



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

Order F10-38

**OFFICE OF THE PREMIER**

Celia Francis, Senior Adjudicator

November 4, 2010

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**Summary:** The applicant requested records of telephone calls between Patrick Kinsella and the Premier's Office from 2001 to the date of his request. The Premier's Office issued a fee estimate of \$450 for locating and retrieving the records. The applicant requested a public interest fee waiver which the Premier's Office denied. The Premier's Office's decision to deny a fee waiver was appropriate, as the requested records do not relate to a matter of public interest.

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

**Authorities Considered:** **B.C.:** Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45; F07-09, [2007] B.C.I.P.C.D. No. 12; F09-05, [2009] B.C.I.P.C.D. No. 8; F09-11, [2009] B.C.I.P.C.D. No. 14; Order 02-43, [2002] B.C.I.P.C.D. No. 43; F07-01, [2007] B.C.I.P.C.D. No. 1; F07-08, [2007] B.C.I.P.C.D. No. 10.

## 1.0 INTRODUCTION

[1] The applicant in this case is a journalist who made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the Office of the Premier ("Premier's Office"), for records of outgoing calls made by the Premier, his deputy minister, his executive assistant and his chief of staff's telephone lines to Patrick Kinsella's cell, home and business telephone numbers, from June 5, 2001 on.

[2] In his request, the applicant also said this:

It is my contention that the release of these records — which will provide clarity concerning the scope of Kinsella’s interactions with the provincial government — is in the public interest, triggering section 25 of the Freedom of Information and Protection of Privacy Act.

[3] The Premier’s Office responded by issuing the following fee estimate:

(a)	Locating and retrieving records (18 hours in total; 3 hours free) (15 hours @ \$7.50 per ¼ hour)	\$ 450.00
	Total	<u>\$ 450.00</u>

[4] The Premier’s Office requested a deposit of \$225 before it would proceed with its search. It also told the applicant he could request a fee waiver if he could not afford the fee or if the records related to a matter of public interest.<sup>1</sup>

[5] The applicant requested a fee waiver on these grounds:

Interactions between the government and Patrick Kinsella have been the subject of public controversy (allegations of unregistered lobbying, his involvement in the BC Rail privatization deal, etc.). Furthermore, at least one former member of the premier’s office has publicly stated he regularly destroys public records. As such, one of the only means of determining the extent of interactions between members of the premier’s office and Mr. Kinsella is via their phone records.

[6] The Premier’s Office responded to the fee waiver request by saying this:

There is no pressing or urgent need to conduct this search in the public interest at this time.<sup>2</sup>

[7] The applicant complained to this office (“OIPC”) about the “election eve” decision to deny his fee waiver request, arguing that Patrick Kinsella had been “a figure of considerable interest to the public — having been accused of lobbying the government he was instrumental in electing without registering”.<sup>3</sup> The applicant noted that earlier requests for records of contacts between

<sup>1</sup> The Premier’s Office did not explain what was involved in this search nor how it arrived at this estimate. It also did not suggest ways of narrowing the request which might have resulted in a lower fee estimate. All of these things would have been helpful to the applicant.

<sup>2</sup> This barebones response was unsatisfactory, as it did not provide reasons for rejecting the fee waiver request. I note that in Order 01-24, [2001] B.C.I.P.C.D. No. 25, at para. 52, Commissioner Loukidelis, as he then was, encouraged public bodies to provide reasons for rejecting fee waiver requests, as being both fair and in keeping with their duty to assist applicants under s. 6(1).

<sup>3</sup> Applicant’s request for review.

Mr Kinsella and the Premier's Office "have been unresponsive"<sup>4</sup> and that the Premier's Office had refused to answer questions about Mr Kinsella's interactions with "the Campbell administration". He said his only recourse had therefore been an access request. He closed by saying this:

I believe that determination is in the public interest, given the fact questions about Mr. Kinsella were also raised on the campaign trail.

[8] During mediation of the complaint, the applicant agreed to abandon his s. 25 argument. Mediation was otherwise unsuccessful and the matter proceeded to a hearing. The OIPC invited and received submissions from the applicant and the Premier's Office.

## 2.0 ISSUE

[9] The issue before me is whether the applicant's request for a fee waiver is warranted under s. 75(5). FIPPA is silent respecting the burden of proof regarding s. 75(5) cases and it is thus incumbent on the parties to provide argument and evidence in support of their positions on the issue.

[10] The Premier's Office argued that the applicant bears the burden of proof in this case.<sup>5</sup> While it is true that earlier orders placed the burden of proof on the applicant to show that a fee waiver was warranted<sup>6</sup>, the legislation does not expressly impose an evidentiary burden on either party. Orders of the OIPC have for some years rejected the argument that the applicant has the burden in public interest fee waiver cases. They have also said that, where FIPPA is silent as to burden, as a practical matter, it is in the interests of each party to present argument and evidence to justify its position.<sup>7</sup> I therefore encourage public bodies not to keep raising this argument.

## 3.0 DISCUSSION

[11] **3.1 Public interest fee waivers**—The relevant part of FIPPA reads as follows:

### Fees

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, ...

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<sup>4</sup> Applicant's request for review. I take the applicant to mean that he was told there were no responsive records.

<sup>5</sup> Para. 10, Premier's Office's initial submission.

<sup>6</sup> For example, Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45.

<sup>7</sup> See for example Order F07-09, [2007] B.C.I.P.C.D. No. 12, Order F09-05, [2009] B.C.I.P.C.D. No. 8, and Order F09-11, [2009] B.C.I.P.C.D. No. 14.

(b) the record relates to a matter of public interest, including the environment or public health or safety.

[12] Several orders have considered the issue of whether or not fee waivers are merited under s. 75(5)(b) and I take the same approach here without repetition.<sup>8</sup>

[13] **3.2 Is a fee waiver merited?**—The applicant began by noting that Patrick Kinsella was the BC Liberal Party’s campaign co-chair during the 2001 and 2005 elections. He added:

[Mr Kinsella’s] interactions with the government as a consultant for private and public sector clients have been a matter of considerable public debate.<sup>9</sup>

[14] The applicant said that, according to British Columbia and Washington State records and client interviews, Mr Kinsella was involved in a number of activities. One example was a contract with BC Rail in 2002 to “assist” the firm in “understanding and interpreting the Core Review Process as to its potential impact on the Corporation”. Another was a contract with Alcan Inc to “promote and educate the government of [sic] the value of allowing Alcan to increase the size of its smelter operations in Kitimat”.<sup>10</sup>

[15] The applicant argued that

... Mr. Kinsella and his firm to [sic] have been involved with clients who have benefited from some of the government’s most controversial decisions — including the expansion of gambling and private liquor stores in British Columbia, as well as the promotion of independent power projects.

This involvement became the subject of question period debates and media coverage, as well as an election issue — in part, because Mr. Kinsella did not register as a lobbyist on behalf of any of his clients.<sup>11</sup>

[16] Among other things, the applicant argued that it is in the public interest to disclose records that show the extent of Mr Kinsella’s interaction with members of the Premier’s Office, in part as a measure of how much influence Mr Kinsella and his clients had. Disclosure would, in his view, also assist in determining if there was a violation of BC’s lobbying legislation. In support of his argument that the matter has been the subject of public debate, the applicant attached a series of media articles from 2008-2010 on Patrick Kinsella. The applicant added that he is in a position to disseminate information to the public, because he is a syndicated columnist, a radio talk show host and the editor of Public Eye.<sup>12</sup>

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<sup>8</sup> See for example Order 02-43, [2002] B.C.I.P.C.D. No. 43, at paras. 10-11.

<sup>9</sup> Page 2, applicant’s initial submission.

<sup>10</sup> Page 2, applicant’s initial submission.

<sup>11</sup> Page 3, applicant’s initial submission.

<sup>12</sup> Pages 4-5, applicant’s initial submission.

[17] The Premier's Office made a number of preliminary arguments about the purpose of fees under FIPPA,<sup>13</sup> similar to those the public body made in Order F07-01<sup>14</sup> and Order F07-08.<sup>15</sup> My comments here are the same as the ones I made in those two cases and so I will not repeat them here.<sup>16</sup> I will also observe that it does not assist public bodies to keep raising these arguments and I encourage them not to do so in future.

[18] The Premier's Office then argued that the term "public interest" does not include everything the public may be interested in knowing. Thus, the fact that something is of interest to the public does not mean it meets the public interest test in s. 75. It acknowledged that there has been public scrutiny and debate regarding Patrick Kinsella's relationship with members of the government. However, in its view, the requested telephone records are not key to that debate and would not improve the public's understanding of Mr Kinsella's alleged lobbying activities, as they cannot reveal the contents of the calls. There is also no way of determining who placed or received those calls, it argued. For these reasons, Allan Seckel, Deputy Attorney General at that time and thus the delegated decision-maker, concluded that the records did not relate to a matter of public interest and a fee waiver was not warranted.<sup>17</sup> The Premier's Office said it did not dispute the applicant's ability to disseminate information but argued that he had not shown how the requested records met the test for a fee waiver as set out in Order 02-43.<sup>18</sup>

[19] The Premier's Office provided an affidavit from David Loukidelis, the current Deputy Attorney General and delegated decision-maker, in support of its position. He said he reviewed the original decision in March 2010:

8. In my view, while there has been public scrutiny and debate regarding Mr. Kinsella's relationship with members of the government, these phone records are not key to that debate. The requested phone bills will not improve the public's understanding of Mr. Kinsella's alleged lobbying activities, as they cannot reveal the contents of the calls, nor is there any way of determining from the phone bills who was placing or receiving those calls. The requested records cannot by their nature disclose whether calls were being placed for personal reasons or some other purpose.
9. The records responsive to the Request would not disclose an environmental concern or a public health or safety concern.

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<sup>13</sup> Paras. 11-20, Premier's Office's initial submission.

<sup>14</sup> [2007] B.C.I.P.C.D. No. 1, at para. 56.

<sup>15</sup> [2007] B.C.I.P.C.D. No.10, at para. 23.

<sup>16</sup> See paras. 57-60 of Order F07-01 and para. 56 of Order F08-07.

<sup>17</sup> Paras. 21-27, Premier's Office's initial submission.

<sup>18</sup> Paras. 1-4, Premier's Office's reply submission.

10. I do not believe that disclosure of the requested records would contribute to the development or public understanding of, or debate on, an important environmental or public health or safety issue.
11. I do not believe that disclosure of the requested records would contribute to the development or public understanding of, or debate on, an important policy, law, program or service.
12. Records of calls made and received will not disclose how the ministry is allocating financial or other resources.
13. Accordingly, in March 2010 it was my view that the records responsive to the Request do not relate to a matter of public interest, and therefore a fee waiver was not warranted. I maintain that view today.
14. As I did not consider the records to relate to a matter of public interest, in March I did not go on to consider whether the Applicant should be excused from paying all or part of the fee. On consideration of that issue today, I have taken note of the applicant's role as a member of the press, and the publisher of a website with an established readership. It is my view that if the records relate to a matter of public interest, the Applicant should be excused from paying all of the fee. [underlining in original]

### ***Analysis***

[20] I accept from the applicant's submission that Mr Kinsella's activities have been the subject of public debate. I also agree that his interactions with government are a suitable subject for public scrutiny. I am moreover satisfied that the applicant would use the requested records for a public interest purpose. However this is not the test for a fee waiver under s. 75(5)(b).<sup>19</sup> The records themselves must relate to a matter of public interest. For reasons which follow, I have concluded that the requested records do not meet this test.

[21] First, the applicant has not shown how records of telephone calls between telephone numbers associated with Patrick Kinsella and the Premier's Office have themselves been the subject of public debate. It may be that the applicant wishes to find out if the records would illuminate public debate about Mr Kinsella's activities in some way, for example, by the frequency, duration or timing of the calls. However, even if the records revealed a pattern of calls surrounding a particular event, the records themselves would not reveal the nature or content of any such calls, nor whether the individuals of interest to the applicant actually made the calls. It is not apparent therefore, how these records, on their face, would reveal any influence Mr Kinsella and his clients may have had or how they would disclose whether or not Mr Kinsella violated provincial lobbying laws.

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<sup>19</sup> See for example Order 01-24 at paras. 60 and 62.

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[21] I also do not see how the subject matter of the request relates to public health or safety, the environment or other matters of public interest. Nor are any other factors from the first stage of the public interest fee waiver test present here. The requested records strike me as routine and administrative in nature. In my view they would shed no light on the public interest matters of interest to the applicant.

[22] For these reasons, I find that the requested records do not meet the first part of the test for public interest fee waivers as set out in previous orders. I need not therefore consider the second stage of the test.

#### **4.0 CONCLUSION**

[23] For reasons given above, under s. 58 of FIPPA, I confirm the Premier's Office's decision not to waive the fee.

November 4, 2010

#### **ORIGINAL SIGNED BY**

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Celia Francis  
Senior Adjudicator

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