet its ss. 6(1) and 7 obligations. The public body should also take steps to follow up vigorously with the other public bodies to ensure that they are dealing with the consultations in a timely manner. Ministries of the provincial government that consult with each other on a frequent basis may even wish to consider setting up a protocol under which, among other things, they undertake to process each other's consultations in a timely fashion. I also note that a public body experiencing consultation delay beyond its control should seek an extension under s. 10 in any event.

[15] LWBC said that it received the requested records from the program area in two stages, on March 16 and April 5, 2004. During its review of the records, it realized that consultation with its own legal counsel and other public bodies was required in order to determine what records could be disclosed to the applicant. It carried out internal consultations in May and then began its consultations with the other public bodies on

May 12, 2004, following up with them, first in early July 2004 and again later the same month (between two and two and a half months after consultations began). LWBC does not say if it set a deadline by which it asked the other public bodies to respond.

[16] Upon receiving a complaint about the delay in early September 2004 from the applicant, LWBC says it again followed up in mid-September with the other public bodies and once more in early October. LWBC finally received input from the other public bodies on October 13 and 27, 2004 (between five and five and a half months after it began its consultations). LWBC says that it understands that “it took those public bodies as long as it did it to provide input to the Public Body concerning the request because of the volume of other requests being handled by them, *i.e.*, their own workload pressures in dealing with their own requests under the Act”. (LWBC provides no specifics to support this assertion.) As noted above, LWBC responded in full to the request in mid-November 2004 (paras. 4.19-4.35, initial submission; paras. 11-37, Edwards affidavit).

[17] LWBC said that this was a particularly complicated request due to the nature and volume of the requested records, the consultations it had to conduct, both internally and with a number of public bodies, and the number of potential exceptions that applied. LWBC says this request was much more complicated and time-consuming than the vast majority of the other requests it has handled and that the potential application of s. 16 complicated matters. (Aside from commenting on the legal and financial nature of the records, however, LWBC does not provide any specifics in support of its assertions on these points.) LWBC also says that it was unable to provide a response to the applicant until it had received input from the public bodies with which it was consulting. The analyst responsible for the request estimates that she spent at least 200 hours processing the request and that program staff and a consultant spent another 50 hours (totalling approximately 35½ working days). LWBC argues that it processed the request as quickly as it could, that there was nothing it could have done to process it more quickly without potentially disclosing information subject to the Act’s exceptions and, while it responded past the s. 7 deadline, it nevertheless processed the request without delay. LWBC believes it could have responded to the request within the deadline if it had been able to complete its consultations within 30 days (paras. 4.36-4.43, initial submission; paras. 38-41, Edwards affidavit).

[18] The applicant points out that LWBC did not provide any records until over three months after the July 30 deadline. In its view, LWBC clearly failed to fulfil its s. 7 obligations. It points out that several orders have found that a public body that fails to respond when required cannot be found to have fulfilled its s. 6(1) obligations. The applicant also says that LWBC failed to provide records in stages, as this office had directed in granting the extension request. Among other things, in the applicant’s view, LWBC has shown a pattern of disregard for the Act, this office and for the applicant itself. (LWBC rejects these assertions at para. 2 of its reply and says that the applicant has provided no evidence to support its views.) The applicant requests that I order a refund or reduction of the deposit it paid (paras. 14-26, initial submission).

[19] The applicant also refers to the Commissioner's findings at paras. 10-12 in Order 04-30, suggesting that the same finding applies here. It also seems to suggest that LWBC did not follow up with the other public bodies as vigorously as it might in requesting their input. In response to LWBC's explanation that the other public bodies' workload was the cause of the slow response to the consultations, the applicant points to the Commissioner's comments in Order 02-38 where he said that public bodies should ensure that they make adequate resources available to their access to information staff so that staff can process requests in compliance with the law. In the applicant's view, LWBC was not entitled to a further extension and the request was not complicated. LWBC produced no evidence to support any of its statements, the applicant concludes (paras. 1-5, reply submission).

[20] LWBC says a number of times that this request was unusually complex to process, although it provides no details to support this argument. Nevertheless, LWBC processed the request at a steady pace in the early stages, in my view making reasonable efforts to fulfil its s. 6(1) and 7 obligations. It is evident from LWBC's submissions that the delay was largely due to the time it took the other public bodies to respond on the consultations. I have some sympathy for LWBC here, as it was evidently in an awkward position.

[21] However, LWBC cites only "workload pressures" as its, in my view, inadequate explanation as to why the other public bodies took several months to respond. LWBC says nothing about the numbers of requests the other public bodies were dealing with at the same time, the volume of records involved, whether they allotted additional resources to processing their own requests or the consultations from LWBC, other demands on their resources or any other details to support its position that the other public bodies could not respond any sooner than five to five and a half months. Without more, even allowing for the volume and complexity of records on which the LWBC was consulting the other public bodies, it is difficult to understand why the other public bodies took several months to respond on the consultations.

[22] LWBC also does not say if it took, or considered taking, additional steps while awaiting responses on its consultations, for example, by following up earlier and more frequently with the other public bodies. If LWBC's reminders were not having the desired effect, did it escalate the matter to senior officials within its own and the other public bodies? If not, why not? Were there other ways of prompting a response so that LWBC could respond within legislated timelines? LWBC also offered an inadequate explanation as to why it failed to seek a further extension from this office, to which it now says it would have been entitled. LWBC also provided no explanation of why it was not able to disclose records in stages, as this office instructed it to do in granting the 45-day extension. I have not seen the records but, without more, it is difficult to accept that LWBC could not disclose at least some records earlier than it did. There may be good answers to these questions but LWBC has not given them.

Conclusion on ss. 6(1) and 7

[23] There is no doubt that LWBC provided a response over three months past its extended deadline and that it thus failed to comply with the timeframe allowed by s. 7. For the reasons discussed above, I find that LWBC failed to meet its duty under s. 7 to respond within legislated timelines. Viewed against the reasonableness standard of s. 6(1), LWBC has not shown that it met its statutory duty to respond without delay, accurately and completely. I therefore conclude, again for reasons described above, that LWBC failed to fulfil its duty under s. 6(1) to respond without delay, openly, accurately and completely. I note the Commissioner made similar findings in similar circumstances in Order 02-38 and Orders 03-30 to 03-32.

[24] **3.2 Is it Appropriate to Excuse, Reduce or Refund the Fee?** – The parties submit, and I agree, that, since LWBC has responded in full, it is not appropriate for me to order LWBC to comply with its duty to respond. LWBC argues initially that there was no need for me to issue any order at all. The applicant notes that LWBC had waived any further fees but argues that, under s. 58(3)(c), I should order a refund or reduction of the fee deposit of \$570 it has paid. LWBC later provided a submission on why, in its view, such a remedy is not appropriate in this case, to which the applicant responded. Section 58(3)(c) reads as follows:

Commissioner’s orders

58(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following: ...

- (c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met; ...

[25] The Commissioner mentioned the possibility of this type of remedy at para. 23 of Order 02-38, noting that, in that case, he could not order a waiver or refund, as the public body had not charged a fee. He has not to date considered it as a remedy in an order. It is however clear that not meeting a time limit is an appropriate circumstance in which to excuse, reduce or refund fees.

[26] LWBC acknowledged that I have discretion under s. 58(3)(c) of the Act to confirm, refund, reduce or excuse fees, including where a time limit is not met, and suggests that, even though the time limit was not met, this is a case where I should confirm the fee (paras. 1-5, further submission).

[27] LWBC refers to “*Lavigne*”, in which the Supreme Court of Canada said that the words of a statute are to be read in their context and harmoniously with the scheme and

object of the Act and Parliament's intentions⁷. LWBC adds that it is appropriate for me to

6. ... consider the scheme of the Act as a whole, including the fact that the Legislature intended, in passing section 75, that public bodies should not be required to bear the entire financial burden of responding to requests for large amounts of records where there were not compelling public interest reasons for doing so. The Public Body submits that the intent of section 75 is that public bodies should be able to recover some of the costs of processing requests for large amount of records, i.e. records involving more than three hours of search time. This is just such a request given that it involved approximately 1100 pages of records.

(I do not consider a request that involves more than three hours of search time constitutes a "large request". Nor do I consider that a request involving 1,100 pages of records is necessarily a "large request".)

[28] LWBC asks if it is fair for it (and thus the taxpayers of British Columbia) to bear the entire financial burden of processing the request or whether the applicant should bear some of the costs, keeping in mind that fees payable under the Act make up only a small percentage of the resources required to process a request. It makes a number of general arguments around "significant demands for government services and limited government resources", wise spending of government funds and fiscal responsibility. (LWBC provided no details about "limited government resources" or "significant demand on government services", either generally or in relation to itself, or any other evidence to back up this point.) It points out that it has already waived 60% of the fee and argues that waiving the rest of the fee would unreasonably shift the burden of responding to the request to the LWBC. Again, it provides no details in support of its contention that waiving the remaining \$850 would result in an unreasonable shifting of costs to it. I do not accept LWBC's argument on this point

[29] For much the same reasons that it said it was late in responding to the request, LWBC says it would not be appropriate for it to be required to refund the remaining 40%. Ordering a refund in this case would punish it for something over which it had no control, it suggests, and would "send a message to public bodies that if they wish to recoup some of the costs of processing requests they must respond regardless of whether they have had an opportunity to make a fully considered decision concerning the application of the Act's exceptions to the requested records." It also suggests that it is appropriate to consider whether the applicant was willing to narrow the request, a factor the Commissioner considered in Order 02-43, a fee waiver case. It remarks again, and again without specifics, on the voluminous records and the complexity of processing the request and that extensive consultations were required. It says that at no point did the

⁷ LWBC's reference to the Supreme Court of Canada decision "*Lavigne*" gives no citation. It is clear, however, that PSSG is referring to *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] S.C.J. No. 55, 2002 SCC 53. The Commissioner has acknowledged this approach to the interpretation of the Act in many decisions. See, for example, Order 03-06, [2003] B.C.I.P.C.D. No. 6.

applicant offer to narrow the request to reduce the fee or allow the LWBC to process the request in a more timely manner. This weighs in favour of confirming the fee, in its view (paras. 7-19, further submission).

[30] The applicant suggested a number of factors (some overlapping) for me to consider, including: whether a time limit was met and, if not, how long after the expiry of the time limit it responded; the manner in which the public body responded to the request; whether the public body took every opportunity to obtain an extension; whether the public body complied with the directions given to disclose the records in stages; whether LWBC contacted the applicant to specifically request that it narrow the scope of the request or reduce costs and assisted the applicant in doing so; whether the applicant unreasonably rejected such a proposal by the public body; and whether a refund would shift an unreasonable burden of processing the request from the applicant to the public body (para. 1, further submission).

[31] In the applicant's view, all of these factors favour an order to refund the fee it has already paid. It points out that LWBC did not respond for several months after the extended deadline and that it never contacted the applicant to discuss narrowing the request. (I observe that the applicant was free to contact the public body to discuss narrowing the request and reducing the fees and that it does not mention having done so.) The applicant also argues that the public body could have attempted to obtain an extension from this office and that LWBC failed to comply with the directions to disclose the records in stages.

[32] The applicant also does not accept that a fee refund would unreasonably shift a financial burden on to the public body. It says that the public body did not present any evidence as to how shifting the costs would affect its operations and that, in its view, a few hundred dollars would not unduly burden LWBC. It believes the LWBC has overstated the legislative intent behind s. 75 and says that the ability under s. 58 to order a fee refund, "including if a time limit is not met", is a clear acknowledgement that there are circumstances in which a public body ought to bear the full costs of responding to a particular request. It points out that fees are not mandatory and that s. 75 gives a public body discretion both to charge fees and to waive fees on various grounds (paras. 4-18, further submission).

[33] In considering public interest fee waivers, the Commissioner has said public bodies should consider the following factors, among others, in exercising discretion: whether the applicant has co-operated reasonably with the public body, where the public body has requested it, including by narrowing the request where it is reasonable to do so; and whether the applicant has unreasonably rejected a proposal by the public body to reduce costs (the Commissioner acknowledged that it would be reasonable for an applicant to reject such a proposal where it would "materially affect the completeness or quality of the public body's response") (see, for example, Order 01-35⁸).

⁸ [2001] B.C.I.P.C.D. No. 36.

[34] LWBC did not, in its fee estimate letter, invite the applicant to narrow the request. It also does not say that it took the initiative to contact the applicant to discuss the scope of the request with a view to reducing the fees. In fact, there appears to have been no meaningful communication at all between the applicant and LWBC on the request, whether to narrow the request, reduce fees and speed response times or ensure that the applicant received the records it wanted. Thus, I do not think LWBC can now complain that the applicant refused to narrow the request when LWBC does not appear to have made an effort to encourage it to do so. Given the amount of time and effort LWBC says it expended in processing this request, it was in LWBC's interests to be proactive in attempting to narrow the request with the applicant. The fact that it does not appear to have done so does not assist it here.

[35] It is also possible that the applicant did not wish to narrow the request, as it wanted all responsive records. The applicant may also not have been in a position to suggest ways of narrowing the request, since there is no evidence here to suggest that LWBC told the applicant the nature of the records. In any case, I infer from the applicant's submissions that it would have been content to pay the fees, if only LWBC had responded within legislated timelines. In the absence of any evidence as to what if anything the applicant might have refused or agreed to in the way of narrowing the request to lower the fees and speed processing (noting that LWBC said it had first located approximately 100 pages of records and later 1,100 pages), I do not find LWBC's arguments on this point to be persuasive.

[36] I suggested above that, among other things, LWBC could have taken steps to expedite its consultations and that it apparently chose not to do so. I also do not accept that the inevitable consequence of not awaiting input from the other public bodies was the likely disclosure of information that should be withheld. Public bodies in the ordinary course will take care in assessing records for exceptions. They are also entitled to charge certain types of fees. They should, however, also ensure that their freedom of information offices are adequately resourced to process requests within legislated time limits, a point the Commissioner has made on a number of occasions, at least as early as Order 02-38. In cases where public bodies receive an unanticipated peak in consultations, request numbers or requests involving complex and voluminous records, it seems to me they should take appropriate steps to deal with those situations in a timely way, rather than allowing their response timelines to lag interminably or rushing their responses without proper consideration of whether exceptions apply.

[37] I consider that the Legislature worded s. 58(3)(c) as it did for a reason. I believe the Legislature intended to establish that, while public bodies may charge fees, they may be penalized by forgoing those fees in certain cases, including where they fail to meet time limits. Indeed, in a case such as this, where the public body has already responded, excusing, reducing or refunding the fee may be the only possible remedy.

Conclusion on s. 58(3)(c)

[38] I will not repeat the discussions about the lengthy delay in responding and the unanswered questions about the consultations that I set out above, although I have considered them here. As I discussed above, LWBC appears to have processed the request relatively quickly and efficiently in the early stages (as well as, I might add, after it received the responses on its consultations). However, LWBC failed, in my view to satisfactorily account for the lengthy time its consultations took and to explain why it did not take more vigorous steps to obtain a timely response from the other public bodies. Nor has it explained why it did not disclose the records in stages and did not seek a further extension. I acknowledge that LWBC has waived 60% of the fee but I do not consider that, in this case, this argues against my excusing the rest of the fee. The factors I discuss above lead me to the conclusion that this is an appropriate case in which to order a complete refund of the fees the applicant has paid.

Criteria for a decision under s. 58(3)(c)

[39] Although the list of factors to consider will never be exhaustive, I consider the following criteria be relevant to a decision under s. 58(3)(c):

- Was the time limit met? If not, how long after the expiry of original or extended timelines did the public body respond?
- How complete was that response?
- What efforts did the public body make to comply with its s. 6(1) obligations, including:
 - reasonable efforts to locate responsive records as soon as possible;
 - allocation of additional resources to process the request in as timely a way as possible;
 - timely follow-up on consultations;
 - release of records in stages, where practicable; and
 - contacting the applicant to discuss ways of narrowing the request to reduce fees and speed response times;
- Did the public body seek extensions under s. 10 of time limits?
- Were the final chargeable costs the same as the original estimated costs? If not, in what way did they differ?
- Would excusing, refunding or reducing the fee result in an unreasonable shift in the cost burden to the public body?

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- Did the applicant, viewed reasonably, co-operate 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?
 - 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.

4.0 CONCLUSION

[40] For the reasons given above, under s. 58 of the Act, I order LWBC to refund to the applicant the fees the applicant has paid in this case.

July 12, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator