



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

Decision F08-05

TOWNSHIP OF LANGLEY

Celia Francis, Senior Adjudicator

July 16, 2008

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Summary: Langley's request that an inquiry not be held respecting its decision to deny a fee waiver is granted.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 56, s. 75(5).

Authorities Considered: **B.C.:** Decision F08-06, [2008] B.C.I.P.C.D. No. 23; Order F08-14, [2008] B.C.I.P.C.D. No. 24; Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45.

1.0 INTRODUCTION

[1] The Township of Langley ("Langley") has requested, under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), that an inquiry under Part 5 of FIPPA not be held respecting a fee waiver related to the respondent's request for records. For reasons which follow, I have exercised my discretion to grant Langley's request that this matter not proceed to inquiry.

[2] The respondent's son represented her throughout this matter and some of the correspondence is from him, on her behalf. I will refer here only to the respondent for ease of reading.

[3] This decision is related to Decision F08-06¹ and Order F08-14² which I am issuing concurrently. In arriving at my decision in this case, I considered the records for which Langley charged the fee in issue here and which are the same records that Langley provided to me for its other s. 56 application, (Decision F08-06).³ The records show that, among other things, the respondent complained to Langley about the presence of a mobile home on a neighbouring property and that she is dissatisfied with Langley's response to her complaints.

2.0 DISCUSSION

*The access request*⁴

[4] The respondent initially requested access to documents related to permit applications made by the owners of the neighbouring property referred to above.⁵ Langley disclosed approximately 50 pages in response to this request. Because the records consisted mainly of correspondence with the respondent, Langley did not charge the respondent for providing access to the records.⁶

[5] The respondent wrote back to Langley to say that its response was incomplete. She listed 18 groups of records related to her "property use complaint" which she said were missing.⁷ Langley treated the follow-up letter as a new request and issued a fee estimate of \$373.17 to the respondent,⁸ which it calculated as follows:

Locating, retrieving, producing & preparing the records for disclosure:

3 hours no charge	00
10 hours @\$7.50 per quarter hour (\$30 an hour)	\$300.00

Copying records:

121 pages @ \$.25 per page (8½ x 11)	30.25
Sub Total	\$330.25
GST	19.81
PST	23.11
TOTAL INVOICE	\$373.17

¹ [2008] B.C.I.P.C.D. No. 23.

² [2008] B.C.I.P.C.D. No. 24.

³ See my letter of June 24, 2008 to Langley, copied to respondent. Langley had no comment on this letter; see this Office's letter of July 3, 2008 to Langley, copied to respondent.

⁴ The following chronology is drawn mainly from the correspondence between the respondent, Langley and this office on the request and fee issues provided to me for this application. I also drew on Langley's s. 56 application of February 25, 2008.

⁵ Respondent's letter of December 21, 2006 to Langley.

⁶ Langley's letter of January 16, 2007 to respondent. Under s. 75(3) of FIPPA, public bodies may not charge applicants for providing access to their own personal information.

⁷ Respondent's letter of January 27, 2007 to Langley.

⁸ Langley's letter of February 19, 2007 to respondent.

[6] Langley told the respondent in the same letter that she could request a fee waiver on the basis that she could not afford the fee or if there were other reasons justifying a fee waiver.

[7] The respondent then wrote to this Office to complain about the inadequacy of Langley's search for records regarding her December 2006 request.⁹ The respondent also disputed Langley's decision to charge a fee in separate letters to Langley and this Office. In those letters, she argued that the request was for her personal information as the records related to her complaint and Langley had relied on them in deciding not to act on her complaint because the mobile home complied with zoning bylaws.¹⁰ She also said there should be no fee because, under s. 75(5)(b) of FIPPA, the records relate to a matter of public interest for these reasons:

- there was an environmental issue related to Langley allowing "an illegal dwelling" (the mobile home) to remain on sensitive Agricultural Land Reserve farmland:

This is in the public interest because due to crop destruction from global warming triggered climate change, and rising energy costs putting the price of agricultural products beyond the reach of many citizens, and automobile produced greenhouse gases it is public policy and in the public interest to reduce urban sprawl and protect British Columbia's limited and diminishing supply of farmland.¹¹

- Langley was allowing "an illegal suite village"¹² (which the respondent also described as "multiple dwelling rental accommodation units") on this farmland, contrary to the *Agricultural Land Commission Act*
- the requests scrutinize Langley's actions in administering provincial law¹³ as they question "the legality of the Township allowing residential development in a watershed area of greatest environmental sensitivity"; the respondent also noted that she was in a position to disseminate information to council meetings and the media¹⁴

[8] Langley told the respondent that the records did not contain her personal information and thus a fee applied.¹⁵ The respondent wrote again to this Office

⁹ Respondent's complaint of February 28, 2007 to this Office.

¹⁰ Respondent's letter of March 5, 2007 to Langley, respondent's letter of March 6, 2007 to this Office and respondent's first letter of March 7, 2007 to this Office.

¹¹ Respondent's letter of March 6, 2007 to this Office.

¹² Respondent's letter of March 5, 2007 to Langley.

¹³ Respondent's letter of March 5, 2007 to Langley; respondent's letter of March 6, 2007 to this Office.

¹⁴ Respondent's letter of March 6, 2007 to this Office.

¹⁵ Langley's letter of March 6, 2007 to respondent.

about the fee,¹⁶ saying that the request was for her personal information and under s. 75(5)(a) it was fair to excuse payment, for these reasons:

... [I]t is a fundamental principle of natural justice in a free and democratic society that a citizen has a right of access to the evidence the state has used in making any decision affecting that citizen, and it has been decided that charging a fee for access to such records is a contravention of a person's charter rights.

It is unfair, and a violation of a person's constitutional rights for the state to charge a fee for allowing access to documents provided in disclosure or discovery in proceedings against a citizen by the state.

...

It is clearly unfair, and a violation of [the respondent's] charter rights and a violation of section 75(5)(a) for Langley Township to charge a fee for any and all records ...¹⁷

[9] During mediation of the fee complaint, the respondent paid the fee "under protest" and Langley disclosed the records.¹⁸ Langley also told the respondent it was denying a fee waiver on public interest grounds,¹⁹ although it later refunded \$42.92, which represented the GST and PST part of the fee.²⁰ In a separate letter to Langley, the respondent objected to the amount of the fee because, as she thought, Langley had charged her for multiple copies of "extraneous and needless and unrequested pages".²¹

[10] The respondent continued to protest the denial of the fee waiver on natural justice grounds and said that it was unfair under s. 75(5)(a) to charge fees. She reiterated that the records arose out of her complaints about the "illegal mobile home" on the neighbouring property and Langley's failure to act on those complaints, and that the records were therefore her personal information. She argued that she should not be required to pay for records used by Langley

¹⁶ Respondent's letter of March 6, 2007 to this Office and second letter of March 7, 2007 to this Office.

¹⁷ Respondent's second letter of March 7, 2007 to this Office.

¹⁸ This occurred after the respondent paid the fee on March 13, 2007, according to Langley's s. 56 application.

¹⁹ Langley's letter of May 9, 2007 to respondent.

²⁰ Langley's letter of June 27, 2007 to respondent.

²¹ Respondent's letter of March 21, 2007 to Langley. It does not appear that the respondent complained directly to this Office about the copying charges and she does not appear at any time to have taken issue with the estimated search and preparation time. I have therefore not considered the calculation of the fee in this decision. In any case, as noted below, Langley said it did not charge the respondent for providing copies of all 408 pages that it provided but only for the 121 pages it originally estimated were responsive to the request.

“to make a decision so grossly and detrimentally affecting her well-being” and FIPPA should not be interpreted so as to violate her constitutional rights. She reiterated some of her public interest arguments as well and asked that the matter of the fee waiver be set down for inquiry under Part 5.²²

[11] Langley then told the respondent that she had not said she could not afford payment and had not provided any reasons for which it was fair to excuse payment under s. 75(5)(a). Even if she did provide reasons for the latter type of fee waiver, however, Langley said it would deny a fee waiver on this basis.²³

[12] On February 25, 2008, Langley made a request under s. 56 that an inquiry on the fee waiver denial not be held. This Office invited the respondent to comment on Langley’s s. 56 application but she did not do so. Accordingly, I have relied here on Langley’s application and the request and fee correspondence provided to me for this application, as set out in this decision.

Langley’s arguments

[13] Langley takes the position that the respondent’s complaint falls outside the scope of FIPPA and that, as such, there is no arguable issue which merits adjudication in an inquiry. This is because s. 75(5) is permissive, Langley said, and discretion rests with the head of the public body. Langley said that the respondent is neither claiming financial hardship nor saying that the records relate to a matter of public interest.²⁴ It then suggested that the respondent is challenging both its decision to deny a fee waiver and its authority under s. 75 to do so. Langley said it does not believe an inquiry is the appropriate venue for a challenge on constitutional grounds and suggested that the courts are the appropriate place for the respondent to challenge the validity of s. 75.²⁵

[14] Apparently in reference to the respondent’s argument about “proceedings against a citizen”,²⁶ Langley also said it is not aware of any proceedings against the respondent for which she may have requested the records. It said that in fact the focus of the respondent’s concerns to this point has been the

... alleged improper use by the neighbouring property owners in maintaining illegal dwellings on the property which related to the policies of the Agricultural Land Commission.²⁷

²² Respondent’s letter of September 3, 2007 to this Office.

²³ Langley’s letter of September 10, 2007 to respondent.

²⁴ As noted above, the respondent claimed on a number of occasions that the records relate to a matter of public interest. Langley denied a fee waiver on this basis in its letter of May 9, 2007 to the respondent.

²⁵ Paras. 7-10, initial submission.

²⁶ Respondent’s second letter of March 7, 2007 to this Office; see quote above.

²⁷ Para. 11, initial submission.

[15] Langley said it only charged the respondent for access to general records that did not refer to or contain the respondent's personal information. It said it did not charge for search time for the 53 pages it disclosed in response to the first request on the basis that they were mostly the respondent's personal information. Langley also pointed out that it had provided a fee estimate for 121 pages in accordance with FIPPA and, although it had actually provided 408 pages, these contained many duplicates for which it did not charge, but which it prepared in order to answer the respondent's questions about the supposedly missing documents. Langley argued that it charged reasonable fees in accordance with FIPPA and that the fees were not a barrier to access.

Issue

[16] Section 56(1) of FIPPA reads as follows:

Inquiry by Commissioner

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[17] As Adjudicator Austin-Olsen said in Decision F07-04:²⁸

[16] Section 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. As noted in earlier decisions, there are a variety of reasons why this discretion might be exercised in favour of not holding an inquiry. These include circumstances where the principles of abuse of process, *res judicata* or issue estoppel clearly apply. Other circumstances are where it is plain and obvious that the records in dispute are subject to an exception to disclosure or that they fall outside FIPPA's scope. In each case, however, it must be clear that there is no issue which merits adjudication in an inquiry. [citations omitted]

[17] In an application of this kind under s. 56, it is the party asking that an inquiry not be held (in this case the District) who bears the burden of demonstrating why that request should be granted. The respondent does not bear an equal burden of demonstrating why an inquiry should be held. This reflects the current policy of this Office that, when mediation is unsuccessful, the matter in dispute is referred for an inquiry.

[18] That being said, it is in my view precisely this type of case which is contemplated by the permissive language of s. 56. In cases where it appears obvious from previous Orders and Decisions of this Office that the outcome of an inquiry will be to confirm that the public body has properly applied the provisions of FIPPA, the respondent must provide some cogent basis for arguing the contrary. That has not occurred here.

²⁸ [2004] B.C.I.P.C.D. No. 20.

Analysis

[18] A public body has discretion both to charge and waive fees under s. 75 of FIPPA, the relevant parts of which read as follows:

Fees

- 75(3) Subsection (1) does not apply to a request for the applicant's own personal information.
- (4) If an applicant is required to pay a fee for services under subsection (1), the head of the public body
- (a) must give the applicant a written estimate of the total fee before providing the service, and
 - (b) may require the applicant to pay a deposit in the amount set by the head of the public body.
- (5) If the head of a public body receives an applicant's written request to be excused from paying all or part of the fees for services, the head may excuse the applicant if, in the head's opinion,
- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or
 - (b) the record relates to a matter of public interest, including the environment or public health or safety.

[19] I will begin by saying I disagree with Langley's argument that this fee waiver issue is outside the scope of FIPPA because discretion for waiving fees rests with the head of the public body. Langley is essentially saying I have no authority under FIPPA to question its decision in levying a fee. A number of orders have dismissed this kind of argument, for example, Order No. 332-1999:²⁹

... 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

²⁹ [1999] B.C.I.P.C.D. No. 45, at p. 3.

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.

[20] Having said that, I agree with Langley that an inquiry should not be held on the fee waiver issue in this case. The respondent does not argue that she could not afford the fee so I have not considered that issue here. I also agree with Langley that the records from the second request for which Langley charged do not contain the respondent's personal information. This leaves the respondent's arguments on fairness and public interest grounds.

[21] In my view, the respondent's material does not establish any basis for a fee waiver based on the public interest. She did not, for example, explain how the requested records, which arise out of her complaints about her neighbours' property, relate to a matter of public interest. Her dissatisfaction with Langley's actions regarding the mobile home and the allegedly detrimental effect of the mobile home on her well-being involve a private rather than a public interest. Nor does the respondent's material demonstrate how the presence of the mobile home on the neighbours' property is an environmental issue, as she asserts. No connection is drawn between the mobile home and watershed issues in the area that the applicant claims exist. Nor is it at all evident how the mobile home or other rental accommodation on the neighbours' property raises fears of urban sprawl. The records themselves also do not support a fee waiver on public interest grounds.

[22] Nor can I find that it might be "fair for any other reason" to excuse payment. The respondent's material does not explain how the mobile home has had a detrimental effect on her, nor how any such effect makes it unfair for her to pay for the records. Her vague constitutional and *Charter* arguments, and her attempts to show that she should not have to pay a fee to see evidence used in a decision affecting her,³⁰ also do not establish a basis for considering whether it would be fair to excuse the fee in this case. The respondent has not been accused of anything and has not explained what proceeding she might be involved in which might warrant a fee waiver in "fairness". The records themselves also provide no support for a fee waiver on fairness grounds.

3.0 CONCLUSION

[23] In these circumstances, where it is plain and obvious—including in light of previous orders respecting similar types of records—that a public interest fee waiver is not warranted, I have decided that no inquiry should be held under

³⁰ Respondent's letter of September 3, 2007 to this Office. The respondent apparently means Langley's actions regarding her complaints.

Part 5 of FIPPA respecting the respondent's request for a fee waiver. This Office's file for the respondent's complaint on the fee waiver denial will be closed.

July 16, 2008

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File: F07-31040