Order F07-08

MINISTRY OF ENVIRONMENT

Celia Francis, Adjudicator

April 10, 2007

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Summary: Applicant requested public interest waiver of $24,060 estimated fee. Ministry later recalculated fee estimate to be $172,947.50 and granted waiver of 5% of estimated fee. Ministry found not to have applied s. 75(5)(b) in a reasonable manner and ordered to discharge its duty to make a decision on whether or not to excuse the fees.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 75(5)(1), (5)(b) and (5.1).

Authorities Considered: B.C.: Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order No. 155-1997, [1997] B.C.I.P.C.D. No. 13; Order No. 297-1999, [1999] B.C.I.P.C.D. No. 10; Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order F05-36, [2005] B.C.I.P.C.D. No. 50; Order F07-01, [2007] B.C.I.P.C.D. No. 1; Order No. 90-1996, [1996] B.C.I.P.C.D. No. 16; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45. **Ont.:** Order MO-1980, [2005] O.I.P.C. No. 158.

1.0 INTRODUCTION

[1] This is another in a series of fee waiver orders in the last few years involving the Ministry of Environment and a now defunct public body for which it used to provide services. Sierra Legal Defence Fund ("SLDF"), the applicant in this case, submitted a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for a series of records related to compliance by companies and municipalities with the *Waste Management Act* and various associated records. The records covered one year, *i.e.*, January 1, 2003 to December 31, 2003. SLDF accompanied its request with a request for a fee

waiver in the public interest. The Ministry responded with a fee estimate of $24,060.00, about which SLDF complained to this Office.

[2] Because the matter did not settle in mediation, a written inquiry was scheduled under Part 5 of FIPPA. The Ministry at that date revised its fee estimate to $172,947.50 and provided SLDF with reasons for denying its request for a fee waiver, after which the inquiry took place.

2.0 ISSUE

[3] The issues before me in this case are:

1. Did the public body fail to comply with a duty under FIPPA to respond to a request by the complainant to be excused from paying fees for services in connection with its access request?
2. Is the public body's $172,947.50 fee estimate for services appropriate in the circumstances?
3. Should the fees for services in connection with the complainant's access request be confirmed, excused, reduced or refunded, in whole or in part?

3.0 DISCUSSION

[4] **3.1 Chronology of Request—**It is helpful to begin by outlining the events that occurred in this case. SLDF submitted its access request on March 23, 2004 as follows:

> 1. Where there has been an incident of non-compliance under the *Waste Management Act* with any limit set by permit, statute, regulation or other standard, please provide:
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> - all terms and requirements terms and requirements [*sic*] related to any discharge limits as set out in permits, permit extensions, operational certificates, approvals, upgrades and variances issued;
> - the dates of exceedences, and an indication of whether the exceedences are of a daily, monthly or annual limit;
> - the limit which has been exceeded and the pollutant involved;
> - the names, location and addresses of the companies or municipalities involved, and the name of the instrument or regulation with which the company or municipality is not in compliance
>
> 2. All requests for operational plan approvals or modifications, and any Ministry response thereto.
> 3. All spill response reports filed during the one-year period.
> 4. All official warning letters or warnings issued.

5. All records disclosing dischargers referred to the Conservation Officer Service.

6. All records related to public complaints regarding noncompliance. (For purposes of clarification, we do not seek information related to the identity of the persons making the complaint and consent to the excerpt of such material.)

7. Information on enforcement action taken by the Ministry in response to the violations that occurred during the request period, including the names of facilities that have been charged, convicted, and/or levied fines.

I would be pleased to discuss this request in order to clarify any issues to ensure that the a [*sic*] minimum of Ministry staff time is required.

[5] SLDF's request for a public interest fee waiver set out the questions in the first step in the test for public interest fee waivers. It then quoted the Information and Privacy Commissioner's discussion of the term "environment"[1] and said the following:

The inquiries stated above are each answered affirmatively in relation to the information sought in this request:

a) Issues of environmental non-compliance have been the subject of considerable recent debate, particularly the issue of fish farms.

b) The enforcement of environmental statutes is by definition related directly to the environment. Further, these statutes of environmental compliance are formulated to help protect the public health and safety of the provincial constituent.

c) Sierra Legal Defence Fund plans to use this information to author a "BC Environment Noncompliance List" Report. These reports were historically prepared by the BC Ministry of the Environment, Lands and Parks, and Sierra Legal Defence Fund wishes to continue offering these reports to the public. The dissemination of this information, that of private companies polluting the public good, is a matter of public importance, supported by the fact that the Ministry used to fax the report to many media sources.

d) The details of compliance enforcement will shed light on Ministry priorities: which companies are charged for what activities, which are convicted, and fined for how much?

[6] SLDF then listed the factors from the second stage of the public interest fee waiver test from Order No. 155-1997[2] and quoted a four-paragraph passage

[1] Para. 30 of Order 01-35, [2001] B.C.I.P.C.D. No. 36. The salient wording in that paragraph is " … a record will relate to the environment if it relates, at the very least, to the quality, health, protection, degradation or preservation of the environment".
[2] [1997] B.C.I.P.C.D. No. 13.

from Order No. 297-1999[3] about its ability to disseminate information. It concluded in this way:

> In the present case, the applicant has a clear and demonstrated ability to analyze, interpret and disseminate information. Further, the dissemination of this information will enlighten public debate regarding management of British Columbia's public resources, both from an environmental and economic perspective.

[7] The Ministry responded on April 14, 2004 by issuing a fee estimate of $24,060 as follows:

805 (minus 3 free hours) to search and locate records is 802 hrs @ $30 an hr =	$24,060
Total =	$24,060

[8] The Ministry requested a deposit of $12,030 before it would proceed further and said if it did not hear from SLDF by May 27, 2004 it would consider the request abandoned. It also told SLDF that the fee estimate was based on a search of "all permits in the ministry's seven regions" but did not include photocopying costs or costs of providing records held by the Ministry's Conservation Officer Service. The Ministry did not explain why the estimate omitted these costs and, while it noted that SLDF could request a fee waiver, also did not acknowledge or respond to SLDF's fee waiver request.

[9] SLDF wrote to this Office on May 27, 2004 to complain that the Ministry had not considered the fee waiver request set out in its request letter. It then said:

> We are also challenging the fee calculation. We note that we specifically asked the Ministry to consult with us regarding potential alternatives for making the request less onerous. The Ministry has refused this request.[4]

[10] Mediation was apparently unproductive as SLDF asked in October 2005 that the matter proceed to an inquiry. The Ministry requested a four-week adjournment to the inquiry in February 2006 so that it could make a decision on the fee waiver request. That request for a waiver had, of course, been in front of the Ministry from the outset. The Ministry nonetheless sought the adjournment, stating that it had not yet had the opportunity to make such a decision and that it would therefore be inappropriate for the Commissioner to decide whether it was

[3] [1999] B.C.I.P.C.D. No. 10.

[4] SLDF attached to its complaint two Ontario newspaper articles on information it had obtained under the Ontario *Freedom of Information and Protection of Privacy Act*, in support of its argument that the requested information would benefit the public.

reasonable to waive the fee.[5] SLDF agreed to the adjournment as long as it was able to modify its request to be for records from 2005—not 2003, as originally requested—and so long as the inquiry included the issue of whether the Ministry could ignore fee waiver requests submitted with records requests. The Ministry agreed to all of this.

[11] On March 8, 2006, the Ministry issued a decision on SLDF's fee waiver request. It referred to the original fee estimate of $24,060 and noted that this estimate had not included certain chargeable costs: locating records in several regional offices of the Ministry; locating Conservation Officer Service records; and photocopying costs. Because of this and the change in year from 2003 to 2005, the Ministry said it had revised the fee estimate as follows:

3,680 hours (minus 3 free hours) to search and locate records is 3,677 hours @ $30 per hour	=110,310.00
52,190 pages @ .25¢ [*sic*] per copy	= 13,047.50
1,643 hours preparing the records for disclosure is 1,643 hours @ $30 per hours	= 49,290.00
Shipping	= 300.00
Total	**$172,947.50**

[12] The Ministry then said the final fee amount would almost certainly be different and that SLDF would be expected to pay the actual costs. Among other things, the Ministry said that, as result of discussions with this Office, it would respond to the fee waiver request, although normally it does not respond to such requests until it has located and assessed the records. It also said that it would not change its "established procedures" for dealing with fee waiver requests, even though it was now responding in this case.

[13] The Ministry went on to deal with SLDF's fee waiver request, as follows:

> As I understand SDLF's [*sic*] arguments that fees should be waived in the public interest, it is that:
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> 1. Issues of non-compliance with environmental regulations have been the subject of considerable, recent public debate, particularly as they relate to fish farms;
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> 2. The enforcement of environmental statutes is directly related to the environment and also to public health;

[5] See Ministry's letter of February 13, 2006. The Ministry also said that it had expected SLDF to contact it after receiving the fee estimate but instead SLDF had complained directly to this Office. It also said that, after it received notice of the complaint, it had not been contacted during this Office's dealings on the complaint and thus "had not been engaged in dealing with the specific concerns raised by the Applicant in this case". The Ministry did not say whether it had made any overtures itself during this time.

> 3. SDLF [*sic*] intends to publish a "BC Environment Non-Compliance Report", such has [*sic*] was historically prepared by the Ministry, in pursuit of the public good;
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> 4. Detailed information about the Ministry's compliance enforcement efforts, in other words who has been charged of [*sic*] doing what, who has been convicted, and the magnitude of any resulting fines, shed light on Ministry priorities; and
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> 5. SDLF [*sic*] has a demonstrated ability to analyze, interpret, and disseminate information with a view to informing the public debate regarding the management of BC's public resources.

[14] The Ministry acknowledged SLDF's offer to accept records for either a calendar or fiscal year,[6] whichever was easier for the Ministry, and said that neither was less onerous for it. There were ways of reducing the costs, it said, but this was not one of them, adding that "The Ministry remains ready to discuss such measures and would, in fact, have done so had either SDLF [*sic*] or the OIPC approached it to engage in such discussions."

[15] I summarize below the rest of the Ministry's letter of March 8, 2006 in which it responded to SLDF's points in support of its fee waiver request, set out above:

1. There had been considerable recent public debate about the environmental impact of fish farming but not on whether or not it complies with relevant environmental regulations. The request is not limited to fish farms but extends effectively to everything about regulated discharges to the environment. There has been public discussion, though not much debate,[7] about the environmental impact of various spills and other discharges on the environment, but not on whether or not various industries comply with relevant regulations or whether those regulations are being enforced with adequate vigour.

2. The vigour with which environmental regulations are being enforced relates directly to the environment but virtually everything the Ministry does relates to the environment.

3. The Ministry made a conscious decision to stop publishing environmental compliance reports because of the cost, there was some question of whether the "name and shame" strategy was an effective means of enforcing compliance and public and media interest in the report was waning. SLDF's intention to publish such a report thus does not carry much weight.

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[6] I could find no indication in the material before me of when this offer arose.
[7] It is not clear to me how this distinction is useful here.

4. Who has been charged with violating environmental regulations and the results of those charges are already a matter of public record.

5. There was at least one occasion in the past when SLDF did not disseminate information it received after the Ministry had waived fees based on SLDF's ability to disseminate[8] (which the Ministry said it did not question here). The Ministry did not therefore give this factor much weight.

[16] As a result, the Ministry said, SLDF had not demonstrated that a public interest fee waiver was merited in this case. In arriving at this conclusion, the Ministry said it had also considered whether the information in the records:

- discloses an environmental or public health or safety concern;
- would contribute to the development of public understanding of, or debate on, an important environmental or public health or safety issue or an important policy, law or program; and
- discloses how the Ministry is allocating financial or other resources.

[17] The Ministry said it also considered whether it was prepared to look at ways of reducing the cost of producing the requested records[9] and whether SLDF made reasonable efforts to work with the Ministry in this matter.

[18] The Ministry acknowledged that some of the requested records probably do relate to a matter of public interest. The Ministry said that it recognized five levels of regulatory non-compliance, ranging from administrative matters (such as late filing of reports) through to major issues. Its files on the latter category were the most likely to contain records related to a matter of public interest. It would, however, be necessary to review all the files to determine which ones relate to major non-compliance issues (perhaps 5-10% of the files).

[19] Of those records, after subtracting records related to public notifications and prosecutions, as well as those the Ministry considered not to be substantive, less than 5% of the requested records were what the Ministry considered to be "substantive". The Ministry was prepared to waive the fees for those records, that is, 5% of the revised fee. The Ministry closed its March 2006 letter by saying it was willing to meet with SLDF to explain its compliance plan, the way the Ministry checks for and records compliance and how it deals with non-compliance.

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[8] As SLDF pointed out in its reply, the Ministry gave no particulars of this case (or indeed of other cases where SLDF did publish information it received) and so this argument, the relevance of which is doubtful in any case, is of little assistance here.

[9] I saw no evidence in the material before me that the Ministry actually did this or that it ever told SLDF how costs might be reduced.

[20] The Ministry and SLDF later exchanged letters (in April and May 2006) in which SLDF confirmed that it had not requested a modification of the scope of its request to records related to major non-compliance.

[21] **3.2 Application of Public Interest Fee Waiver Test—**The relevant sections of FIPPA read as follows:

> **Fees**
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> 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:
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> (a) locating, retrieving and producing the record;
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> (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.
>
> (3) Subsection (1) does not apply to a request for the applicant's own personal information.
>
> (4) If an applicant is required to pay a fee for services under subsection (1), the head of the public body
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> (a) must give the applicant a written estimate of the total fee before providing the service, and
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> (b) may require the applicant to pay a deposit in the amount set by the head of the public body.
>
> (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. …
>
> (5.1) The head of a public body must respond under subsection (5) in writing and within 20 days after receiving the request. …

[22] A number of orders have considered whether fee waivers in the public interest are merited.[10] I set out the two-step process most recently in Order F07-01 and I have applied the two-step approach here without repeating it.

[10] See, for example, 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 F05-36, [2005] B.C.I.P.C.D. No. 50, and Order F07-01, [2007] B.C.I.P.C.D. No. 1.

[23] The Ministry opened its discussion of the fee waiver issue with arguments on the purpose of fees under FIPPA,[11] arguments similar to those it made in Order F07-01.[12] My comments here are the same as those I made in that case, which I am afraid merit repetition here for emphasis:

> [57] The Ministry has got hold of the wrong end of the stick here. First, while the right of access under FIPPA is subject to the payment of fees, it is clear from the wording of s. 75 that fees are discretionary. I do not think this means they are "a necessary component of the proper administration" of FIPPA.
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> [58] Moreover, contrary to what the Ministry suggests, it is the circumstances under which public bodies may charge fees that are limited, not those under which they may waive fees. Section 75(1) lists the four services for which public bodies may charge while, under s. 75(5)(a), it is clear that public bodies may waive fees under any circumstances where they consider it fair to do so.
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> [59] While the Ministry did not suggest otherwise, it is worth reiterating that the public interest consideration in s. 75(5)(b) is not limited to matters relating to the environment or public health or safety. In Order 01-24, to give only one example, the Commissioner said these terms were not exhaustive and found that the settling of aboriginal land claims was a matter of public interest.
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> [60] Finally, the issue here is not whether the Ministry or WCWC should bear some or all of the costs of processing WCWC's request. Rather, the issue is whether the records in dispute relate to a matter of public interest and, if so, whether a fee waiver is warranted in the circumstances.

[24] **3.3 Obligation to Respond to the Fee Waiver Request—**SLDF is of the view that, by the plain wording of ss. 75(5) and (5.1), it was entitled to a decision on its fee waiver request from the outset and the Ministry was under a duty to provide that response. SLDF said that s. 75 does not state that a public body must first issue a fee estimate and only then respond to a fee waiver request within 20 days.[13]

[25] SLDF argued that submitting a fee waiver request at the same time as a records request saves time and also allows the public body to consider whether the records contain information that relates to a matter of public interest when the public body is identifying responsive records, meaning two reviews of the same records are not necessary.[14] Given that a public body is required to respond to a request within 30 days, SLDF believes that a public body should generally be in

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[11] Paras. 4.01-4.08, initial submission.
[12] See para. 56 of that order.
[13] Para. 9, initial submission.
[14] Page 4, reply submission. I made a similar comment at para. 35 of Order F07-01.

a position to provide a fee estimate within 20 days of receiving the request and, where an applicant has requested a fee waiver at the same time, also to make a decision on the fee waiver request.[15]

[26] SLDF said that it often requests fee waivers with its records requests,[16] the Ministry "predictably" refuses to consider the fee waiver requests, the Ministry tells SLDF it can request a fee waiver and SLDF then re-faxes the original letter with a cover note asking the Ministry to consider the fee waiver, which SLDF acknowledges has often been granted. SLDF said that the Western Canada Wilderness Committee ("WCWC") "has also endured this kafkaesque treatment" by the Ministry. SLDF said that

> … applicants routinely face the surreal situation where the Public Body states that it is unable to consider the fee waiver originally submitted with a request, as it is necessary to calculate a fee estimate, which is stated *in the very same letter* in which the Public Body provides the fee estimate. Such conduct is in no way consistent with the Public Body's obligation to assist applicants, but rather reveals the intent of the Public Body to delay and frustrate attempts to obtain government information.[17] [italics in original]

[27] SLDF said that the Ministry's April 2004 fee estimate letter did not mention SLDF's fee waiver request although, in SLDF's view, the Ministry was "in possession of all information necessary to consider the request". Since the issuance of a fee estimate "stops the clock" under s. 7(4) of FIPPA, SLDF said, a public body's handling of fee waiver requests should not unduly delay disclosure of information to the public.[18]

[28] The Ministry takes the position that it is appropriate for a public body to issue a fee estimate first and for an applicant then to make a case for having the fee waived. It said that a public body is not generally able to make a decision on a fee waiver request until it has canvassed its program areas and ascertained the amount of the fee (based on the amount of search time and the volume of records involved) and "after it has been able to ascertain, to the extent possible in the circumstances, the content of the requested records". In the Ministry's view,

> … it is appropriate to determine the nature of the records sought and then to have discussions with the applicant to determine whether the receipt of certain records of interest to the requester would be sufficient, to the

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[15] Para. 10, initial submission.
[16] The Ministry said that in its experience SLDF always asks for a fee waiver, regardless of the records sought, "something the vast majority of applicants do not do"; paras. 3-4, reply submission.
[17] Paras. 11-12, initial submission. The applicant in Order F07-01, WCWC, expressed similar frustrations with this Ministry's responses to its fee waiver requests.
[18] Paras. 13-15, initial submission.

> exclusion of others, with a view to potentially saving costs for the applicant and any unnecessary time, effort, and expense on the part of the public body.[19]

[29] The Ministry made similar arguments in Order F07-01.[20] As I said there, a public body can always encourage an applicant to narrow a request, regardless of whether or not the applicant has requested a fee waiver.

[30] The Ministry then referred to Order No. 90-1996[21] as an example of how applicants should proceed in fee waiver cases. That Order dealt with a case where the public body had issued a fee estimate and the applicant had come directly to this Office requesting a fee waiver. Commissioner Flaherty stated the following expectations of applicants in fee waiver cases: the public body should issue a fee estimate; the applicant should provide the public body with reasons for a fee waiver; the public body should provide reasons for denying a fee waiver; and the applicant should ask this office to examine the denial of the fee waiver. The Commissioner declined to make a decision on the fee waiver issue in that case, as the applicant had not provided the public body with a rationale for a fee waiver and the public body had not made a decision.[22]

[31] The Ministry acknowledged that in this case SLDF provided reasons for a fee waiver with its request for records. It said that in both cases, however, the applicants had approached this Office about the fee waiver issue without first having dealt with the public body. The Ministry said it could reasonably have expected SLDF to respond to its fee estimate letter and that SLDF had instead complained directly to this Office. In its view, "such an uncooperative and non-communicative approach by an applicant should not be countenanced".[23]

[32] SLDF responded that, when it made its records request, it

> … proposed to open a dialogue to investigate ways to make the request less onerous, but the Public Body did not respond to that overture. After the request for review was made, Sierra Legal wrote numerous times seeking resolution to this dispute and offering additional information to facilitate the Public Body's consideration of the fee wavier [*sic*], whereas the Public Body never responded to these communications.[24]

[33] This statement appears to be at odds with the Ministry's complaint (see footnote 5 above and para. 39 below) that SLDF never communicated with it

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[19] Paras. 4.09-4.11, initial submission.
[20] See para. 31 of that order.
[21] [1996] B.C.I.P.C.D. No. 16.
[22] Para. 4.12, initial submission. In 1996, s. 75(5.1) did not exist but only came into effect in April 2002. Any supposed awkwardness with the 20-day timeline for deciding on a fee waiver request could therefore not have arisen in Order No. 90-1996.
[23] Para. 4.12, initial submission.
[24] Page 4, reply submission.

after the Ministry issued the first fee estimate. The material before me does not include any such communications, possibly because they occurred during mediation of SLDF's complaint. As this mediation material is not before me in this inquiry, I am not able to consider it here.

[34] In any case, while I do not think the comparison with Order No. 90-1996 is helpful, I agree with the Ministry that SLDF could have tried to negotiate the fee estimate with the Ministry before coming to this Office.[25] SLDF could for that matter have discussed the scope of its request with the Ministry before or after making it. Equally, the Ministry could have approached SLDF once it had an idea of the scope of the request and the volume of records. In this vein, SLDF is correct to remind me that, in its request, it invited the Ministry to discuss the request, but the Ministry does not appear to have taken up SLDF's invitation. Considering the original estimated search time of 805 hours (approximately 115 days of one person's time), a significant amount of staff time, it was in the Ministry's best interests to try to negotiate a narrower scope as early as possible.

[35] As I said in Order F07-01,[26] communication on a request is a two-way street. Both applicants and public bodies bear a responsibility to discuss a request and fee estimate—particularly large ones as in this case—early in the process to ensure that applicants receive the records they need and that public bodies do not do unnecessary work. Such a step can result in a narrowing of the scope of the request, with a corresponding drop in costs to the applicant and reduction in demand on the public body's resources.

[36] There is no doubt this access request was on its face broadly-worded and both the applicant and public body would, in my view, have done well to discuss it early on, before they became entrenched in their positions. Each side had a responsibility to initiate discussions about the request and fee estimate as early as possible. It is now rather late in the game for the parties to start blaming each other about failures to communicate.

[37] Returning to the Ministry's arguments, it says that ss. 75(5) and (5.1) support its view that an applicant should wait for a public body to issue a fee estimate before requesting a fee waiver. Section 75(5.1) requires a public body to respond to a request for a fee waiver within 20 days of receiving such a request, it said, and

> … [t]he Applicant may argue that the Act contemplates, or at least allows for, a request for a fee waiver to be made at the time of the initial request for records under Part 2 of the Act. However, the Ministry submits that such a proposition cannot withstand a probing examination.[27]

[25] Even at $24,060, the fee estimate represented a significant amount of money and should have been SLDF's cue to discuss the request with the Ministry.
[26] See para. 103 of that order.
[27] Paras. 4.13-4.14, initial submission.

[38] According to the Ministry, responding to a fee waiver request under s. 75(5) made at the time of a records request means that a public body would have to respond to the fee waiver request within 20 days. In many cases, for example, those involving a large volume of records or extensive search time (such as this case) or where a public body takes a time extension under s. 10, it can take some time to determine the estimated number of responsive records and a public body will not be in a position to issue a fee estimate within 20 days, let alone deal with a request for a fee waiver. It would be absurd, in the Ministry's view, to have to respond to a fee waiver request before determining the amount of a fee.[28]

[39] Rather, the Ministry argues, s. 75 contemplates a particular process in which a public body may require an applicant to pay fees, it issues a written fee estimate, the applicant requests a fee waiver and the public body responds to that fee waiver request within 20 days. In this case, the Ministry said it reasonably expected SLDF to provide further reasons as to why the fee should be fully or partially waived but instead SLDF complained directly to this Office and after that never attempted to address the issue with the Ministry.[29] The Ministry therefore believes it did not fail to comply with a duty under FIPPA respecting its processing of SLDF's fee waiver request. Having said that, the Ministry acknowledges that it made a decision on the fee waiver issue in this case but only "to lay the proper evidentiary foundation for a consideration of the last issue in dispute in this inquiry". It does not however believe it was under any duty to do so, "in light of the Applicant's failure to provide reasons for its request for a fee waiver in light of the actual fee estimate provided".[30]

[40] In Order F07-01, the applicant also complained that the Ministry had refused to consider its fee waiver request which the applicant had made concurrently with its records request. In that case, the Ministry made arguments similar to those it makes here, although it did not cite s. 75(5.1) in support of its position. I said the following there:

> [34] I take the Ministry's point that, in the normal course, a public body will first issue a fee estimate and an applicant may then request a fee waiver. However, in my view, WCWC showed some foresight in providing the Ministry with its public interest fee waiver arguments at the beginning of the request process, rather than waiting until it received a fee estimate.
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> [35] Preparing a fee estimate entails a review, at least in a preliminary way, of files or records. The public interest fee waiver test requires a public body, not just to review, but to examine responsive records to determine if

[28] Para. 4.15, initial submission; para. 2 reply submission.
[29] SLDF said that the Ministry never told SLDF to provide additional submissions and that FIPPA does not require applicants to provide multiple arguments for fee waivers; p. 4, reply submission.
[30] Paras. 4.16-4.21, initial submission; the Ministry reiterated much of this at paras. 1, 4 & 5 of its reply submission.

> they relate to a matter of public interest. [footnote omitted] I do not see why the Ministry could not have saved duplication of effort by combining these two activities and issuing a joint fee estimate and decision on the fee waiver request, particularly since WCWC simply re-sent the same argument when it responded to the Ministry's request for reasons for the fee waiver. Doing so might have shortened the processing time by up to three weeks, judging by the dates of the relevant letters.

[41] As in that case, I acknowledge that it will normally make sense for an applicant to await a fee estimate before requesting a fee waiver. For one thing, it is possible that a given request will not involve fees. It is also possible that a public body will waive any fees without being asked, for example, if the fee is modest or it is immediately evident that the records relate to a matter of public interest.

[42] Section 75 does not explicitly state that a fee waiver request can only be made after a public body issues a fee estimate. Nor do I think one can otherwise read s. 75 as requiring an applicant to await a fee estimate before requesting a fee waiver. There may be any number of reasons where it would be appropriate in a given case for an applicant to submit a fee waiver request concurrently with a records request. For example, the applicant may not be able to afford any fees, regardless of the amount, and may wish to establish this right away for the public body by providing evidence to support a waiver on this ground. Alternatively, an applicant may already know or believe at the time of its request that the records it is requesting relate to a matter of public interest and thus not need to await a fee estimate before asking for a public interest fee waiver.[31]

[43] I also reject the Ministry's contention that, in this case, it would have been in the awkward position of having to respond to a fee waiver request before determining the volume of records involved and thus the amount of the fee. SLDF submitted its records and fee waiver requests on March 23, 2004 and the Ministry issued its first fee estimate on April 14, 2004, 14 business days later. While the Ministry now disavows that fee estimate, the fact remains that the Ministry was in a position to issue a fee estimate well within the 20 business-day response time that s. 75(5.1) requires for responding to a fee waiver request.

[44] It is reasonable to assume that, in preparing its fee estimate, the Ministry had gained—or could quite readily have gained—some knowledge of the contents of the records. The Ministry could therefore in my view have responded to SLDF's fee waiver request in the same letter as it provided the fee estimate, if only to deny the fee waiver request or to ask for further reasons.[32] However, the

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[31] The applicant in Order F07-01 believed, based on its experience with previous requests and other factors, that the records it was requesting related to a matter of public interest and provided extensive reasons for a public interest fee waiver at the same time as requesting the records.

[32] SLDF's reasons for a fee waiver were scanty and did not, in my view, suffice to establish that a public interest fee waiver was merited in this case.

Ministry not only did not even acknowledge the applicant's fee waiver request, it also gave no indication that it "reasonably expected" SLDF to get in touch with it after receiving the fee estimate, contrary to the Ministry's suggestion to this effect in its submissions.

[45] For these reasons, the Ministry was remiss in not addressing the fee waiver request upon receiving it and I find that it failed to comply with its duty under s. 75(5.1) to respond to the fee waiver request within 20 days.

[46] **3.4 Appropriateness of Fee Estimate—**The Ministry referred me to affidavit evidence in support of its view that it calculated the fee as accurately as possible and in compliance with s. 75. Daphne Dolhaine, the Ministry's Manager, Division Initiatives, Environmental Protection Branch, deposed as follows:

- in order to locate all responsive records, that is, all situations where there has been a finding of non-compliance with the *Waste Management Act* or the *Environmental Management Act*, with any limit set by permit, statue, regulation or other standard, it would be necessary to review each active authorization for the period in question
- active authorizations include things such as permits to operate large industrial operations, municipal liquid and solid waste management, hazardous waste transportation, storage of lead acid car and truck batteries, recycling of tires and used oil, some aspects of manure management, various discharges and approved processes and other activities
- there were approximately 5,000 active authorizations issued in 2005 and each has its own file
- the files are in various regional offices and it would be necessary for a ministry environmental protection officer to review each file to locate records related to any non-compliance
- it would take anywhere from 10 minutes to 5 hours (or an average of 45 minutes) to review each file, totalling 3,680 hours or 2.1 years of one person's time to locate responsive records
- it would take half of the Branch's 57 environmental protection officers three full weeks to locate responsive records, meaning the Ministry would have to stop non-compliance activities for that time[33]
- the Ministry does not label its records according to whether there was compliance or major or minor non-compliance
- it is thus not possible to estimate the percentage of responsive records that relate to minor non-compliance matters or to estimate the amount of records that are "administrative in nature" without reviewing all relevant

[33] The Ministry rather dramatically overstates this argument as it would not be obliged to halt all its other activities to search for records.

files, which the Ministry has not done due to the "enormous amount of time that would be required to do so".[34]

[47] The affidavit of Trip Kennedy, the Ministry's Manager, Information, Privacy and Records Services and Ministry Records Officer, explained that the original fee estimate had not included time for locating certain types of responsive records[35] and also did not include preparation, shipping and photocopying costs. This affidavit also confirmed the estimated number of pages of responsive records and the estimated search and preparation times, as set out in the Ministry's March 2006 fee estimate letter.[36] The Ministry said later that its original fee estimate had included allowable costs of approximately $75,000 for three regions[37] but that the fee estimate a Ministry employee issued omitted costs over $24,000.[38]

[48] The Ministry also pointed out that an estimate is just that and that a public body is not able to tell how accurate its estimate is until it has processed the request. The Ministry rejected SLDF's accusation that it acted in bad faith in revising its fee estimate and said it informed the applicant of the inaccuracy of the original estimate as soon as it became aware of it.[39] The Ministry also said a search of records from 2003 would have cost more, not less, than the estimated search fee for 2005 records, as more files would have been involved.[40]

[49] SLDF began its discussion of this issue by questioning whether the Ministry should be allowed to revise its fee estimate. When SLDF agreed to the Ministry's request for an adjournment in order to make a decision on the fee waiver issue, it did not expect the Ministry to revise the fee. The revision was not minor, in its view, but a "seven *fold* increase in the fee" [italics in original]. SLDF does not believe FIPPA authorizes public bodies to re-issue fee estimates and a revision should not be allowed.[41]

[50] SLDF also complained that the original fee estimate only stated that 805 hours of search time would be required and that it was not an "honest, good faith attempt to accurately estimate the cost of retrieving" as there was no estimate of the number of responsive records,[42] photocopying charges or electronic storage

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[34] Paras. 10-20, Dolhaine affidavit.
[35] Conservation Officer Services records and records dealing with monitoring and spill response files.
[36] Paras. 8-13, Kennedy affidavit.
[37] The original fee estimate said that the estimate covered seven regions.
[38] Para. 6, reply submission. The Ministry did not explain why the employee did this.
[39] Paras. 7-8, reply submission. The Ministry's submissions indicate that it did not become aware of how inaccurate the estimate was until it began preparing for this inquiry (para. 7, Kennedy affidavit) but do not say why it did not realize this earlier.
[40] Para. 9, reply submission.
[41] Paras. 16-21, initial submission.
[42] I observe that public bodies may not be in a position to estimate the number of pages of responsive records until later in the request process and may wish to wait until they have done

media requirements. In any case, SLDF said, both original and revised fee estimates were "simply ludicrous". Ontario, which SLDF said oversees a much larger number of permits and facilities, responded to an almost identical request with a fee estimate of $7,321, which SLDF said the Ontario Information and Privacy Commissioner "waived" after SLDF disputed the fee.[43]

[51] SLDF also relied on Ontario Order MO-1980,[44] in which a $6,000 fee estimate ballooned to $5,195,576 after the applicant appealed the first estimate to the Ontario Information and Privacy Commissioner. In that case, the adjudicator found fault with the first estimate in that it did not provide a breakdown and thus did not provide the applicant with enough information to decide whether or not to pursue access. The Ontario institution also apparently did not do any sample records searches until the inquiry stage, a year after the first estimate. The adjudicator found that it would be unfair to allow the institution to "revise" the fee estimate in this case and that doing so would undermine the integrity of the Ontario *Freedom of Information and Protection of Privacy Act*.[45]

[52] SLDF suggested that the high fee indicates one of three possibilities:

- that the Ministry issued the first estimate without regard to the true costs, to ensure that the records would not have to be released as such a high fee would allow the Ministry to argue that no public interest, no matter how compelling, could justify waiving the fee

- the Ministry does not know what facilities are in or out of compliance and the relevant records should thus be disclosed regardless of cost; simply identifying the facilities in non-compliance could yield significant benefits

- since public reporting has ceased, the number of non-compliant facilities has "spiralled out of control" which, SLDF said, happened in Ontario; it is hard to conceive that there are over 52,000 responsive pages for a one-year period and, if there are, it indicates that the Ministry has abdicated its enforcement responsibilities[46]

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their search to tell the applicant the estimated number of pages. Alternatively, they may choose to provide an estimated range.

[43] Paras. 22-24, initial submission.

[44] [2005] O.I.P.C. No. 158. This order makes it clear that Ontario institutions are expected to issue an interim access decision with their fee estimates, a different process from the one in this province. The order also acknowledges that institutions often revise fee estimates during appeals.

[45] Pages 1-2, reply submission.

[46] Paras. 25-26, initial submission. The Ministry vigorously rejected these "scenarios" at para. 11 of its reply, saying it had already explained why the original fee estimate was inaccurate and that the reason the fee estimate was so high was that SLDF had requested records that required a search of 3,680 hours through almost 5,000 files.

[53] SLDF then complained that the Ministry had estimated significant costs for photocopying but no estimates for "electronic storage media". SLDF argued that it is unlikely that the Ministry's records are all in paper form and converting electronic records to paper form "diminishes the utility of the records".[47]

[54] SLDF noted that the Dolhaine affidavit did not provide any examples of responsive records, indexes of files that would have to be searched or any other supporting documents. It also argued that the Dolhaine affidavit was inconsistent with a letter to the editor[48] from the responsible Minister who stated that in the past year the Ministry had signed a $1.5 million contract to implement a "new consolidated Authorization Management System (AMS) to begin replacing 62 antiquated computer systems from the 1990s that hindered consistent reporting". Thus, SLDF argued, the Minister had acknowledged "the existence of 62 computer systems related to the monitoring and tracking of non-compliance data". SLDF asked why the Ministry is not using computer searches to expedite the location of responsive records and why the Ministry is saying there are over 52,000 pages of records which would cost $13,000 to photocopy.[49]

[55] I disagree with SLDF that the Ministry should not be "allowed" to revise its fee estimate. One of the purposes of mediation is to clarify and refine the issues in dispute. In cases where a public body has denied access to records, mediation can result in the addition or subtraction of exceptions or the disclosure of more information. Mediation in other cases may lead to the lowering of a fee or to a partial or complete fee waiver. It seems unlikely that SLDF would have objected if mediation had led to a reduction or waiver of the fee in this case but, while unfortunate, it happens that the result of mediation was a sizeable increase.

[56] It is regrettable that the Ministry realized how inaccurate the estimate was only as it was preparing for this inquiry. The Ministry also did not explain why it did not realize this earlier in the process. Nevertheless, in the circumstances of this particular case, at least, I have no quarrel with the Ministry for revising the search portion of the fee. I accept that the Ministry's original fee estimate (for 2003 records) was grossly inaccurate and that an accurate fee estimate

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[47] Paras. 27-32, initial submission. The Ministry said at para. 12 of its reply that most of the responsive records are paper based and then explained the manual process required to retrieve responsive records which would make SLDF's request time-consuming to process.

[48] Appendix "C", reply submission; letter from Barry Penner, Minister of Environment, to the editor of the Times Colonist, March 30, 2006.

[49] Pages 5-6, reply submission. The Ministry commented at para. 13 of its reply that it had "identified the need to build a better information management system" on its compliance activities, a "complicated and costly process", the first phase of this new system was not expected until late 2006 and full implementation would take several years. (The Ministry did not refer to the "62 antiquated computer systems" in its reply.) The Ministry also denied SLDF's suggestion that it was manipulating the fees by converting electronic records to paper ones; para. 14, reply submission.

regarding these records would have been even higher than the revised fee estimate (for 2005 records), as more files would have been involved. I am also satisfied with the Ministry's evidence on the estimated amount of time to review the 5,000 files involved here. I see no reason to reduce this aspect of the Ministry's fee estimate.

[57] Unlike the estimated search time, the Ministry did not explain how it arrived at the estimated figure of 52,190 responsive pages. It simply provided a table with the estimated number of responsive records for each region.[50] However, the Ministry's estimate works out to about 10 pages per file. Such a figure does not strike me as unreasonable and, recognizing that the actual number of responsive pages may be higher or lower, including as a result of any narrowing of the request or because SLDF may choose to review original records and select the ones it wants copied, I accept this aspect of the estimate as appropriate.

[58] I am however doubtful of the estimated preparation time, as there is no explanation of what the Ministry means by this term nor of how it arrived at the figure of 1,643 hours, a rather precise one in the circumstances. Search and retrieval time presumably entails identifying and pulling responsive records but what activities does "preparing the records for disclosure" encompass? The Ministry does not say and it is not evident what it means from the material before me. The estimated preparation times in the Kennedy affidavit do not, for example, appear to have any correlation to the estimated search times or estimated number of records. The Ministry should not expect me to divine these things and, without more, I am unable to find that this aspect of the fee estimate is appropriate. To summarize, I find that the estimates for the search time and the number of responsive records were appropriate and that the estimate for preparation time was not appropriate.

[59] **3.5 Do the Records Relate to a Matter of Public Interest?—** The Ministry said that it concluded that SLDF had not demonstrated that it would be appropriate to waive the $172,947.50 fee in this case, giving the same reasons as in the Ministry's March 2006 letter. Relying on affidavit evidence of Trip Kennedy, the Ministry said that, although it had not gathered and reviewed the records, it believed that "some portion of the requested records probably do relate to a matter of public interest", although the Ministry did not say on what basis it held this belief. The Ministry then said that it estimated that 5-10% of the regulatory files might relate to major non-compliance issues (known as "level 5"), which are those characterized by a known or likely human health impact.[51]

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[50] Para. 13, first Kennedy affidavit.

[51] Paras. 4.28-4.44, initial submission; first Dolhaine affidavit; paras. 14-18, first Kennedy affidavit; SLDF pointed out that this would mean approximately 500 facilities were in a state of "major non-compliance"; p. 6, reply submission.

[60] Trip Kennedy further deposed as follows:

> 22. Through my years as Ministry Records Officer, I have acquired general knowledge [*sic*] staff filing practices. I have also considerable experience in dealing with requests for Ministry records in that I have supervised the response to more than 700 records access requests made to the Ministry of Environment and its predecessor ministries over the last 4 years.

[61] Allowing for cases where the Ministry had already made such matters public and where remediation had since taken place and for routine "administrative" records[52] (which would likely be about half the records in files relating to incidents of major non-compliance), Trip Kennedy estimated that perhaps 5% of the requested records might be substantive in content (*i.e.*, those dealing with compliance, non-compliance or efforts at achieving compliance) and thus relate to matters of public interest. He said he was prepared to waive 5% of the fees on this basis, leaving an estimated fee of $164,300.13.[53]

[62] The Ministry provided a copy of its June 2005 "Compliance and Enforcement Policy and Procedure", "Version 1",[54] which guides the Ministry's response to non-compliance issues, as well as its approach to inspections and investigations. Section 4.3 of this policy discusses the "Non-Compliance Decision Matrix" and includes the following description of "Levels of Escalating Environmental, Human Health or Safety Impact Actual or Potential":

> **Level 1**
> - Non-compliance that does not result or is unlikely to result in any environmental, human health or safety impact; or
> - Minor administrative non-compliance.
>
> **Level 2**
> - Non-compliance resulting in a minor, temporary impact to the environment or minor temporary threat to human health or safety; or
> - Significant administrative non-compliance.
>
> **Level 3**
> - Non-compliance resulting in a moderate, temporary impact to the environment or moderate, temporary threat to human health or safety.

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[52] The Ministry described these administrative records as including emails on meetings and communications issues, discussions of whether or not plans or modifications should be approved, complaint letters, the majority of which related to permitted activities, discussion around referrals for investigation and information on enforcement action taken, most of which have already been made public; para. 24, first Kennedy affidavit.

[53] Paras. 4.44-4.51, initial submission; paras. 19-26, first Kennedy affidavit.

[54] Exhibit "D", first Kennedy affidavit.

Level 4

- Non-compliance resulting in a significant impact to the environment or significant threat to human health or safety (may be temporary or permanent).

Level 5

- Known or likely human health impact that is severe in effect, i.e. resulting in hospitalization and/or long term human health consequences.

[63] This policy and the short descriptions of records related to so-called major non-compliance (*i.e.*, records related to compliance, non-compliance or efforts at achieving compliance for level 5 cases, *i.e.*, those characterized by a known or likely human health impact)[55] were the only evidence the Ministry provided on the nature of the 5% of records it considers to relate to a matter of public interest. The Ministry provided no evidence on this point from knowledgeable program area employees, which to say the least would have been helpful.

[64] In SLDF's view, the requested records relate to a matter of public interest because they are indicators of additional pollution risks to human health, safety or the environment, and would reveal whether "compliance" has been achieved for certain facilities through relaxation of standards in permits and whether pollution standards are becoming more stringent or more lax. They would also reveal the existence of spills of regulated materials and what remediation action was taken. Disclosure of "warning letters" to polluters would reveal those who have been unable or unwilling to address chronic non-compliance, reveal the Ministry's "informal" enforcement efforts and the diligence of the Ministry's enforcement efforts or the Ministry's decisions to consider prosecutions of chronic offenders and its success rate (SLDF only seeks the names in this last case). Other records would reveal public complaints of non-compliance and whether the Ministry is responsive to those complaints.[56]

[65] SLDF said that it seeks records about contravention of standards established to protect public health or safety and the environment from activities known to cause risks to those things. Violations of those standards are directly and indisputably related to matters of health, safety and the environment, SLDF argued, and when the government refuses to make such information public, the public is denied information that would allow it to avoid or decrease exposure to such threats.[57]

[66] SLDF referred to a number of publications promoting access to the type of information that it has requested and said British Columbians are entitled to know about health, safety and environmental risks arising out of activities, especially

[55] Paras. 18 & 23, first Kennedy affidavit.
[56] Paras. 36-43, initial submission.
[57] Paras. 50-52, initial submission.

the discharge of pollutants. SLDF said that both Ontario and British Columbia used to publish non-compliance information and that both provinces stopped. It started asking for such information under Ontario's *Freedom of Information and Protection of Privacy Act* so that it could assess and publish reports on non-compliance. Its reports detail violations of wastewater and air emissions in Ontario and, among other things, include the name and location of each facility, the number of violations, contaminants discharged, failed toxicity tests or discharged pathogenic pollutants and actions the Ontario government took.[58]

[67] SLDF said that the relationship between reporting and compliance is "well researched and documented" and referred to studies and publications that it considers support the effectiveness of reporting non-compliance. SLDF said that its work exposing chronic violators of Ontario's air and water pollution laws has received widespread media attention and that it has been credited "with motivating some of the most notorious companies to clean up their act". SLDF said that in Ontario when reporting stopped, violations rose and, once SLDF began issuing its compliance reports, violations in Ontario fell by over half. It said that federal and provincial officials have used its reports to determine which facilities are problematic, that at least once its reports led to a prosecution and that Ontario has now resumed reporting non-compliance data. It also referred to relevant Ontario orders and provided extracts of its reports based on Ontario non-compliance data and media articles it said flowed from its reports. Elaine MacDonald, SLDF staff scientist, gave evidence on the lengthy processes SLDF underwent in Ontario to obtain data, sometimes incomplete, often only after appeals to the Ontario Commissioner for fee waivers and orders to disclose records.[59]

[68] SLDF also took issue with the Ministry's assessment that there had been no recent public debate on the subject, saying it had provided a collection of recent media articles that "represent considerable public debate, and outrage" at the Ministry's position in this case. (The media articles SLDF refers to for the most part date from 2005-2006 and thus post-date the request by one to two years, although one is from 2004 and flows from the release of its Ontario non-compliance reports.) It also said that its Ontario non-compliance reports receive considerable media attention on release and that the non-compliance

[58] Paras. 53-67, initial submission; paras. 25-26, MacDonald affidavit.

[59] Paras. 68-81, initial submission; paras. 27-40, MacDonald affidavit. In response, the Ministry distinguished this case from those in the Ontario orders that SLDF referred to, inlcuding because: Ontario appears to have a different reporting system using data bases that require much less time to consult: SLDF's requests in the Ontario cases were apparently narrower in scope; the fees in the Ontario cases were much lower, $7,000-10,000; the number of responsive records in one Ontario case was lower; see paras. 21-27, reply submission; paras. 3-6, second Kennedy affidavit. I also note that Ontario's legislation regarding fee waivers and the public interest uses a different test from FIPPA's. In Ontario, therefore, it appears find that raw scientific data could be used to benefit the public whereas here the records themselves must relate to a matter of public interest. Thus, a comparison between the two provinces' treatment of public interest fee waivers is not helpful, in my view.

issue received extensive media coverage when the British Columbia Ministry released non-compliance information from 1990-2001.[60]

[69] SLDF said that, if there is less current public debate about these issues, it is because the Ministry no longer makes non-compliance information public. SLDF continued as follows:

> 118. … The Public Body's position is dangerous. To accept such a position in the circumstances would be to countenance government attempts to frustrate public disclosure by withholding information from the public so that they may claim there is no current debate or interest in the topic when faced with a request for information related to that issue. British Columbians assume — as they should be able to — that there are pollution standards in place to protect their health and the environment, and further that those standards are enforced. The extent of debate on this issue will be directly related to levels of non compliance.[61]

[70] The Ministry disputed SLDF's claim that reporting improves compliance with pollution standards, saying this has not been proven. The Ministry said it has a variety of tools for achieving compliance with environmental regulations, including education, audits, administrative orders, investigations, tickets and formal proceedings. Publication of non-compliance is only one tool, it continued, and there are times when it is an appropriate tool and other times when it is not. The Ministry's main objective is obtaining compliance in a timely and efficient manner and "engaging in cooperative efforts is often the most effective way of achieving compliance". Only a small percentage of operators "attempt to evade the law", requiring stronger measures. The Ministry also noted that it publishes regular air and water quality reports[62] and air quality advisories and is "developing a strategy to publish quarterly reports of charges laid and convictions entered for non-compliance activity" and planned to start in May 2006.[63]

[71] The Ministry also said that SLDF had not asked only for records related to major non-compliance (the estimated 5% of responsive records on which the Ministry has already said it would waive the fees) but all records related to any incident of non-compliance, even where that non-compliance is minor or administrative, such as late filing of reports or late posting of notices. The Ministry does not regard these latter types of records as meeting the public interest test for fee waivers.[64]

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[60] Paras. 111-117, initial submission.
[61] SLDF continued in a similar vein at paras. 118-128, initial submission and pages 6-7 of its reply submission.
[62] For example, "Drinking Water Sources Quality Monitoring", December 2005, Exhibit "C", second Dolhaine affidavit.
[63] Paras. 29-45, reply submission; second Dolhaine affidavit.
[64] Paras. 46-48, reply submission.

[72] The Ministry has something of a point here. While the tenor of SLDF's submissions suggests that it wants only major non-compliance records, such as those related to major pollution incidents or major violations of certain standards, it has explicitly stated it wants all of the requested records and wants a fee waiver for all of them. SLDF did not acknowledge or otherwise address the Ministry's description of records that relate to lower levels of non-compliance and those which appear to relate to administrative issues or problems and which do not appear to be the type of record that SLDF wants.

[73] In addressing these arguments, I come back to the well-established process for deciding public interest fee waiver requests under s. 75(5)(b). The first step of that process involves an examination of the requested records, or at least a representative sample of those records where there are voluminous records, in order to determine whether the records relate to a matter of public interest.

[74] There is no evidence in the present case that the Ministry undertook an examination of the requested records or even a representative sample of them, a step that has been held to be essential in applying the public interest waiver test in numerous orders. Indeed, the Ministry acknowledged that it merely speculated on the proportion of records which might relate to a matter of public interest.[65] Trip Kennedy, who is responsible for FIPPA requests and records management, provided the 5% estimate. However, he does not appear to have any expertise in the subject matter of the records themselves or compliance issues generally. The Ministry did not provide any examples of the responsive records nor, except for the "administrative records", did it submit any evidence as to their content or character from knowledgeable Ministry employees.

[75] The evidence from the Ministry falls far short of establishing that it has reasonably estimated the percentage of records that "probably", as the Ministry puts it, relate to a matter of public interest. The Ministry did not explain the basis for its conclusion that only certain types of files likely contain records related to a matter of public interest and why the others likely do not. While it appears possible, from the minimal evidence before me, that at least some of the level 5 non-compliance records may relate to a matter of public interest, given the descriptions in the Ministry's policy, it seems possible that at least some records related to levels 3 and 4 non-compliance, and perhaps other levels, may as well. The Ministry fails to explain why records of non-compliance with a "severe" impact relate to a matter of public interest while those related to a "significant" or "moderate" impact do not. I have no way of determining from the scant evidence before me why this might be so. It also seems that at least some of the so-called "administrative records"[66] may relate to a matter of public interest but, again,

[65] Para. 18, first Kennedy affidavit.
[66] Such as those related to enforcement and prosecution decisions.

without a proper examination of some or all of the records and evidence on this point, it is impossible to say.

[76] I acknowledge that, in this case, there may be tens of thousands of responsive records, but the Ministry did not even examine a representative sample before making its decision that 5% may relate to a matter of public interest. There is no evidentiary basis for this estimate and it is not one that can stand up to any scrutiny, given the arbitrary manner in which it was reached. The Ministry has in my view failed in its duty to apply the first part of the s. 75(5) test because it did not take adequate steps to properly determine the proportion of requested records that relate to a matter of public interest.

[77] **3.6 Exercise of Discretion—**I have found that the Ministry did not properly apply the first step of the public interest fee waiver test and will not therefore go further.

4.0 CONCLUSION

[78] Section 75(5.1) of FIPPA imposes a duty on the head of a public body to respond to an applicant's written request to be excused from paying all or part of the fees for services within the prescribed time limit. In fulfilling this duty, the head of a public body must exercise his or her discretion to waive fees in a reasonable manner, having regard to the criteria set out in s. 75(5). For the reasons set out above, I have concluded that, in responding to the request for a fee waiver, the Ministry failed to exercise its discretion in a reasonable manner having regard to the criteria under s. 75(5)(b) by: (a) failing to examine the actual records that were requested, or a representative sample of those records, in order to determine whether they relate, in whole or in part, to a matter of public interest; and (b) limiting its consideration to records in level 5 of its "Compliance and Enforcement Policy and Procedure", thereby failing to consider whether other categories of records—those resulting in temporary, moderate or significant impact to the environment and the so-called "administrative records"—may also relate to a matter of public interest. The evidence establishes that the estimate of 5% is nothing more than an extremely rough and unsubstantiated approximation made by a Ministry employee who does not have any apparent expertise in the subject matter of the requested records and related compliance issues.

[79] Where a public body exercises its discretion under s. 75(5) in an unreasonable manner, the appropriate remedy would normally be an order made under s. 58(3)(c) of FIPPA to excuse or reduce a fee or order a refund as appropriate. In Order No. 332-1999,[67] Commissioner Loukidelis rejected the public body's suggestion that he had a "limited power of review that should be used only where a public body has acted inappropriately in refusing a fee

[67] [1999] B.C.I.P.C.D. No. 45, at p. 3.

waiver". He went on to say this about the broad scope for review of public bodies' decisions on requests for fee waivers:

> … In my view, the legislative scheme of the Act as a whole leaves no doubt that s. 58(3)(c) gives the commissioner the power to substitute his or her decision for that of the public body.
>
> In *Minister of Forests et al. v. Information and Privacy Commissioner et al.* (B.C. Supreme Court, Victoria Registry No. 99-1290, August 13, 1999), Wilkinson J. dismissed an application by the Ministry of Forests for judicial review of Order No. 293-1999. That decision was handed down just after the close of submissions in this inquiry. The judgement in that case confirms that s. 58(3)(c) gives the commissioner a broad power to confirm, excuse or reduce a fee "in the appropriate circumstances". It is not necessary to establish that the head of a public body has acted irrationally or in bad faith before the commissioner can excuse a fee. The jurisdiction to intervene under s. 58(3)(c) is broad. It may well enable me, in appropriate cases, to substitute my opinion – *i.e.*, my discretion – for that of the head. In other cases, however, it will not be appropriate to do that.

[80] I recognize that the Ministry faces practical challenges in responding to an access request that involves this volume and range of records. However, in this case, it did not make a proper and reasonable determination of the proportion of the responsive records that relate to a matter of public interest. The evidence in this inquiry is not sufficient to permit me to undertake that task. I conclude the circumstances are not appropriate to order my own quantification under s. 58(3)(c) of the proportion of the fees to be excused. Instead, I order the Ministry under s. 58(3)(a) to discharge its duty to make a decision on whether or not to excuse fees under s. 75(5) on a demonstrably proper and reasonable basis.

[81] In my view, the Ministry may accomplish this by:

1. Conducting a review of a randomly selected sample of responsive records in order to provide an informed, objective and reasonable basis (through the process of extrapolation) for determining the percentage of records that relate to a matter of public interest;

2. Considering whether records that fall within the scope of Levels 1 to 4 under section 4.3 of the June 2005 "Compliance and Enforcement Policy and Procedure" "Version 1" and the so-called "administrative records" relate to a matter of public interest;

3. Exercising discretion in deciding what part of the fee estimate to waive having regard to these considerations;

4. Issuing a decision that includes proper explanatory reasons for the conclusion reached.

[82] I must also consider the appropriate remedy in relation to the quantification of the fee estimate. If an applicant is required to pay a fee, s. 75(4) of FIPPA imposes a duty on the head of a public body to provide a written estimate of the total fee before providing the service. The fee estimate must be based on a reasonable consideration of the services outlined in ss. 75(1)(a) to (d). For the reasons outlined above, I conclude that the Ministry's estimate was not reasonable in relation to the time allocated for preparing the records for disclosure under s. 75(1)(b) and I do not have sufficient evidence to order my own quantification for preparation time. I therefore order the Ministry under s. 58(3)(a) to discharge its duty to prepare an estimate under s. 75(4) on a demonstrably proper and reasonable basis, having regard to this consideration.

[83] Under s. 58(4), I specify that the Ministry is to comply with this order within 30 days of the date of this decision, that the Ministry is to copy me on the resulting decision letter to SLDF and that the parties are at liberty to apply to me with respect to any issues arising from this order or the Ministry's compliance with it.

[84] Finally, I strongly encourage SLDF and the Ministry to work co-operatively to explore any possibilities of further refining the scope of the access request as it is in the interests of both of the parties to do so.

April 10, 2007

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

OIPC File: F04-21332