



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

Order F07-09

MINISTRY OF ENVIRONMENT

Celia Francis, Senior Adjudicator

June 7, 2007

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Summary: Applicant requested public interest fee waiver that Ministry initially denied. Ministry later granted partial fee waivers in stages. Ministry found not to have applied public interest fee waiver test properly. Refund of remaining \$65 fee ordered as remedy under s. 58(3)(c).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 58(3)(c), 75(5)(b).

1.0 INTRODUCTION

[1] This decision is the latest arising out of fee waiver decisions that the Ministry of Water, Land and Air Protection, now the Ministry of Environment (“Ministry”), has made regarding requests by environmental groups. The Western Canada Wilderness Committee (“WCWC”), the applicant in this case, made a request to the Ministry for records relating to the construction of a road through Monck Provincial Park. With its access request, WCWC also requested that any fees be waived under s. 75(5)(b) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), on the grounds that the records requested related to a matter of public interest.

[2] The Ministry responded to WCWC’s access and fee waiver requests by issuing a fee estimate of \$395.00 and requesting \$200.00 as a deposit. Its letter did not mention WCWC’s fee waiver request. In this way, the Ministry’s response was, as with previous Ministry responses in similar cases, as a ship passing the waiver request in the night.¹

¹ The Ministry’s response did say that FIPPA allows the Ministry to excuse all or part of a fee and told WCWC how to contact the Ministry if it wanted the fees excused.

[3] WCWC in return sent another request for a fee waiver to the Ministry, with fuller reasons than in its first request. The Ministry refused to waive the fee and WCWC then paid the \$200.00 deposit “under protest”. WCWC later obtained access to approximately 580 pages of responsive documents. By then, the fee had increased to \$650, of which the Ministry waived \$450.00. The \$200.00 deposit that WCWC had paid remained in dispute. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of FIPPA. On the brink of the inquiry, the Ministry waived a further \$135.00, leaving a mere \$65.00 in dispute, but the inquiry proceeded.

2.0 ISSUE

[4] The issue set out in the Notice of Inquiry was “the public body’s decision to deny a full fee waiver as requested by the applicant under s. 75(5)(b) of the Act”. The Ministry indicated that I should also consider the reasonableness of its decision to deny a full fee waiver and its decision to require a \$65 fee for the records. I agree that it is appropriate to consider the reasonableness of these decisions in light of the manner in which the fee estimate unfolded.

Burden of proof

[5] The Ministry argued that WCWC bears the burden of proof as the applicant in this case.² While it is true that earlier orders³ placed the burden of proof on the applicant to show that a fee waiver was warranted, the legislation does not expressly impose an evidentiary burden on either party. The Commissioner has since held in cases where FIPPA does not set out a burden that, as a practical matter, it is in the interests of each party to present evidence as to whether the provision in issue applies.⁴

Fee waiver as remedy

[6] WCWC has raised the issue of whether a fee waiver is appropriate under s. 58(3)(c) because of the Ministry’s alleged delay in providing copies of responsive records. The Ministry responded to the delay argument in its reply. WCWC also seeks to challenge the Ministry’s approach to determining whether the requested records relate to a matter of public interest.

[7] I told the parties that I would consider whether it would be appropriate to confirm, excuse, reduce or refund the \$65.00 fee. I indicated that I would also consider the manner in which the Ministry applied the public interest fee waiver test and the timing of its application of that test and invited the parties to make further submissions on s. 58(3)(c). The Ministry made a further submission but WCWC did not, even though it was WCWC that raised the issue in the first place.

² Paras. 23-24, initial submission.

³ For example, Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45.

⁴ See Order 03-28, [2003] B.C.I.P.C.D. No. 28, for example.

3.0 DISCUSSION

[8] **3.1 Background to the Access Request**—Monck Park is a provincial park near Merritt. In 2002, the Ministry agreed to a proposal in which the Crown would provide a public road through Monck Park to a private subdivision in return for land to be added to the park and the construction of campsites by the developer. The Ministry said that the agreement came after consultation with First Nations in the area and formed part of a settlement between the developer and the government of two actions that the developer had filed against the provincial Crown.⁵

[9] **3.2 Chronology of Request**—A chronology helps place my decision in context. By an August 24, 2004 letter,⁶ WCWC requested “any records” related to:

- the development of a road through Monck Park to access a housing development, Nicola Lakeshore Estates
- the public consultation process, the environmental assessment process and stakeholders consulted
- the amount of land within the park impacted by the road, the number of trees cut within the park boundaries and the amount of private land that was traded for park land
- the “Order in Council” which permitted the construction of the road through the park

[10] WCWC, which identified itself as a non-profit organization, also requested a fee waiver under s. 75(5) of FIPPA on the basis that its public education activities promote public awareness regarding the impact that funding cuts, industrial development and privatization initiatives are having on BC’s provincial parks and protected areas. It referred to its newsletter on threats to BC provincial parks and to its website as sources of public information.⁷

[11] On September 17, 2004, the Ministry issued a fee estimate of \$395.00 for locating and copying 1,000 pages of records. The Ministry requested a deposit of \$200.00 but noted that it could excuse fees if WCWC could not afford to pay or for other reasons. The Ministry also told WCWC it could ask this Office to review the fee.

[12] On October 19, 2004, WCWC sent a letter to the Ministry⁸ setting out why it believed a fee waiver in the public interest under s. 75(5) was warranted. WCWC cited virtually the same arguments that it made in the case that led to

⁵ Para. 24, initial submission.

⁶ The Ministry received this letter on August 31, 2004; see fee estimate letter of September 17, 2004, Exhibit “B”, first Kennedy affidavit.

⁷ WCWC’s letter of August 24, 2004.

⁸ The Ministry received this letter on October 20, 2004; see Exhibit “C”, first Kennedy affidavit.

Order F07-01,⁹ although it also made specific reference to the road through Monck Park (*i.e.*, the alleged lack of public accountability about the road and the public's concerns about the road development and subsequent logging in Monck Park).

[13] In its November 1, 2004 response, the Ministry acknowledged that the issue of the management of provincial parks, "with due regard to their wilderness and heritage preservation values", was of some currency. The Ministry also observed, having regard to the scope of the request, that "few" of the records WCWC sought would likely "speak directly to stewardship and the decision making around the permission to construct a road through Monck Park". The Ministry suggested that WCWC could:

- narrow the scope of its request to records related only to the decision to permit construction of the road, as such records might merit a public interest fee waiver
- pay the deposit "under protest" and, once the Ministry had retrieved the records, the Ministry and WCWC could "have an informed discussion about the records", possibly resulting "in some other recasting of your request that would substantially reduce the fees payable"
- ask this Office to look at its denial of the fee waiver

[14] On November 2, 2004, WCWC exchanged emails with the Ministry with a view to clarifying their positions. WCWC emphasized that its fee waiver request was based on public interest aspects only, rather than on an inability to pay or its non-profit advocacy status. The Ministry reiterated that it could only see the argument for a public interest fee waiver for records relating to the decision permitting construction of the road. The Ministry indicated that, if WCWC wished to revise its request, the Ministry would determine the number of records involved and would likely waive the fees based on the arguments that had already been made.

[15] On November 4, 2004, WCWC paid the \$200.00 deposit "under protest" indicating that the remainder would be paid upon receipt of the requested documents. WCWC also said that it would ask the Commissioner to review the fee waiver denial.¹⁰ Later that month,¹¹ WCWC filed a complaint with this Office regarding the fee waiver denial.

[16] In early December 2004, this Office notified the Ministry that WCWC had filed a complaint regarding the denial of the fee waiver.¹² The Ministry had apparently collected the records by this time but had not released them to

⁹ [2007] B.C.I.P.C.D. No. 1, paras. 41-43.

¹⁰ WCWC's letter is dated November 4, 2004 and the Ministry received it on November 9, 2004. See Exhibit "E", first Kennedy affidavit.

¹¹ November 29, 2004; Exhibit "G", first Kennedy affidavit.

¹² This Office told the Ministry that it opened the complaint file as of December 3, 2004; Exhibit "G", first Kennedy affidavit.

WCWC, saying “it is the operating policy of the Ministry not to release records when fee waiver complaints are outstanding”.¹³ The Ministry indicated that this policy is designed to ensure that it “does not deprive itself of disputed fees to which it is entitled”.¹⁴

[17] In February 2005, this Office told the Ministry that WCWC had requested a review of the Ministry’s deemed refusal to respond to its request and asked about the status of the Ministry’s response. The Ministry told this Office that the records were ready to be released pending payment of the outstanding fee. This Office pointed out that WCWC had agreed to pay the remaining fees upon receipt of the records and asked if the Ministry had informed WCWC that the records were ready to be disclosed but that it first required full payment of the remaining fees. The Ministry responded that its normal procedure was to request the balance of the fees before releasing the records but that three people had been working on the request and it would follow up on what had happened.¹⁵ It then said:

If, in fact, we neglected to request the balance of the fees and we’ve all just been sitting around here for a month or two thinking “after you, Alphonse” then I’ll waive the balance of the fees.¹⁶

[18] The Ministry subsequently said that staff had been awaiting contact from this Office on the fee waiver complaint and that it also appeared that the Ministry had not told WCWC of its policy nor that the records were ready for release.¹⁷

[19] In this inquiry, the Ministry’s information and privacy manager deposed as follows about this phase:

13. Under the circumstances, and taking into account that the Applicant is a respected and legitimate advocacy group which frequently makes requests, I thought it was appropriate for the records to be released to the Applicant. I did not think it was reasonable to deprive the Applicant of access to the portion of the records that were in the public interest on the basis of purely administrative considerations. I felt confident that whatever the outcome of this Inquiry, the Applicant would make good on its obligations to the Ministry. The Ministry would not always come to the same conclusion with this or other applicants.
14. Therefore, the Ministry waived the outstanding balance of fees and immediately released all of the records to the Applicant. ...

...

¹³ Para. 11, first Kennedy affidavit.

¹⁴ Para. 11, first Kennedy Affidavit

¹⁵ Paras. 10-19, first Kennedy affidavit; Exhibits “G” to “I”, first Kennedy affidavit.

¹⁶ Exhibit “H”, first Kennedy affidavit.

¹⁷ Exhibit “H”, first Kennedy affidavit; Exhibit “A”, second Kennedy affidavit.

16. In February 2005, the Ministry did not reassess the proportion of records that were administrative vs. the proportion that were in the public interest. My decision to waive part of the fees reflected my conviction that a portion of the records would qualify for a s.75 public interest fee waiver. I hoped to resolve this issue through discussion with the Applicant. At the time I also was satisfied that mediation through the Commissioner's office would likely address this issue—although this ultimately did not prove to be the case. As well, the Ministry was aware that this question could properly be dealt with as part of the Applicant's December 7, 2004 complaint.¹⁸

[20] In mid-February 2005, the Ministry told WCWC that processing of the records was complete and that it had revised the fee as follows:

700 pages @ \$.25 per page	=	\$175.00
17 hours to locate and retrieve records @ \$30an hr	=	\$420.00
(First 3 hours of [sic] to locate and retrieve are at no cost)		
1.5 to prepare the records for disclosure @ \$30.00 per	=	\$ 45.00
Shipping	=	\$ 10.00
Less \$200.00 fee deposit paid		\$(200.00)
Total	=	\$450.00

[21] The Ministry added that, “[i]n view of the circumstances, the fee amount of \$450.00 is waived”.¹⁹

[22] By mid-November 2005, mediation on the fee waiver complaint had failed and WCWC requested that the fee waiver issue proceed to inquiry. The Ministry then made a preliminary application requesting that the Commissioner decline to proceed on the basis that WCWC had delayed too long before requesting a review of the fee waiver decision. The Commissioner was not persuaded that the Ministry had been prejudiced by any delay and ordered that the inquiry proceed.²⁰

[23] The Ministry reviewed the records in preparation for the inquiry that was to proceed. The Ministry's information and privacy manager deposed as follows:

17. In preparation for this Inquiry, I reviewed the records provided to the Applicant, and separated those in the public interest (and therefore which would qualify for a fee waiver) from the Administrative records. ... I concluded that some 90% of the records would qualify for a public interest fee waiver under s. 75. Approximately 10% percent [sic] of the records were Administrative records.²¹

¹⁸ First Kennedy affidavit.

¹⁹ Around this time the Ministry also exchanged emails with WCWC clarifying that the total revised fee was \$650 and that the Ministry was waiving \$450.00, not the entire fee; see Exhibit “I”, first and second Kennedy affidavits. The Ministry also told WCWC that it was withholding some information under ss. 14 and 22 of FIPPA. This decision is not in issue here.

²⁰ The Commissioner invited the Ministry to make further submissions during the inquiry on the issues it raised in that preliminary application. It made none.

²¹ Kennedy affidavit.

[24] The Ministry then apparently asked the WCWC to accept a corresponding reduction of the fee in settlement of the fee waiver issue, but WCWC chose to proceed with the inquiry, as it said this:

We do not wish to be seen to be vexatious or frivolous in our rejection of the Public Body's offer. Although the offer by the Public body appears infinitely reasonable we reluctantly rejected the offer in order to obtain guidance from the Commissioner's Office for future dealings with the Public Body regarding administrative/operational vs policy or evaluation/assessment records.²²

[25] **3.3 Public Interest Fee Waivers**—The relevant section of FIPPA reads as follows:

- 75(5) If the head of a public body receives an applicant's written request to be excused from paying all or part of the fees for services, the head may excuse the applicant if, in the head's opinion, ...
- (b) the record relates to a matter of public interest, including the environment or public health or safety.

[26] The two-step process for deciding public interest fee waivers under s. 75(5)(b) is well-established: see Orders 01-24²³, 01-35²⁴ and F07-01. I apply that two-step process here without repeating it.

[27] The Ministry began its discussion of the fee waiver issue with the same arguments about the purpose of fees under FIPPA²⁵ that it made in the cases that led to Order F07-01²⁶ and Order F07-08.²⁷ My comments on those arguments are the same as the ones I made in those orders²⁸ and I will not repeat them here.

[28] **3.4 Is a Public Interest Fee Waiver Warranted?**—In view of my decision under s. 58(3)(c) to order a refund of the remaining \$65 fee, for reasons given below, it is not strictly necessary to consider whether the records in dispute warranted a public interest fee waiver. However, I have for the sake of completeness considered the parties' arguments on s. 75(5)(b) and, in particular, the Ministry's approach to applying the public interest fee waiver test, in arriving at my decision under s. 58(3)(c). I therefore set out the parties' positions on this issue below, along with some comments.

[29] The Ministry's information and privacy manager, who had delegated authority to make decisions on fee waiver requests, deposed as follows:

²² Para. 6, initial submission.

²³ [2001] B.C.I.P.C.D. No. 25.

²⁴ [2001] B.C.I.P.C.D. No. 36.

²⁵ Paras. 25-28, initial submission; paras. 18-22, further submission of January 31, 2007.

²⁶ See para. 56 of that order.

²⁷ [2007] B.C.I.P.C.D. No. 10. See para. 23 of that order.

²⁸ See paras. 57-60 of Order F07-01 and para. 23 of Order F07-08.

3. I believe that when deciding if a fee waiver is warranted, that decision cannot be made in the absence of context. I believe that I must consider the scope or breadth of the applicant's request and what I know of the typical contents of the Ministry's files, along with the specific provisions of s. 75 and their conventional interpretation when making a decision. I believe this is the only way that a decision will be reasonable.
4. It is the policy of the Ministry to reevaluate [*sic*] all fee estimates once the records have been gathered and processed.²⁹ If an applicant has paid too much under the original estimate, fees will be refunded. Alternatively the Ministry will request additional fees if this is warranted.³⁰

[30] The Ministry indicated that the information and privacy manager relied on his own experience and expertise to estimate what the "likely nature, or content, of the Ministry's files would be that were responsive" to the request. He concluded that WCWC had failed to demonstrate that a significant portion of the requested records related to a matter of "public interest" for the purposes of s. 75. The Ministry went on to say:

33. ... Without benefit of seeing the records, Mr. Kennedy made a professional judgment about the likely content of the records that a broad request like the Applicant's would result in. It is clear from his letter that he anticipated that when retrieved the records could be broadly characterized as two types:
 - A smaller number of records which "speak directly to stewardship and the decision making around the permission to construct a road through Monck Park" and "that throw light on the decision to permit construction of the road through Monck Park."
 - The bulk of records, which would be administrative in nature.

[31] The information and privacy manager offered this regarding his application of the first step of the public interest fee waiver test:

6. ... I wrote that I had considered their [WCWC's] request, and that it was my decision that they had not made a case for a waiver for all of the fees for the Request. Based on my years of experience working with the Ministry's files,³¹ but without the benefit of seeing the records, it was my belief that approximately 50% of the records responsive to the Request would be administrative records, that is, records that would not shed light on the stewardship and decision making

²⁹ It seems that this includes an assessment of whether or not the records relate to a matter of public interest as, at para. 6 of its reply, the Ministry indicated that it evaluates the content of records when it revisits fee estimates after it has completed work on a request.

³⁰ Second Kennedy affidavit.

³¹ Trip Kennedy deposed that he had been manager of information and privacy for the Ministry since 2002; para. 1, first Kennedy affidavit.

processes around the construction of a road through Monck Park (the “Administrative Records”).³² [underlining in original]

[32] It appears that the information and privacy manager concluded that 50% of the requested records were not related to a matter of public interest because, without seeing them, he speculated that they were “administrative” in nature. From this, I infer that he concluded that the other half of the records were likely related to a matter of public interest, again without seeing the records. It is not clear, however, when the information and privacy manager decided in this way that half of the records related to a matter of public interest. The Ministry’s November 2004 fee waiver decision said that “few” of the requested records would likely relate to a matter of public interest and the Ministry’s initial submission indicated that the information and privacy manager initially thought “a smaller number” of the responsive records would relate to a matter of public interest, while the “bulk” of the records would be “administrative”. The terms “few” and “smaller number” do not constitute anywhere near 50% of the records.

[33] Moreover, there is no evidence that, before this inquiry, the Ministry ever told WCWC that it had estimated that 50% of the responsive records were “administrative” in nature. Nor, apart from relying on the information and privacy manager’s “expertise” and experience in working on FIPPA requests and his knowledge of the “typical contents of the Ministry’s files”, did the Ministry explain how it arrived at any of the estimates.

[34] The information and privacy manager deposed that he considered the following factors in deciding that not all of the records would relate to a matter of public interest:³³

- the breadth of the request, *i.e.*, “any records pertaining to the development of a road ...” [underlining in original]
- “some records” would not be relevant to accountability or transparency as regards the government’s discharge of its stewardship responsibilities to the environment
- the “anticipated Administrative Records” would not “speak to” accountable or transparent decision-making regarding fiscal management
- the “Administrative Records” would not contribute to the development or public understanding of or debate on important environmental or public health or safety issues, or a policy, law, program or service
- ordering a fee waiver would unreasonably shift the cost burden from WCWC to the Ministry in this case;³⁴ WCWC, like any other applicant,

³² First Kennedy affidavit.

³³ Para. 7, first Kennedy affidavit. As it has in past cases, for example, Order F05-36, [2005] B.C.I.P.C.D. No. 50, and Order F07-01, the Ministry’s arguments here tended to conflate the first and second steps of the public interest fee waiver test and to include factors that do not relate to the public interest fee waiver test.

... should be expected to be reasonable and work with public bodies on questions related to what records are really required to address their interests/needs and should not be able to demand free access to everything, regardless of the content of the records sought;³⁵

- WCWC has provided no evidence that it cannot pay the fee and it is therefore reasonable to expect WCWC to “contribute something towards the cost of producing the requested records”³⁶

[35] The Ministry explained that it did not re-assess the proportion of records that were administrative in nature as opposed to those that related to a matter of public interest before they were sent to WCWC in February 2005, because it believed this would occur through discussion with WCWC, in mediation with this Office, or as part of the Ministry’s preparation for this inquiry.³⁷

[36] During its preparation, the Ministry reviewed the records and determined that 90% related to a matter of public interest³⁸ and that only 10% were “administrative”³⁹ in nature. As a consequence, the Ministry waived 90% of the total fee (*i.e.*, 90% of the \$650 final fee it had assessed) and refunded \$135 of the deposit to WCWC. This left a balance of \$65, reflecting 10% of the final fee.⁴⁰ The Ministry did not explain how it arrived at the conclusion that 90% of the responsive records related to a matter of public interest. Nor did it refer to the exercise of discretion⁴¹ in deciding to waive 90% of the fee.

[37] The Ministry contended that WCWC’s request encompassed both “public interest” and “administrative” records, the latter of which it said do not relate to

³⁴ This factor relates to the second step in the public interest fee waiver test, not the first. Moreover, the Ministry provided no evidence that waiving the remaining \$65 fee would unreasonably shift the cost burden from WCWC to the Ministry.

³⁵ This Ministry made the same arguments in Orders F07-01 and F07-08 and, in both cases, I commented that public bodies can encourage applicants to narrow their requests, regardless of whether they are seeking fee waivers. Moreover, an applicant’s willingness to co-operate with a public body has nothing to do with whether a fee waiver would unreasonably shift a cost burden from the applicant to the Ministry.

³⁶ WCWC nowhere suggested that it should receive a fee waiver on the grounds that it could not afford the fee. In any case, this factor has no relation to the public interest fee waiver test.

³⁷ See also para. 16, first Kennedy affidavit. Of course, the Ministry had not assessed the records at all up to this point, so I do not see how it could have “reassessed” them when it sent them to WCWC.

³⁸ The Ministry said that the “public interest” records included briefing notes, information on the land transfer, including maps, settlement records between the government and the developer and records of consultations with local First Nations; see para. 43, initial submission.

³⁹ The Ministry said the “administrative” records included correspondence from the public about their experiences camping in the park, documents on litigation (letters, guidelines and a writ of summons), documents related to publishing a notice in the Gazette, land title documents and related invoices, fax cover sheets, fax reports and shipping invoices; see para. 42, initial submission.

⁴⁰ Para. 63, initial submission. See also paras. 17-19, first Kennedy affidavit.

⁴¹ The second step in the public interest fee waiver test.

the environment or to another matter of public interest.⁴² It submitted that the first part of the public interest fee waiver test was not met with respect to all of the responsive records and WCWC did not “qualify” for a full fee waiver. The Ministry also took the position that it had acted properly by: (a) requiring a deposit so it could gather and assess the records; and (b) encouraging WCWC to work with it “to minimize the potential fees payable”. It argued that the remaining \$65 fee is appropriate in relation to the “administrative” records.⁴³

[38] WCWC maintained that the requested records were used to make a decision to allow the development of a commercial road through Monck Park to access a new housing development on the other side of the park’s boundaries. It also maintained that the records “originally deemed” to be “administrative” dealt with information specific to the park, including maps of the proposed road and historical documents on the creation and purpose of the park, and that the classification of these records as “administrative” reflected an arbitrary approach on the Ministry’s part.⁴⁴

[39] I disagree with WCWC on this point, as the maps and historical documents were not contained in the “administrative” records the Ministry provided. Indeed, I note that the Ministry expressly referred to the maps as part of the “public interest” records. Since the Ministry did not review the responsive records until preparing for this inquiry, there is no evidence that it “originally deemed” the maps and historical documents to be “administrative” in nature.

[40] WCWC argued that the Ministry’s revelation that 90% of the records related to a matter of public interest confirmed that its original approach was arbitrary, inconsistent and not measurable. WCWC contends that the Ministry’s characterization of records as “administrative” or “evaluation/assessment” or “policy” conflicts with the provincial government’s records classification system which divides records into “administrative” and “operational” categories. It argued that records in both of these categories may relate to matters of public interest.⁴⁵

[41] WCWC was also critical that the Ministry made a decision on the nature of the records without even reviewing them. It questioned how a decision-maker could determine whether records relate to a matter of public interest without even seeing them. In WCWC’s submission, the designation of records “in such an arbitrary and haphazard manner” undermines the integrity of the process and “the impartiality and professionalism” of the Ministry. It continued in this vein, alleging, amongst other things, that the Ministry’s behaviour was part of a “consistent pattern of delay and obfuscation” designed to frustrate WCWC’s rights under FIPPA.⁴⁶

⁴² As the Ministry only provided me with a copy of the “administrative records”, I have no basis for comparing the two sets of records.

⁴³ Paras. 62 & 65-66, initial submission.

⁴⁴ Paras. 18-20, initial submission.

⁴⁵ Paras. 21-26, initial submission.

⁴⁶ Paras. 1-9, reply submission.

[42] In WCWC's view, a commercial road through an area that had been set aside for protection from development clearly relates to the "quality, health, protection, degradation or preservation of the environment".⁴⁷ Thus, WCWC believes, the Ministry incorrectly characterized the records in dispute as "administrative", as they include correspondence from the public on concerns about the building of the road and on litigation between the government and the developer. In WCWC's view, these records shed light on the issue of the road through Monck Park, although it concedes that a number of the disputed records, such as fax cover sheets and shipping invoices, are "administrative"⁴⁸ and thus presumably do not meet the public interest test.

[43] The Ministry responded that it simply uses the term "administrative" as a useful shorthand tool for identifying records that do not relate to a matter of public interest. The Ministry indicated that it does not use the provincial government records classification system to decide whether or not records relate to a matter of public interest. It also denied that its approach was arbitrary and maintained that it had applied the proper considerations laid out in previous orders.⁴⁹ The Ministry also said this:

6. ... it was not the Ministry, but the Legislature that created a procedure that requires the statutory decision maker (in this case the delegate of the Minister, as head of the Public Body) to use their judgment when evaluating the likely content of the records encompassed by a request from an applicant, without benefit of seeing the records.⁵⁰ This is not an arbitrary procedure, however, it is also not a procedure under which the Ministry can guarantee that their fee estimate will be accurate every time. This is why the Ministry revisits fee estimates after the work has been completed.

...

8. In November 2004 the Ministry did not make a determination about the nature of each record as the Applicant asserts. This would be impossible—the records had not been gathered yet, and were unavailable to Mr. Kennedy for his review. That review, and the subsequent determination about each record's eligibility for a fee waiver, was only made in preparation for this inquiry, as discussed above and in the Ministry's initial submissions.⁵¹

⁴⁷ WCWC said this is a quote from Order 01-35.

⁴⁸ Paras. 10-12, reply submission.

⁴⁹ Paras. 1-8 & 12-13, reply submission; paras. 2 & 5, second Kennedy affidavit. In these paragraphs, the Ministry also reiterated many of its arguments from its initial submission on the approach it took to applying the public interest fee waiver test.

⁵⁰ FIPPA does not "require" the decision maker to do any such thing. Fees are discretionary and a decision maker is expected to apply s. 75(5) in a reasonable manner when responding to a request for a fee waiver. As noted elsewhere, the long-established procedure for doing so begins with reviewing the records.

⁵¹ Reply submission; see also para. 4, second Kennedy affidavit.

[44] The Ministry said that it had acknowledged from the outset that some of the requested records related to a matter of public interest and that the only change has been with respect to its estimate of the proportion of those records to the whole. As the Ministry had not reviewed the records in 2004, it could only “estimate what the likely breakdown” of the records would be. It was not until the Ministry was preparing for this inquiry, and the decision-maker reviewed the actual records, that it determined that the majority of the records related to a matter of public interest. WCWC could, it said, have refined its request or worked with the Ministry to ensure that it received only records that met the public interest test. The Ministry argued not only that its decision to charge fees was reasonable but that it estimated the fees in good faith, albeit inaccurately, based on relevant considerations.⁵²

[45] I return below to the Ministry’s application of the first step of the public interest test.

Exercise of discretion

[46] If the head of a public body determines, as a result of an examination of the records or a representative sample, that the records, or a portion of them, relate to a matter of public interest, the head must still decide whether the applicant should be excused from paying all or part of the estimated fee.

[47] It appeared initially that the Ministry did not exercise its discretion but simply equated its finding that some of the records related to a matter of public interest with a fee waiver. However, based on a careful review of the Ministry’s material, I accept that it did consider factors that relate to the second step of the public interest fee waiver test, although it conflated them with factors from the first step:

- it noted that WCWC pursues public interest goals
- it acknowledged that WCWC is in a position to disseminate the information it receives to the public to inform public debate about parks issues⁵³
- it made suggestions to WCWC on how to reduce fees⁵⁴
- it concluded that a fee waiver for the “administrative records” would unreasonably shift a cost burden from WCWC to the Ministry⁵⁵
- it considered that WCWC should co-operate with it in determining what records WCWC required⁵⁶ (this seems to suggest that the Ministry viewed WCWC as unco-operative)

⁵² Paras. 9-11, reply submission; paras. 3-6, second Kennedy affidavit.

⁵³ These first two factors are drawn from the Ministry’s initial fee waiver decision letter.

⁵⁴ See November 2004 decision letter.

⁵⁵ See para. 7, first Kennedy affidavit. The Ministry provided no evidentiary support for this argument, which it later abandoned. See below.

⁵⁶ This also comes from para. 7 of the first Kennedy affidavit.

[48] It appears that the Ministry—properly in my view—considered that the first two factors militated in favour of a fee waiver. I will discuss the remaining three factors below, as they overlap with the criteria for making a decision under s. 58(3)(c).

[49] **3.5 Is a Fee Waiver an Appropriate Remedy?**—I turn now to the issue of whether appropriate circumstances exist in this case to waive the remaining \$65 fee under s. 58(3)(c). This section reads as follows:

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;

[50] I set out the non-exhaustive list of criteria for making this determination at para. 39 of Order F05-21⁵⁷ and, without repeating them, apply those criteria here. I consider below only those criteria that I found to be relevant in this case.

Was the time limit met?

[51] WCWC requested a fee waiver under s. 58(3)(c) on the basis of the Ministry's failure to meet statutory deadlines under FIPPA. WCWC noted that almost six months passed between the time of its request and its receipt of the records, although it acknowledged that one month of that was due to the time it took to respond to the Ministry's fee assessment. WCWC also noted that it requested a review of the Ministry's deemed refusal to respond to its request in January 2005 and that it received the records in mid-February 2005.⁵⁸

[52] The Ministry attributed the delay to a lapse in communication and staffing issues.⁵⁹ It added:

15. The Ministry submits that the delay was occasioned by the Applicant's decision to go to make a fee waiver complaint to the Commissioner's office. The policy of the Ministry is that records are not released while there is a dispute over the fees payable outstanding. The Applicant has been previously made aware of this policy, as stated in correspondence to the Applicant from Mr. Kennedy in February 2005.⁶⁰

⁵⁷ [2005] B.C.I.P.C.D. No. 29.

⁵⁸ Paras. 27-35, initial submission.

⁵⁹ Exhibit "A", first Kennedy affidavit.

⁶⁰ Reply submission; see also para. 6, second Kennedy affidavit (the Registrar of Inquiries of this office removed para. 16 of the Ministry's reply submission and paras 7-9 of the second Kennedy affidavit as being related to the mediation process); see also Exhibit "A", to the second Kennedy affidavit, an email of February 14, 2005 from Trip Kennedy to WCWC in which he told WCWC of the Ministry's policy. This appears to be the first time the Ministry told WCWC of this policy.

[53] The Ministry did not provide a copy of the “policy”. Nor did it explain the basis for this policy except to say that it is designed to ensure the Ministry does not forfeit fees to which it is entitled.

[54] The Ministry maintains that it exceeded the minimum requirements of FIPPA by providing the records while the fee waiver issue remained outstanding. It argued that the time limit was suspended under s. 7(5) of FIPPA. It referred to my finding on a similar issue in Order F07-01,⁶¹ which involved the same parties, and said there had been no delay and that this factor weighed in favour of not waiving the fee.⁶² WCWC did not address s. 7(5) in its submissions and, as noted above, did not respond to my invitation to make further submissions with respect to s. 58(3)(c).

[55] As WCWC had already paid the deposit and the Ministry had waived the balance of the fees, I do not see how, as the Ministry contends, releasing the records before the fee waiver matter was resolved “exceeded the minimum requirements of FIPPA”. Doing so certainly would not have deprived the Ministry of revenues to which it might have been entitled. Rather, it was, in my view, both reasonable and helpful in the circumstances for the Ministry to disclose the records at that point.

[56] In any case, regardless of the reasons for the delay in releasing the records during mediation of the fee waiver complaint,⁶³ ss. 7(4) and (5) of FIPPA are relevant to the issue of whether or not the Ministry complied with the statutory time limits for responding to WCWC’s request. The relevant portions of s. 7 read as follows:

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).
- ...
- (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:
- (a) the head of the public body excuses the applicant from paying all of the fees under section 75 (5);
 - (b) the head of the public body excuses the applicant from paying part of the fees under section 75 (5), and the applicant agrees to pay the remainder and, if required by the head of a public body, pays the deposit required;

⁶¹ At paras. 29 and 97.

⁶² Paras. 5-10, further submission of January 31, 2007.

⁶³ The material before me shows that this Office received WCWC’s complaint in early December 2004 and the Ministry did not disclose the records until mid-February 2005.

- (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.
- (5) If an applicant asks the commissioner under section 52 (1) to review a fee estimate or a refusal to excuse the payment of all or part of the fee required by the head of the public body, the 30 days referred to in subsection (1) do not include the period from the start of the day the applicant asks for the review to the end of the day the commissioner makes a decision. ...

[57] Based on my calculation, the Ministry was just within its 30-day time limit for responding when WCWC submitted its fee waiver complaint. As the time limit no longer applied, this factor is not relevant to my consideration of s. 58(3)(c).

Ministry's efforts to comply with its s. 6 duty

[58] Although s. 6 encompass several elements, only one is relevant here, namely whether the Ministry contacted the applicant to discuss ways of narrowing request to reduce fees and expedite response times.

[59] The Ministry referred again to the time and resources required to process this request⁶⁴ and noted that it had released the records during mediation of the fee waiver dispute and waived the outstanding fee. While the Ministry acknowledged that it had failed to tell WCWC that the records were ready for release, it noted that it had responded to all correspondence from WCWC and this Office.⁶⁵ The Ministry also suggested that WCWC had a responsibility, of what kind or source is not clear, to work with the Ministry on the request.⁶⁶

[60] There was evidence of only one occasion on which the Ministry attempted to engage WCWC in a discussion of narrowing the access request. This occurred when it released its fee waiver decision on November 1, 2004. Of course, the Ministry's suggestions were made at a time when it had not yet reviewed the records and believed that "few" of the estimated 1,000 pages would relate to a matter of public interest. In light of the Ministry's ultimate determination that 90% of the records merited a public interest fee waiver, its suggestion to restrict the scope of the request to the "public interest" records would not have had a significant effect.

[61] Aside from this, there is no evidence that the Ministry pursued discussions with WCWC regarding the scope of the request, either before or after it issued the fee estimate. It also appears that the Ministry took no further steps to contact WCWC after it filed a complaint about the fee waiver denial.

⁶⁴ Paras. 14-17 of its initial submission and paras. 11-14 of the first Kennedy affidavit.

⁶⁵ Paras. 11-13, further submission of January 31, 2007.

⁶⁶ See summary of Trip Kennedy's evidence at para. 7 of his first affidavit, above.

[62] Each party was free to approach the other throughout this time and indeed, as I have said before,⁶⁷ had some responsibility to initiate discussions on the scope of the request. The fact that the Ministry made only one attempt to do so in the context of the history of this request does not assist it here.

WCWC's actions

[63] WCWC paid the deposit "under protest" but did not otherwise refer to the Ministry's offer to discuss ways of narrowing the request in its submissions. As there is no evidence that WCWC accepted the Ministry's invitation to discuss ways to refine the request, I conclude that it declined the Ministry's suggestions.

[64] The Ministry argued that all applicants should be expected to be reasonable and to work with public bodies on questions related to what records are really required to address their interests or needs and that applicants should not expect to be able to demand free access to everything, regardless of the content of the records sought.⁶⁸ The Ministry cited para. 103 of Order F07-01 which confirmed that "communication on a request is a two-way street" and that both applicants and public bodies bear some responsibility to discuss a request early in the process to ensure that applicants will receive the records they really want or need. The Ministry contends that WCWC's failure to respond to its suggestions set out in the November 2004 decision letter militate against waiving the fee.⁶⁹

[65] Although the Ministry did not acknowledge this in its submission, the passage it cited from para. 103 of Order F07-01 continues as follows:

... In this vein, however, public bodies should also bear in mind that applicants may not be familiar with the types of records a public body has or, more particularly, with the contents of records for which they receive a fee estimate, and may therefore be ill-equipped to narrow a request without the public body's help. It thus falls primarily to public bodies to assist applicants by describing responsive records and otherwise discussing requests with applicants. This would be time well spent and might result in lower fees and fewer fee disputes. It would also almost certainly result in better service, improved relations and higher applicant satisfaction.

[66] Just as a public body should do its best to negotiate request matters with an applicant, an applicant should, where appropriate, approach a public body to discuss ways of refining the scope of a request. Applicants should also explore ways of reducing a fee estimate with a public body before filing a complaint with this Office.

⁶⁷ See paras. 34-36, Order F07-08, and para. 103, Order F07-01.

⁶⁸ Paras. 14-17, further submission of January 31, 2007.

⁶⁹ Paras. 14-17, further submission of January 31, 2007.

[67] In this case, the initial estimated search time of five hours was minimal. However, in light of the Ministry's opinion at the time of the fee waiver decision that only a small percentage of the records were likely to relate to a matter of public interest, it would have been prudent for WCWC to discuss ways of narrowing the request with the Ministry after receiving the fee estimate, rather than immediately complaining to this Office. WCWC would also have been well advised to ask for a fee waiver only for those records which relate to a matter of public interest, rather than take the position, as it seems to have done, that all of the requested records related to a matter of public interest. I find that WCWC's failure to discuss the Ministry's suggestions and work with the Ministry on ways of reducing the fees was not reasonable.

Unreasonable shift in cost burden

[68] The Ministry initially claimed that waiving the \$395 fee in November 2004 would have resulted in an unreasonable shift in cost from WCWC to the Ministry based on an opinion the information and privacy manager expressed. As WCWC had not provided evidence that it could not pay the fee, the Ministry concluded that it was reasonable to expect the applicant to pay some of the costs.⁷⁰ As noted, WCWC never suggested that it could not afford the fee and this factor is irrelevant to the public interest fee waiver test.

[69] The Ministry later admitted that waiver of a \$65 fee would not shift an "unmanageable cost" to the government. It nevertheless argued that the minimal fee in this case was reasonable and excusing the fee would be unreasonable because:

21. ... it would shift the cost burden to the Ministry, which limits its ability to administer the Act in a fiscally sound manner.

22. ... the Applicant should bear the burden of the processing of the records that do not address the public interest ...⁷¹

[70] The Ministry has now abandoned its initial arguments regarding the burden that would arise from the shift in cost, which I would have unhesitatingly rejected in any event for the reasons outlined in Order F07-01.⁷² I also do not accept that excusing a fee of \$65 would constrain the Ministry's ability to administer FIPPA in a "fiscally sound manner", an argument for which the Ministry provided no evidentiary support.

Ministry's application of public interest fee waiver test

[71] WCWC devoted considerable attention to the way in which the Ministry applied the public interest fee waiver test, particularly the failure of the information and privacy manager to review the records before making his initial

⁷⁰ Para. 37, initial submission; para. 7, Kennedy affidavit.

⁷¹ Further submission of January 31, 2007.

⁷² See para. 99.

decision and the improper distinction in records classification to determine the nature of the records. WCWC contended that the Ministry's use of this classification method was at the heart of its decision to pursue this inquiry.⁷³

[72] As I have already set out WCWC's views on this aspect of the matter, as well as the Ministry's responses,⁷⁴ I will not repeat them here. I have, however, carefully considered the submissions and evidence of both parties in making my decision on the remedy under s. 58(3)(c). I also observe that, while I explicitly told the parties that I would be considering the manner in which the Ministry applied the public interest fee waiver test and the timing of its application of that test, the Ministry did not address the timing issue at all in its further submission or elsewhere.

[73] I do not accept the Ministry's claim that its estimate of the breakdown of records using the classification method was based on relevant considerations. The estimate reflected nothing more than a simple guess by the information and privacy manager, based on his experience with a "typical file", as to how many records would relate to a matter of public interest.

[74] While I understand that it is necessary for public bodies to find an efficient process for making determinations of this nature, it is clear to me that the Ministry's approach was arbitrary and invited a narrow perspective, from the beginning of the assessment, as to the proper scope of WCWC's request and what records would be related to the public interest. Having the information and privacy manager simply guess at the proportion of records that related to public interest without examining the records, or even a representative portion of them, was not a defensible approach in this case, as reflected in the gross inaccuracy of the initial estimate. The Ministry instead was required to exercise its judgement on a proper basis to determine what records were responsive to the request. Where an applicant contends that the records relate to a matter of public interest, the Ministry must review the records, or a representative sample of them, and must do so with an open mind.

[75] It is generally not reasonable to base that judgement on assumptions about the contents of a "typical" file without examining some or all of the responsive records. Reliance on the distinction between "public interest" and "administrative" records overlooks the debate about that distinction itself in many practical instances. Even in this case, the application of the categories to the records was disputed. WCWC argued that some of the 58 pages before me were, in fact, wrongly described as "administrative" and to an extent I agree.

[76] While the Ministry is free to use whatever method it finds useful to respond to requests, its approach must comply with the requirements of FIPPA and must be based on proper considerations. It is valid to organize documents into different categories—e.g., policy, administration, decision-making—but, without

⁷³ Para. 6, initial submission; paras. 1-12, reply submission.

⁷⁴ Paras. 1-13, reply submission.

any review of the records, this cannot be a complete answer to a particular request or sufficient as a general rule in determining what percentage of documents relate to a matter of public interest. The tests for public interest fee waivers require broader considerations.

Do appropriate circumstances exist to excuse the fee?

[77] As I did recently in Order F07-08, in considering the parties' arguments on these issues, I return 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 in order to determine whether they relate to a matter of public interest. It is clear that the Ministry did not apply this first step when considering the applicant's fee waiver request since the information and privacy manager made his initial decision before seeing the records. The Ministry also did not review the records before their release in February 2005, despite its policy of "re-assessing" fees once records have been gathered.

[78] While the Ministry waived two-thirds of the fee "in view of the circumstances", the partial waiver was attributable to the confusion and delay in notifying the applicant that the records were ready for release. The Ministry indicated in its initial submission that it waived the balance of the fee in February based on the "conviction that a portion of the records would qualify for a s. 75 public interest fee waiver"⁷⁵ and the expectation that there would be mediation and a more accurate outcome, but there was no mention of these factors before this inquiry.

[79] Similarly, there is no indication that the Ministry reviewed the records during mediation of the fee waiver complaint, although it apparently expected the public interest fee waiver matter to be resolved during this time.⁷⁶ The Ministry did not review the records until it began preparation for this inquiry and then waived 90% of the fees on the basis that the majority of records related to a matter of public interest. Although there may be exceptional cases where a public body does not need to examine records before deciding whether or not they relate to a matter of public interest, this was clearly not one of them, judging by the fact that the Ministry eventually found that 90% of the records fell into this category.

[80] Not only was the Ministry remiss in failing to examine the records before making a decision on the fee waiver request, it compounded that failure at every opportunity that followed. By waiting until preparation for the inquiry before examining the records, the Ministry not only failed in its duty to apply s. 75(5) properly, it also caused delay and frustration for WCWC. This also caused a considerable expenditure of time, effort and resources by both parties over a relatively minor and ever-diminishing fee.

⁷⁵ Para. 16, first Kennedy affidavit.

⁷⁶ See para. 16, first Kennedy affidavit quoted above.

[81] In conclusion, I find that the Ministry 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. As for the other factors, WCWC should have made more of an effort to work with the Ministry to explore ways to reduce the fee estimate but the Ministry could have done more as well.

[82] Where a public body exercises its discretion under s. 75(5) in an unreasonable manner, the appropriate remedy is normally 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, Commissioner Loukidelis referred to the broad scope of 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.

[83] In Order F07-08, another case in which the Ministry failed to examine the records prior to making its decision on a public interest fee waiver request, I concluded that the circumstances were not appropriate to order my own quantification of the proportion of fees to be excused. I ordered the Ministry to discharge its duty under s. 58(2)(a) to make a decision under s. 75(5)(b) on a demonstrably proper and reasonable basis.

[84] In this case, while the Ministry ultimately examined the records and made a fee waiver decision, it did not examine the records in the first instance and arrived at an arbitrary estimate that only a "few" of the records related to a matter of public interest. The Ministry then failed to remedy this deficiency for months and waited until the inquiry to review the records and make a decision on the public interest issue. Although both parties should have made more of an effort to explore ways to reduce the fee estimate, I conclude that the circumstances are appropriate in this case to order the remaining fees to be refunded under s. 58(3)(c).

4.0 CONCLUSION

[85] For the reasons given above, under s. 58 of the Act, I find that appropriate circumstances exist to refund the remaining fee of \$65.00 and I order the Ministry to refund that amount.

June 7, 2007

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

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