



BY FAX

November 4, 2003

To the parties:

Request for Review – Working Opportunity Fund, Applicant (“WOF”) – Ministry of Attorney General (“Ministry”) – OIPC File No. 17793

This letter communicates my decision on reconsideration of earlier decisions by my delegates to grant the WOF an extension of time, under s. 53(2)(b) of the *Freedom of Information and Protection of Privacy Act* (“Act”), to request a review under the Act.

1.0 BACKGROUND

1.1 WOF’s Access Request – On February 12, 2003, the WOF made access requests to the Ministry, the Ministry of Competition, Science and Enterprise (“CSE”) and the Ministry of Finance (“Finance”) for records concerning the WOF that were created or received on or after January 1, 1998.

The Ministry took an extension of time, under s. 10 of the Act, to process the access request made to it. Around April 25, 2002, this office granted the Ministry a further extension under s. 10, apparently on the basis of the volume of records involved and the Ministry’s need to consult with other public bodies.

On July 24, 2002, the Ministry provided a partial response to the WOF. The WOF was told that the processing of remaining records awaited the completion of consultations between the Ministry and other public bodies. On August 19, 2002, the Ministry completed its response.

In both its July 24 and August 19, 2002 responses, the Ministry told counsel for the WOF that the WOF had the right to request a review of the Ministry’s decisions within 30 business days and enclosed information on the review process.

On March 28, 2003 CSE completed its response to the WOF’s request to it, and on June 10, 2003, Finance completed its response.

1.2 The Ministry’s Decision – The Ministry withheld information under ss. 12, 13 and 14 of the Act. Section 14 (solicitor client privilege) was applied to all of the records withheld. Sections 12 (Cabinet deliberations) and s. 13 (policy advice) were applied to parts of the records. According to the Ministry, many of the Ministry records that the

WOF requested were found in the files of legal counsel, which explains the extent of the Ministry's reliance on s. 14 of the Act.

According to the WOF, the Ministry's response makes up a very small portion of the total responsive records from the three ministries.

1.3 WOF's Request for Review – On May 8, 2003, the WOF delivered to this office a request for review of the CSE's and the Ministry's responses to its access requests. The reasons the WOF gave were that the public bodies had failed to assist the WOF as required by s. 6, had given inadequate reasons for their responses under s. 8, and had not properly applied disclosure exceptions (ss. 12, 13, 14, 16, 21 and 22). The WOF also requested a review of Finance's apparent failure to respond to the access request directed to it.

On June 20, 2003, the WOF delivered a request for review of all three ministries' responses to its access requests. The reasons given were that the public bodies had failed to assist the WOF as required by s. 6, had given inadequate reasons for their responses under s. 8 and had not properly applied disclosure exceptions (ss. 12, 13 and 14). The WOF also requested an extension of time from this office under s. 53(2)(b) of the Act. The following reasons were given for the requested extension:

- (a) the prolonged delay in responding to the Information Request by each of the relevant public bodies and the manner in which the information was released in portions made it impossible for us to determine if we were being provided with adequate and fair disclosure; and
- (b) the assertion for the need to consult with other public bodies by the Finance Ministry in its letter dated April 4, 2002 and by the Attorney General in its letter dated April 25, 2002 led us to believe that the CSE Ministry, the Finance Ministry and the Attorney General office were cooperating in responding to the Information Request.

Based on the reasons above, we decided to continue to wait for a complete response from both CSE and Finance Ministry before requesting a review. We did not receive the final package under the Information Request from the Finance Ministry until June 10, 2003.

We note that all of the records provided to us were as a result of our initial Information Request. We believe that the history of the Information Request and its treatment by the relevant public bodies, establishes a pattern of delay that has been prejudicial to our client's interests. Accordingly, in the interests of fairness and efficiency, we submit that, for the purposes of your review, all of the records provided pursuant to the Information Request should be treated as one review.

1.4 Earlier Handling of WOF's Extension Request – An Intake Officer in this office reviewed the WOF's June 20, 2003 request for an extension of time under s. 53(2)(b) and, by telephone, contacted the Manager of the Ministry's Privacy, Information & Records Section. After considering various objections raised by the Manager, the Intake Officer decided to grant the WOF an extension.

On August 7, 2003, the Ministry delivered a three-page letter of complaint respecting the decision of the Intake Officer. The Director of Compliance and Policy in this office reviewed the decision and confirmed it on August 13, 2003.

On August 28, 2003 the Ministry delivered a 2-page letter requesting further reconsideration of the extension of time granted to the WOF under s. 53(2)(b). I decided to reconsider my delegates' decisions and, for that purpose, to permit further submissions from the Ministry and the WOF. The Ministry made a written submission on September 18, 2003, the WOF responded on September 30, 2003, and the Ministry replied on October 20, 2003.

2.0 DISCUSSION

2.1 Ministry's Position – The Ministry says that a s. 53(2)(b) extension should only be granted where there are extenuating circumstances justifying an applicant's delay and the extension would not prejudice the public body. It contends that the extension should not have been granted in this case because the WOF's delay in delivering its request for review does prejudice the Ministry and the WOF has shown no good reason for not requesting a review within 30 days.

The Ministry points to this office's policies and procedures respecting requests for review, noting that para. 4 of Part 5 indicates that the commissioner may allow a longer period of time to request a review where a public body consents "or where circumstances prevented the applicant from delivering the request within the 30-day period." According to the Ministry, this "requires that an applicant show why circumstances prevented him or her from delivering the request within the" stipulated time-frame and says it is not aware of any circumstances that prevented the WOF from meeting this timeline. The Ministry says that, to the contrary, the WOF is "a sophisticated applicant who is represented by legal counsel" and, on three different occasions between April and August of 2002, the Ministry told the WOF, in writing, that the Act gives an applicant 30 days to request a review.

The Ministry argues that the WOF did not need to wait for responses from CSE and Finance before advancing its case against the Ministry's application of ss. 12, 13 and 14 to information in the Ministry's responsive records. It says the disclosure of records by the other ministries could not reasonably be expected to improve the WOF's ability to argue its case against the Ministry's decision in relation to any of the exceptions under the Act. In a similar vein, the Ministry contends that such a "sophisticated applicant" as the WOF should be able to "understand why section 14 (solicitor client privilege) would apply to records found in the files of legal counsel."

The Ministry also refers to the fact that public bodies often have the burden of proving that exceptions to the right of access that have been relied on actually apply. It argues that "the prejudice that could result to a public body in allowing the review" outside the stipulated time period "should be a central consideration" in whether or not an extension should be granted under s. 53(2)(b).

To support its position, the Ministry relies on an affidavit sworn by the then Information and Privacy Analyst (“Analyst”) responsible for processing the WOF’s access request to the Ministry. The Analyst left the Ministry on December 2, 2002 to work as a Legislative Analyst with the Ministry of Education.

According to the Analyst’s evidence, although the Ministry file respecting the processing of the WOF access request documents “a number of the steps taken in processing that request”, he does not recall everything that happened or all of the discussions that took place in processing the request. He says he would have recalled more about what he did in processing the WOF’s request if the request for review had been made in a timely fashion. The Ministry says it will be at a disadvantage “in explaining all the steps taken in the processing of the Applicant’s request”, with that prejudice being “a direct result” of the WOF’s failure to seek a review within the 30-day period specified in s. 53(2)(a) of the Act.

The Ministry says most of the Analyst’s “discussions considering the severing of the requested records with Ministry program area staff and other public bodies occurred in April, 2002”. Most of those discussions were, apparently, verbal and not written. The Ministry says that, although the Analyst documented “some of those discussions” in the file, not all of them were documented. It contends that he will not, at this point, likely be able to “recall all of the factors considered in dealing with” the application of the exceptions, and that he would have been in a “much better position to recall those factors eight months ago than he is now.” The Ministry submits that, as a result, it would be disadvantaged in explaining its decision because the WOF did not request a review in a more timely fashion.

The Ministry suggests the passage of time, combined with the fact that the Analyst is no longer with the Ministry and carries out different duties elsewhere in government, clouds the sharpness of his memory of processing the WOF’s access request and puts the Ministry at a disadvantage in showing that it complied with s. 6, the duty to assist the WOF and respond without delay openly, accurately and completely.

The Ministry is adamant that the WOF made three separate access requests, albeit for exactly the same type of records, to three different public bodies, which resulted in three different responses and should also result in three different reviews by this office.

2.2 WOF’s Position – The WOF justifies its request for an extension of time under s. 53(2)(b) for the reasons given in its letter of June 20, 2003, quoted above.

The WOF adds that its access requests to the three ministries were treated as a single request by all concerned and that the Act does not indicate the same access request directed to different public bodies is to be treated as multiple requests. In the circumstances, therefore, the WOF says it was reasonable to wait until all of the ministries had responded before requesting a review of all of the responses.

On the issue of prejudice to the Ministry, the WOF says that a review of whether the Ministry properly severed records does not require the involvement of the Analyst, and his departure from the Ministry is not prejudicial to the Ministry or even relevant to the time extension the WOF has requested.

The remainder of the WOF's submission describes, in a little more detail than its June 20, 2003 letter, the grounds of the WOF's request for a review of the Ministry's response to its access request.

2.3 Discussion – I agree, and the WOF did not really argue otherwise, that the WOF was told, in the Ministry's responses to the WOF's access request, of the 30-day time-frame to request a review of a Ministry decision under the Act.

I also agree with the Ministry that the WOF made separate access requests, however similar, to three different public bodies. Its three access requests were not really just a single access request under the Act, even though they were in the same terms and the ministries did consult about the requests.

By the same token, I do not think the Act prevents efficiency measures in the form of a public body, in appropriate circumstances, processing together related access requests by a single applicant or multiple access requests by multiple applicants for the same records. Similarly, in appropriate circumstances, this office may lump together related requests for review by a single applicant or multiple requests for review by multiple applicants in relation to the same subject matter. It seems to me that common sense calls for consideration of such efficiency measures when related matters are involved.

I do not agree with the Ministry's contention that a time extension under s. 53(2)(b) can only be granted if the request for review could not have been delivered within the 30-day period. That is a relevant consideration, but is not a necessary requirement. To the extent it has suggested otherwise to the Ministry, this office's policy is too rigid.

The Act does not treat the time limit for requesting a review strictly. It explicitly allows it to be extended. Time requirements may be missed for all kinds of reasons, some of which are more justified than others. The discretion given under s. 53(2)(b) is not, however, unfettered. Factors to consider in exercising the discretion certainly include: the length of the delay; the merits of the reasons for the delay; the applicant's good faith in pursuing the request for review; and undue prejudice to other parties if an extension of time is granted. Whether it is obvious that the request for review has little or no merit is also relevant. Whether it is in the interests of justice to grant the extension is an overall consideration, one that may involve bearing in mind that the review mechanism in the Act is the only mechanism for independent review of the merits of public body decisions about access requests.

Although the WOF was not prevented, in any strict sense, from making its request for review earlier, it has provided a reasoned explanation for why it did not do so. The Ministry does not agree with the explanation given, but the Ministry's outright rejection of the reasonableness of the WOF's perception that the responses it had yet to receive from CSE and Finance could cast light on the adequacy of the Ministry's response is, I think, not quite a fair assessment. The WOF perceived the access requests and the three ministries' responses to them to be related. The three access requests were made by the WOF at the same time and in the same terms. There would, indeed, be no reason for the three ministries to have consulted, as they did, in processing totally unrelated access requests. It was reasonable for the ministries to relate the access requests to each other.

I do not accept the Ministry's position that it was nonetheless completely unreasonable for the WOF to relate the ministries' responses to each other.

This is not to suggest that it is advisable for applicants to wait eight months to request a review of a decision with the expectation that they will be granted an extension of time under s. 53(2)(b). Lengthy delay is not to be encouraged and the length of delay here is a factor weighing against the WOF's request for a time extension. I do find, however, that WOF has provided a reasoned explanation for its delay in requesting a review in this case.

This brings me to the Ministry's evidence and submissions as to the prejudice it says it will suffer if an extension is given.

No real prejudice to the Ministry has been established from the fact that, on December 2, 2002, the Analyst moved to another ministry. He is still working for the provincial government. His new workplace is in downtown Victoria, as is his former Victoria workplace with the Ministry, so he is close by and accessible. Even if the WOF had made a timely request for review, the Analyst would very likely not have been with the Ministry for all of the review and inquiry phases of this matter.

No doubt the Analyst's memory of at least some details of the Ministry's processing of the WOF's access request was fresher in September or October 2002 than it was in June 2003. Having said that, most of the consultation about the severing of the records took place in April 2002, which would have presented a five-month lapse of time up to the delivery of the request for review, even if the WOF had acted within the 30-day time period.

Is some apprehended clouding of the Analyst's memory of some details of the Ministry's processing of the WOF's access request truly likely to prejudice the Ministry, not just minimally but unduly, if an extension of time is granted under s. 53(2)(b)? I am not satisfied that a likelihood of any undue prejudice to the Ministry is present in this case.

Section 14 (solicitor client privilege) was applied to all of the records withheld by the Ministry and most of those records were found in the files of Ministry legal counsel. In these circumstances, the primary source of evidence about the nature of the records and the application of s. 14 to them will be Ministry counsel. The Analyst would not have critical evidence to give about the applicability of s. 14 to records in the files of Ministry counsel, or even about the Ministry's decision to rely on s. 14 once it was established that it applied to those records.

The Ministry says that "a sophisticated applicant such as the Applicant should understand why section 14 of the Act (solicitor client privilege) should apply to records found in the files of legal counsel". The WOF responds by saying

... it is not the Applicant's intention to gain access to records that are properly the subject of solicitor-client privilege, rather the Applicant is requesting that the Commissioner review the severed documents to determine whether solicitor-client privilege is properly applied.

The precision of the Analyst's recall of details of his involvement in the processing of the access request would not be key to the s. 14 issue in this case.

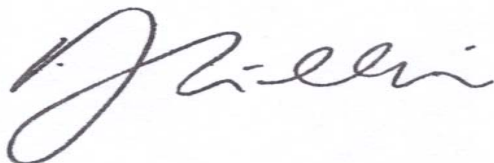
With respect to the ss. 6 and 8 grounds of review, they are tied to the WOF's claims that the exceptions (ss. 12, 13 and 14) the Ministry relied on did not properly apply. I do not understand the proposed ss. 6 or 8 grounds to be based on allegations of an inadequate search for records, in respect of which the precision of the Analyst's records and memory of the details of the processing of the request could be expected to be more important.

As for the ss. 12 and 13 grounds of review, the Ministry claimed s. 14 for all of the records withheld. It claimed ss. 12 and 13 for parts of the records. Sections 12 and 13 would be relevant only if s. 14 is found not to apply to information over which s. 12 or s. 13 was claimed. It is not clear that the Ministry's ability to show it properly claimed s. 12 or s. 13 over the withheld parts of the records is truly likely to be unduly prejudiced by the effect of the passage of time on the Analyst's memory as to the Ministry's processing of the WOF's access request.

Last, I am unable to conclude that the WOF's request of review has little or no merit. That is not apparent at this stage.

For these reasons, I have decided to exercise my discretion under s. 53(2)(b) of the Act, to allow the WOF to request a review, as it did on June 20, 2003, of the Ministry's response to its access request dated February 12, 2002. This matter will therefore be assigned, under s. 55 of the Act, to a Portfolio Officer for mediation.

Yours sincerely,



David Loukidelis
Information and Privacy Commissioner
for British Columbia