Decision F05-05

MINISTRY OF ENVIRONMENT

David Loukidelis, Information and Privacy Commissioner
August 11, 2005

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Summary: The applicant environmental organization requested access to information in electronic format and the Ministry provided paper records instead. After the notice of inquiry was issued, but before inquiry submissions, the Ministry released the records in the requested electronic format. The matter is moot and no other factors warrant holding an inquiry in this case.

Key Words: mootness.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56.

Authorities Considered: B.C.: Order 03-16, [2003] B.C.I.P.C.D. No. 16. **Ont.:** Order M-271, [1994] O.I.P.C. No. 58; Order P-942, [1995] O.I.P.C. No. 236; Order P-1295, [1996] O.I.P.C. No. 398; Order PO-2046, [2002] O.I.P.C. No. 138; Order PO-2194, [2003] O.I.P.C. No. 217; Order P-1281, [1996] O.I.P.C. No. 373.

Cases Considered: *Borowski v. Canada (A.G.),* [1989] 1 S.C.R. 342; [1989] S.C.J. No. 14; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3; [2003] S.C.J. No. 363; *Glacier View Lodge Society v. British Columbia*, [1999] B.C.J. No. 1254 (S.C.).

1.0 INTRODUCTION

[1] This decision deals with a request by the Ministry of Environment ("Ministry") that I decline, apparently under s. 56 of the Act, to proceed with an inquiry under Part 5 of the Act in relation to an access to information request that the respondent environmental group, Raincoast Conservation Society ("Raincoast"), made to the Ministry under the *Freedom of Information and Protection of Privacy Act* ("Act").

[2] The Ministry's request is based on the doctrine of mootness. The Ministry says that, since it has now responded to Raincoast's request in the electronic format Raincoast requested, there is no live issue and the inquiry should not proceed.

[3] Raincoast made an access request to the Ministry under the Act for grizzly bear mortality data in electronic format. The Ministry initially responded by providing Raincoast with paper copies of records, not the requested electronic format. Raincoast then asked for a review of the Ministry's response under Part 5 of the Act, arguing that the Ministry should provide the records in the format requested.

[4] The request for review was referred to mediation under s. 55. Mediation was not successful and this office issued a notice of inquiry to Raincoast and to the Ministry. After the inquiry notice was issued, and not long before submissions were due in the inquiry, the Ministry disclosed the records to Raincoast in electronic format. In doing so, the Ministry told Raincoast that it saw no need for the inquiry and that it had asked that I cancel the inquiry.

[5] For the reasons given below, I have decided that an inquiry under Part 5 should not proceed in this matter.

2.0 ISSUE

[6] The issue before me is whether I should, in these circumstances, now hold an inquiry under Part 5 of the Act respecting Raincoast's request for review.

3.0 DISCUSSION

[7] **3.1 Procedural Objection**—The Ministry objects to Raincoast including, at paras. 8-9 of the Reale affidavit, what the Ministry says are references to events which took place during mediation by this office. The Ministry says this office's inquiry policies and procedures do not allow a party to include mediation material without the consent of the other party. I have not in any case found it necessary to refer to or rely on these aspects of Raincoast's material in reaching my decision here, so do not need to address the Ministry's objection.

[8] **3.2 Is the Matter Moot?**—The Ministry says there is no need to hold an inquiry because the original issue—whether s. 6(2) of the Act places a duty on the Ministry to create the requested records in electronic format—is now moot, as it has disclosed the records in that format. In its view, no useful purpose would be served by proceeding to inquiry on that issue (paras. 1-2, initial submission).

Outline of the mootness doctrine

[9] The following passage from Sopinka J.'s reasons in *Borowski v. Canada (A.G.)*[1] nicely summarizes the doctrine of mootness for present purposes:

> ¶15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
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> ¶16 The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.[2]

[10] As the Ministry acknowledges, in *Borowski*, the Court said that the three rationales for the mootness doctrine are useful in fashioning criteria for exercise of the discretion to hear a matter even where no live controversy exists. These rationales can be summarized as follows:

- The competence of the courts to resolve legal disputes is rooted in the adversary system, which helps ensure that issues are well and fully argued by those who have a stake in the outcome. Even if a party no longer has a direct interest in the outcome, there may be collateral consequences of the outcome that offer the necessary adversarial context.

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[1] [1989] 1 S.C.R. 342; [1989] S.C.J. No. 14.

[2] The Ministry also refers to *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3; [2003] S.C.J. No. 363, and *Glacier View Lodge Society v. British Columbia*, [1999] B.C.J. No. 1254 (S.C.). It refers also to decisions under Ontario's *Freedom of Information and Protection of Privacy Act* that apply the mootness doctrine. The Ministry refers to the following Ontario decisions, which I discuss below: Order M-271, [1994] O.I.P.C. No. 58; Order P-942, [1995] O.I.P.C. No. 236; Order P-1295, [1996] O.I.P.C. No. 398; Order PO-2046, [2002] O.I.P.C. No. 138; and Order PO-2194, [2003] O.I.P.C. No. 217.

- The concern for judicial economy, which recognizes the need to "ration scarce judicial resources among competing claimants."[3] A moot case may be heard "if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it."[4] These circumstances may exist where a decision will nonetheless have a practical impact on the parties' rights even if it will not determine the dispute that gave rise to the proceedings in the first place. They may also exist where the case is of a recurring nature. Last, there is "a rather ill-defined basis" for applying scarce resources in cases that raise issues of "public importance of which a resolution is in the public interest."[5]

- The need for the courts to show their awareness of their proper function as an adjudicative branch in the Canadian political framework. Deciding issues without there being a dispute affecting the rights of the parties can be seen as intruding into the legislative branch's role.

Parties' arguments

[11] Regarding the first step of the two-step analysis in *Borowski*, the Ministry says there is no "live controversy" or concrete dispute because it has disclosed the requested electronic record, rendering the issue academic (paras. 3-11, initial submission).

[12] It then argues that this is not a case that will have an effect on the parties' rights. Nor is it a case that is "capable of repetition yet evasive of review"—if Raincoast wishes to request a review in a similar future case, the Ministry says, it is able to do so. The Ministry also suggests that "an abstract pronouncement on legal rights" in this case would not promote decision-making economy, as it is possible that I might have to deal with this issue in the context of future decisions by public bodies and specific fact situations. The Ministry also contends there is no pressing public interest in my hearing this case, given that I dealt with a request for electronic records in Order 03-16[6]. There are no special circumstances, in the Ministry's view, that make it worth my while to consider this moot case (para. 12, initial submission).

[13] Relying on an administrative law text, Raincoast argues there are three exceptions to the mootness doctrine and says any one of them justify an inquiry proceeding here.[7] Raincoast believes this case presents an ideal situation in which to deal with access to electronic records, given there are no issues respecting severability, releasability or commercial value. Raincoast also asks that I look at the Ministry's claim of copyright over the records—expressed in the Ministry's letter releasing the records—suggesting that the Ministry is trying to intimidate it by raising this issue (paras. 6-7 & 32-33, reply).

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[3] *Borowski*, above, at para. 34.
[4] *Borowski*, above, at para. 34.
[5] *Borowski*, above, at para. 37.
[6] [2003] B.C.I.P.C.D. No. 16.
[7] David Mullan, *Administrative Law*, 3rd ed. (Carswell, Toronto: 1996), at para. 672.

[14] It says, first, that the dispute has collateral consequences. It has three other requests for electronic records pending and expects to file requests for grizzly bear mortality data in electronic format in the future. It is also requesting other hunting data on black bears and cougars in electronic form and plans to seek other information in electronic form, such as forest development plans. It says it is not unique in wishing access to electronic data. Resolution of this issue now will prevent the need to do so in future (paras. 1-3 & 14-18, reply).

[15] Second, it says, access to electronic data is a recurring issue. It alleges that public bodies routinely deny access to electronic data and, when challenged during a review, reconsider and agree to disclosure of electronic records. Raincoast contends that this is what happened here, leaving it to wait nearly 10 months to receive records in the format it requested. With support from several detailed affidavits, it provides examples of other cases where it says public bodies resisted providing records in electronic form (paras. 4 & 19-25, reply; Horter, Reale, O'Carroll & Genovali affidavits). A number of these other cases involve requests to the Ministry of Forests and Range, while others involve present or planned requests to the Ministry of Environment.

[16] Third, Raincoast argues, there is a public interest in resolution of this issue. The lack of clear direction on the public's right of access to electronic records, or the absence of such a right, allows public bodies to repeatedly deny access, it argues. Not all applicants who have been denied access will challenge that denial, it says, resulting in "an unprincipled fettering of public access and loss of government accountability". Cancelling the inquiry in this case would be a waste of resources, in Raincoast's view, since the issue is likely to arise repeatedly (paras. 5 & 26-31, reply).

[17] The Ministry responds by saying that none of the three exceptions Raincoast cites actually arises here. In response to Raincoast's argument that there are collateral consequences, it says this is not a case where there is an absence of previous decisions dealing with the issue. It again says I have dealt with this issue already in Order 03-16 (paras. 2-4, reply).

[18] Repeating its contention that this is not a good case in which to adjudicate the issue of electronic access to records, the Ministry says there is no proper evidentiary basis on which to make a proper determination. Every case is different, it says, and there is little or no value in addressing the issues on a hypothetical basis (para. 5, reply).

[19] Next, while Raincoast contends that bodies have routinely delayed access to electronic records, the Ministry says Raincoast has referred to only three requests to the Ministry of Forests and Range—one of which resulted in Order 03-16—while others involved fee, third-party business and copyright issues. There were also issues regarding the availability of the data in electronic form and that Ministry's ability to produce the requested information in electronic form.

[20] The Ministry says Raincoast is trying to influence me to draw the inference that ministries routinely deny access to electronic records and later change their minds in

order to delay access and ensure there is no formal adjudication by me of the issue. Raincoast has provided no evidence to support its contention that the Ministry intentionally delayed providing access to Raincoast, the Ministry continues. It also provides affidavit evidence from the Manager, Privacy, Information, Records and Litigation Services for the Ministry of Forests and Range to support its rejection of Raincoast's allegations. At no point, the Manager says, did her Ministry deny access to the requested information on the basis that it was in electronic form (paras. 2-11, reply; Vander Beesen affidavit).

[21] Last, the Ministry does not think it is appropriate for me to resolve any copyright claims, saying I have no jurisdiction to do so. Rather it is up to the courts, the Ministry says, referring me to an order under Ontario's *Freedom of Information and Protection of Privacy Act* on this point.[8] In any case, it says, copyright arises whether or not it is claimed and copyright is not defeated by disclosure under the Act. The Ministry denies it is trying to intimidate Raincoast by claiming copyright. Raincoast is free to analyze Ministry data and publish the results, with some provisos, it says. The Ministry also rejects Raincoast's argument that the issue will arise repeatedly in future, repeating its contention that I dealt with the issue of electronic access to records in Order 03-16 (paras. 12-15, reply).

Should an inquiry be held here?

[22] First, neither party argues that I do not have authority to apply the mootness doctrine under the Act, specifically in exercising the authority under s. 56. Previous orders have discussed some of the factors that may be relevant without purporting to exhaust the field. I consider that I have the authority to consider the mootness doctrine in deciding whether or not to hold an inquiry.

[23] In considering whether to proceed, I have applied the approach taken in *Borowski* and later decisions. In addition to considering the other Ontario access-to-information decisions mentioned earlier, I have kept in mind the following observations by Assistant Commissioner Glasberg:

> In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the Commissioner's office to deal with the files of other appellants.[9]

[8] Order P-1281, [1996] O.I.P.C. No. 373.

[9] Order M-271, at p. 2. In that case, Assistant Commissioner Glasberg went on to hear the matter because of its special circumstances, which involved an individual's request to correct his own personal information and issues around which institution had that information in its custody.

[24] As for the first of the two steps in *Borowski*, the Ministry has disclosed the electronic records that Raincoast requested, so there is no live dispute between Raincoast and the Ministry. The nub of this case is whether I should, despite the end of the dispute between Raincoast and the Ministry, nonetheless hold an inquiry. I have decided an inquiry should not be held.

[25] I am not persuaded by Raincoast's argument that an inquiry should be held because a decision in this case will have collateral consequences by addressing similar recurring cases in the future.

[26] The dispute between Raincoast and the Ministry centred around whether s. 6(1) or s. 6(2) requires a public body to give an applicant access to records in electronic form where the applicant has stipulated that medium over another. Both provisions apply standards of reasonableness to the Ministry's obligation to assist applicants (s. 6(1)) and its obligation to create records (s. 6(2)). The consequences of the reasonableness standard articulated in these provisions will vary case by case. For example, whether a record can be created under s. 6(2) without unreasonably interfering with a public body's operations will depend on the nature of the machine readable records in issue, the "normal computer hardware" of the public body and the public body's "software and technical expertise".[10]

[27] I am not persuaded by Raincoast's argument that an inquiry should be held because this is a recurring issue which it would be in the public interest to resolve through a decision on its dispute with the Ministry. Raincoast says other access requesters find it difficult to get access to electronic information, with delay and denial being, it says, a common experience. It argues that there is a public interest in resolving this issue, to offer clear direction on the public's right of access to electronic records. The case-specific nature of the Act's approach under s. 6 is important here as well.

[28] As my comments below indicate and in other venues make plain, I am alive to the broader, and pressing, policy issues associated with the ongoing shift in government to electronic records and information systems. This shift carries considerable implications for the public's right of access to information and for accountability and transparency in government. Any systemic solution that might be needed for problems such as those Raincoast identifies does not lie in a case-specific decision under s. 6 of the Act. There may be broader questions of public importance, but I do not think their solution can be found in a decision in this case under s. 6(1) or s. 6(2).

Electronic records and the public's right of access

[29] Order 03-16, mentioned by the Ministry in its submissions, is of interest from a broader perspective. That case dealt with issues flowing from a Ministry's shift to

[10] The importance of the circumstances of the particular dispute when applying reasonableness standards is underscored by Order 03-16. That case dealt with the issue of whether s. 4(2) of the Act—which also imports the reasonableness concept—required the public body to sever electronic records in order to disclose them electronically.

electronic information systems and the impact of that shift on the public's right of access under the Act. Those issues "converged with the growing pains and complexities of the Ministry's large-scale movement to electronic technology as its primary means of compiling and managing case tracking information" (para. 64). Without expressing any views on the merits of the issues raised by Raincoast's request, public bodies should keep the following observations from Order 03-16 in mind as they move ahead with electronic information systems:

> [64] It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems.…Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective.

[30] I also note that the Legislative Assembly's Special Committee to Review the Freedom of Information and Protection of Privacy Act had this to say in its May 2004 report on its review of the Act:

> The Committee believes that changes in information technology over the past five years have laid the groundwork for enhancing both citizens' access to public records and their privacy rights….Internet technology has also enabled the provincial government to develop electronic information services on ministry and other websites that are now easily accessible to the public.[11]

[31] There is a danger, of course, that changes in information technology are diminishing the public's right of access to records and the accountability of our governments. The Special Committee's report recognizes one tool to address this concern—an instrument found in the United Kingdom's access to information law—and makes this recommendation to government:

> Recommendation No. 5—Add a new section at the beginning of Part 2 of the Act requiring public bodies—at least at the provincial government level—to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.

[32] As another passing observation, I would hope that—whatever the limits of their statutory obligations might be under s. 6—public bodies will wherever possible provide access applicants such as Raincoast with electronic records where requested, as the

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[11] Legislative Assembly of British Columbia, *Enhancing the province's public sector access and privacy law: Special Committee to Review the Freedom of Information and Protection of Privacy Act report* (5th Session, 37th Parliament, May 2004), found at http://www.legis.gov.bc.ca/CMT/37thparl/session-5/foi/reports/Rpt-FOIPPA37-5.pdf.

Ministry ultimately did here. The Act's explicit accountability goals are well served by such a service-oriented approach to access to information requests.[12]

4.0 CONCLUSION

[33] For the above reasons, I have decided that an inquiry should not be held under Part 5 of the Act respecting Raincoast's request for review in this matter.

August 11, 2005

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

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[12] Nor do I see, in this regard, countervailing concerns arising from electronic disclosure. Concerns about copyright, certainly, are addressed by the *Copyright Act* whether the medium of the record is paper or electronic—any copyright in a disclosed record survives disclosure under access to information. For one thing, s. 32.1(1) of the *Copyright Act* (Canada) provides that "it is not an infringement of copyright for any person" to disclose a record under a provincial access to information statute. Section 32.1(2) confirms that anyone to whom a record is disclosed cannot do anything that only the copyright owner can do.