



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

Order 02-46

MINISTRY OF WATER, LAND & AIR PROTECTION

David Loukidelis, Information and Privacy Commissioner
September 12, 2002

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Summary: The applicant requested access through the Internet to live webcam video feeds of two beehive burners. One of the Ministry's regional managers is able to view the live feeds, which arrive over the Internet, on his computer. As the webcam feeds are live and image data is not recorded or stored, the data comprising the live feeds are not a "record" as defined in the Act. Since the Act only applies to records, the webcam feeds are not subject to the right of access.

Key Words: record – recorded – stored – thing on which information is recorded or stored.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 3(1), 4(1), 6, 9; *Wood Residue Burner and Incinerator Regulation*, B.C. Reg. 519/95, s. 1.

Authorities Considered: B.C.: Order No. 121-1996, [1996] B.C.I.P.C.D. No. 48; Order 02-19, [2001] B.C.I.P.C.D. No. 19; Order 02-38, [2002] B.C.I.P.C.D. No. 38.

Cases Considered: *R. v. McCraw*, [1991] 3 S.C.R. 72; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] S.C.J. No. 43, 2002 S.C.C. 42.

1.0 INTRODUCTION

[1] Last year, in a letter to the Ministry of Water, Land & Air Protection ("Ministry"), the applicant requested access, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to:

... the webcam monitor feeds from two beehive burners – the Canadian Forest Ltd. Burner Facility, and Houston Forest Products Company, both located in Houston, British Columbia.

The webcam feeds are currently received by the Smithers, British Columbia office of the Pollution Prevention Program Industrial and Special Waste Section of the Ministry of Water, Lands [*sic*] and Air Protection.

I request that this access provide real-time display of the webcam monitor feeds via the Internet, so that it can be viewed at any time.

[2] The applicant also asked for a public interest fee waiver under s. 75(5)(b) of the Act.

[3] In its response letter, the Ministry said it was “unable to provide information as requested”, on the basis that the applicant had not requested access to a “record” within the meaning of the Act. The Ministry’s letter went on to say the following:

The Act does not give access to information that is not recorded in some manner, nor does the Act give a right to access records which have not yet come into existence, therefore real-time webcam images cannot be accessed through the Act.

I understand that there are some pictures of smoke opacity monitoring events that have been saved and that you can access to [*sic*] these ‘records’ if you’d be interested in seeing them.

[4] The Sierra Legal Defence Fund then applied on the applicant’s behalf for a review, under Part 5 of the Act, of the Ministry’s decision. The request for review said that the issue was part of a “vigorous and lengthy public debate in the Bulkley Valley, in which both Smithers and Houston are located, concerning the continued operation of the beehive burners.” Much of that debate, apparently, is focused on the beehive burners’ contribution to “episodes of poor air quality in the Valley, and the public health impacts of their operation.” The request for review went on to say that the “webcam feeds are designed to assist the Ministry in ensuring that the burners comply with their smoke emission limits, measured primarily through visual opacity readings.” The review request also argued that the Act’s definition of the term “record” should be given a purposive and flexible interpretation that best achieves the purposes of the Act.

[5] Because the matter did not settle during mediation, a written inquiry was held under Part 5 of the Act.

2.0 ISSUE

[6] The issue in this case is whether the live webcam video feed described below is a “record” as that term is defined in Schedule 1 to the Act. If it is not, the Act does not apply and the applicant has no right of access under the Act. The Ministry accepts that it has the burden of establishing that the live webcam feed is not a “record” within the meaning of the Act.

3.0 DISCUSSION

[7] **3.1 Background** – Section 1 of the Wood Residue Burner and Incinerator Regulation, B.C. Reg. 519/95 (“Beehive Burner Regulation”), made under the *Waste Management Act*, contains the following definition:

“**beehive burner**” means a conical-shaped single chamber incinerator used for the disposal of wood residue.

[8] I understand that beehive burners are used to incinerate wood waste from sawmill and other wood products operations. The Beehive Burner Regulation regulates their use.

[9] The two beehive burners in question are operated in Houston, apparently by Canadian Forest Products Limited and Houston Forest Products Company. The applicant says these companies were recently required, by an amendment to the Beehive Burner Regulation, to install webcams to monitor their beehive burners. The same amendment to the Beehive Burner Regulation established a schedule for phasing out beehive burners. The Ministry acknowledges that the Beehive Burner Regulation requires the installation of webcams to monitor the two burners. The Ministry says viewing access is restricted to a manager appointed under the *Waste Management Act*. The webcam feeds are viewed over the Internet by Frank Rhebergen, P. Eng., the Ministry’s Assistant Regional Waste Manager, using his computer.

[10] According to an affidavit sworn by Frank Rhebergen, the webcam feeds have the following characteristics:

6. Webcams record emissions from beehive burners operated by the Forest Companies. Those webcams were installed by systems experts that were hired by those companies. Those experts also established the connection to my computer (via the Internet and security codes) that allows me to access the resulting real time images on my computer.

7. Though I can monitor the images referred to in para. 7 of this affidavit on my computer, the Ministry does not record or store the continuous video image that is transmitted by the webcams. Nor has the Ministry recorded or stored the continuous video images that have been transmitted in the past. As such, I cannot, at a later date, view the continuous video images that have been transmitted in the past.

8. The real time video images received from the Forest Companies are continuous video images, produced at approximately 2 frames per second. The Ministry does not record or store those images.

9. From time to time I save particular still images that are transmitted by the webcams located at the Forest Companies’ burners. The number of still images that I have recorded at a particular time varies. I have had as many as 100 still images stored at one time. Right now, I have about a dozen still images stored. I don’t ordinarily save large numbers of these images over the long term because of the large amount of storage space they use up. There could be occasions where I’d

use some of these images in a report or presentation or where I would print them for the permit file for illustration purposes.

10. Webcam monitoring is a relatively new technology and is a valuable tool for environmental protection agencies. If there is a problem observed in the course of video monitoring, the Ministry can contact the permittee or go to the site and inquire into what is causing the problem. It is also useful in assessing and responding to complaints received from the public about emissions sources or ambient air quality.

[11] The applicant says webcams are “special purpose video cameras” that transmit a series of images “as electronic files over the Internet so that they can be viewed on the monitor of a remote computer.” The applicant says webcam images are “analogous to a photograph or videotape, in that they record and convey visual information about a particular location at a particular time” and this “visual information is recorded or stored by electronic means in the images conveyed from the webcam” to the Ministry’s computers. The applicant deposed as follows in his first affidavit, at paras. 12 and 13:

12. A webcam’s images travel over the Internet using a protocol suite called TCP/IP. The operation of this protocol is not usually obvious to its user. Because images are large compared to text, images transferred by the TCP/IP protocol may be stored in several computers: in the originating computer, in intermediate computers and/or routers and in the local server or the end-user’s desktop computer. This is called “caching”; each computer stores and preserves images locally that may be wanted again. Using the readily accessible local copy prevents reloading the image from a remote (and slow) source. Unix and Windows operating systems routinely cache images, as do individual web browsers. In particular, Netscape Navigator and Microsoft Internet Explorer make use of caches in RAM memory and on hard disk. These images are stored with particular names and time/date stamps, and they can be retrieved, copied and printed. The user will not necessarily be aware that these images are being stored, but it happens nonetheless.

13. MWLAP’s employees are most likely using Unix or Windows operating systems and common web browsers (like Microsoft Internet Explorer or Netscape Navigator) to access webcam images from the Houston Burners on their computers. Thus, some of those images are likely stored in electronic files in MWLAP’s computers. They are likely stored, for example, on the server used by the MWLAP regional office or on the computer used by Mr. Rhebergen. These files could be easily accessed by using a common program like Windows Explorer to examine the contents of temporary Internet folders on a hard disk. Any webcam images of the Houston Burners stored as electronic files in those folders could be easily retrieved, copied, or printed.

[12] In a second affidavit, the applicant deposed as follows:

2. A “continuous feed” is in fact a series of individual images sent discretely and displayed on the receiving computer’s screen so as to provide an approximation of continuous motion. The Ministry’s submission that the frames are transmitted at

two frames per second makes it extremely likely that the images are storable and actually stored.

3. The length of time that images are stored on the Ministry's computers will vary and can be for periods as long as several weeks. The decision about how long to save images is a conscious decision made either by the end user or the network technician. It will always vary according to the use pattern of the network server and the desktop computer.

4. Likewise, the number of images to be stored will be determined either by the end user or the network technician. The decision may simply be to accept the web browser's default setting, or changes to that default may be made.

[13] In his reply submission, the applicant relies on this evidence in contending that “[i]ndividual webcam images may be stored in caches on MWLAP [Ministry] computers for as long as several weeks, depending on the use pattern of the network server and desktop computer.”

[14] In a May 13, 2002 letter to me, the Ministry argued that this evidence is not relevant to the issue before me, which is whether the applicant's request for a live webcam feed over the Internet, not cached data, is a record under the Act. The applicant responded to the Ministry's letter on the same day, as follows:

The Applicant is not requesting access to particular images stored in computer caches. Consistent with his initial request to MWLAP, the Applicant seeks access to the webcam monitor feeds showing “real-time” images of the Houston Burners via the Internet. It would be easier for MWLAP to provide access to the live webcam feed than it would be to search for and provide access to cached electronic files. The Applicant tendered evidence of caching only to support the contention that the images in the real-time webcam monitor feeds are records under the Act.

[15] In his reply submission, the applicant nonetheless says that the “only significant factual dispute between the parties” has to do with the “temporary storage of webcam images” as “electronic files” in Ministry computers. He refers to para. 10 of Frank Rhebergen's affidavit, where he deposed that the Ministry “does not record or store” real-time video images received from the beehive burners.

[16] **3.2 The Act Applies to Records** – Section 3(1) of the Act provides that the Act applies only to a “record” in the “custody or under the control of a public body.” The right of access under s. 4(1) applies only to a “record in the custody or under the control of a public body.” Schedule 1 to the Act contains the following definition:

“**record**” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.

[17] If an access request is made for something that is not a “record”, the Act does not apply and there is no right of access under the legislation. The issue here, of course, is

whether the live webcam video feeds transmitted over the Internet are records covered by the Act.

[18] **3.3 Is the Live Feed A Record?** – Despite the applicant’s efforts to persuade me otherwise, I have decided that the live webcam feeds are not “records” within the meaning of the Act. Before setting out my reasons for this conclusion, I will outline the more significant arguments made by the parties.

Interpretive approaches to the term “record”

[19] The applicant argues that the Act’s “broad purposes” support a “wide interpretation of its scope.” According to the applicant, the Act’s “broad purposes” and the “fundamental” principles generally underlying access to information legislation should govern my interpretation of the term “record”. A narrow interpretation of that word would inappropriately limit the scope of the Act, the applicant argues, giving it a narrow application that would frustrate the legislative purposes set out in s. 2(1). This would, according to the applicant, unduly restrict the “democratic right of access to information.” The applicant argues that the definition should be interpreted “flexibly” to ensure that the Act applies to “evolving information technology” and “new information media” used by public bodies. The applicant elsewhere says I should apply “a purposive analysis” in determining the meaning of the word “record”, an analysis that should lead to “a wide interpretation” of that term. The applicant cites R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1999), at p. 38, where it is said that “purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity”.

[20] Fastening on the word “includes”, found in the first line of the definition of “record”, the applicant says the following (p. 5, initial submission):

The use of the word “includes” in this definition means that it is not exhaustive. Thus, the definition of the word “record” is restricted neither to the specific list at the beginning of the definition (books, documents, etc.) nor to the general phrase at the end of that list. If the Legislature had intended the definition of record to be limited to this specific list and the general phrase following that list, it would have used the word “means” or the phrase “is limited to” at the beginning of the definition.

[21] The applicant says the Act must be “read as a harmonious whole” and that ss. 2, 3, 4, 6 and 9 of the Act all support a “broad interpretation” of the term “record”.

[22] At pp. 6 and 7 of his initial submission, the applicant says my predecessor’s decision in Order No. 121-1996, [1996] B.C.I.P.C.D. No. 48, supports a “flexible” interpretation of the Act. He cites the following statement at p. 7 of that decision:

E-mail messages stored on the system are subject to FOI requests – *even if the information is considered transitory or of temporary usefulness*. [applicant’s emphasis]

[23] At p. 7 of his initial submission, the applicant also says Order No. 121-1996

... supports the proposition that electronic files existing on a public body's computer system are records so long as they can be accessed without unreasonable difficulty – the primary consideration is the ease of providing public access to the information. It does not matter that the information is considered transitory or of temporary usefulness.

[24] The applicant offers the following factors as a test for determining whether something is a “record”:

- Does the medium convey information?
- Can the public body provide access to this medium without unreasonable interference with the operations of the public body and without unreasonable intrusions on personal privacy?
- Does giving the public access to this medium help to make public bodies more accountable?

[25] Applying this three-part test, the applicant says the webcam images are records under the Act because:

- They convey information about burner emissions from beehive burners;
- It is easy for MWLAP to provide access to this information, and the information does not infringe on personal privacy; and,
- This information helps the public to monitor MWLAP's success in ensuring that the burners comply with their emission limits.

[26] The applicant says the following at p. 8 of his initial submission:

The Applicant further submits that the “real-time” webcam image is itself a record, regardless of whether it creates retrievable electronic files. The Commissioner's interpretation of “record” is limited neither by prior decisions of the Commissioner nor by the non-exhaustive definition of that term in Schedule 1 to the Act. The Applicant submits that the Act must be applied broadly to embrace new and important information technologies. Nothing in the Act restricts the right to access records that have not yet come into existence. While such a restriction might arise from the difficulty of providing continuing access to such records, that is not a factor in the present Inquiry; MWLAP can easily provide ongoing public access to the web site displaying images of the Houston Burners.

[27] The Ministry says that, where the meaning of a statutory term is plain, interpretive approaches such as the ‘purposive’ approach that the applicant advances do not apply. Absent ambiguity, the Ministry says, there is no need to consider whether a narrow or broad interpretation is warranted. The principles cited by the applicant only apply, the Ministry says, “where there is some doubt as to what the words of that statute mean” (para. 1, reply submission). The Ministry cites *R. v. McCraw*, [1991] 3 S.C.R. 72.

The Ministry contends that the applicant's interpretation of "record" would be "at odds with the plain wording" of the definition of "record", about which there can be no doubt.

[28] The Ministry says the following in its initial submission:

4.14 The real time webcam images received by the Ministry from the Forest Companies are continuous feed images, transmitted at approximately 2 frames per second. The Ministry is able to access those webcam images in real time, but it does not record or store those images on its own systems. Nor has the Ministry recorded or stored such continuous webcam images in the past. As such, the Ministry cannot, at a later date, view the continuous webcam images that have been transmitted to it via the internet in the past.

4.15 The Applicant is seeking access to something that is not recorded or stored by the Ministry. As such, that request is not a request for a record for the purposes of the Act. The Applicant does not therefore have a right under the Act to access the real time webcam monitoring of the Forest Companies beehive burners.

Are the webcam feeds "records"?

[29] The interpretive approach mentioned in *McCraw* must be viewed in light of more recent Supreme Court of Canada decisions. See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, and *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] S.C.J. No. 43, 2002 S.C.C. 42. I have referred to these decisions in a number of previous cases, including Order 02-19, [2001] B.C.I.P.C.D. No. 19, and Order 02-38, [2002] B.C.I.P.C.D. No. 38. These later Supreme Court of Canada decisions have adopted the following statement of principle from E. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[30] In *Bell ExpressVu*, the Supreme Court of Canada also confirmed that provisions such as s. 8 of the *Interpretation Act* buttress the *Rizzo* approach. Section 8 reads as follows:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects.

[31] I have applied to this case both s. 8 of the *Interpretation Act* and the interpretive approach indicated by *Rizzo*, as I did in Order 02-19 and Order 02-38.

[32] The applicant says his interpretation of the term "record" is a purposive one, but in my view it is so broad that it stretches the definition of "record" beyond the breaking

point. I cannot, in interpreting the meaning of “record”, ignore the explicit language of the Act or supplement it with words that are not there.

[33] I do not accept the applicant’s argument that the live webcam images are records because “visual information is recorded or stored by electronic means in the images conveyed from the webcam.” I have difficulty with the notion that “visual information” is recorded or stored “in the images”. I cannot discern any difference between any “visual information” that is supposedly “recorded or stored” in the “images conveyed” and the “visual images” themselves. The images are the images.

[34] I see no basis in the Act for the three factors the applicant says should be applied in determining if something is a record. Among other things, those factors refer to a “medium” in a way that does not sensibly refer to a “thing” – the operative word used in the definition of “record” – in the sense of a physical medium on or in which information is recorded or stored. The factors more accurately refer, it seems to me, to something that is a medium, or mechanism, for conveying information, such as a video camera. If I understand the applicant’s concept of “medium” correctly, the result would be that any live broadcast of information on television or radio would be a record, even if no one bothered to tape or otherwise record or store the information.

[35] Contrary to the applicant’s argument, the use of the word “includes” in the Act’s definition of “record” does not get around the fact that the definition refers to any “thing” on which information is “recorded or stored” by some “means”. Nothing turns, in this case certainly, on the definition’s reference to recording *or* storage of information. There is, in this case, no “thing” on which information is recorded or stored, since the applicant has clearly limited his request to live webcam data feeds over the Internet and has not sought recorded or stored information comprising images. He is specifically asking for live, real-time access to a stream of information, *i.e.*, data that comprise an image that can be viewed in real-time through Internet access that the applicant has asked be set up for him.

[36] This much is clear from the May 13, 2002 letter to me from the applicant’s counsel, responding to the Ministry’s objection to portions of the applicant’s first affidavit. Having said that, I believe the applicant may be trying to have it both ways. As I noted above, the applicant’s reply submission says the only “significant factual dispute” between the parties relates to “temporary storage of webcam images... as electronic files in MWLAP’s computers”, *i.e.*, the temporary cache-memory storage of image data as part of ordinary web browser function. Again, the applicant has clearly limited his access request to live Internet access to webcam images and is not seeking any temporarily-recorded cache memory images.

[37] As I understand the evidence, the webcams capture images of the beehive burners and the data representing the images are then communicated over the Internet to Frank Rhebergen’s computer in the form of images, or “visual information”, that can be viewed on that computer. Although data may be cached in his computer so as to function, in effect, as part of the computer’s web browser – as a means of speeding up the viewing of data comprising the images – the cached data are not stored or recorded permanently.

Frank Rhebergen deposed that he sometimes saves information comprising images of the beehive burners intentionally, as still images. The material before me indicates that, unless an image is intentionally saved in this way, image data (including cached data) are ordinarily transitory and do not exist other than in temporary cache memory as part of the ordinary functioning of the web browser, as just described.

[38] I do not consider that the automatic temporary storage of image data in cache memory, as part of the functioning of the web browser operating on Frank Rhebergen's computer, makes the live feed of webcam images over the Internet a "record" under the Act. As I understand it, the webcam images could still be viewed live on the computer even if the cache memory did not store and retrieve historical data as a means of speeding up the images' display, but viewing would be slower. The cache memory is for present purposes functionally a part of the web browser. The temporary storage of image data as just described does not turn the live Internet feed to which the applicant seeks real-time access over the Internet into a "record" within the meaning of the Act.

[39] There is no evidence before me to support the conclusion that the live webcam feeds are otherwise recorded or stored in or on any medium, including any of the things mentioned in the definition of "record". The live webcam Internet feeds are just that, live transmissions of image data.

4.0 CONCLUSION

[40] For the above reasons, I find that the applicant's request is not a request for access to a "record" within the meaning of ss. 3(1) and 4(1) of the Act. It follows that the Act does not apply to the requested information. The Ministry has therefore responded appropriately to the applicant's request and, under s. 58(3)(a) of the Act, I confirm that the Ministry has performed its duties under the Act in so responding.

September 12, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia