ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 155-1997
March 18, 1997

INQUIRY RE: A decision of the Ministry of Aboriginal Affairs to deny, in part, a request for a fee waiver from an applicant seeking records related to Clayoquot Sound

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.oipcbc.org

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on January 23, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Ministry of Aboriginal Affairs (the Ministry) to deny a request from Professor Warren Magnusson of the Department of Political Science, University of Victoria (the applicant) for a full fee waiver in the public interest.

2. Documentation of the inquiry process

On August 7, 1996 the applicant requested the Ministry of Aboriginal Affairs to waive fees on his request for certain records related to Clayoquot Sound. On August 15, 1996 the Ministry responded to the applicant by waiving fifty percent of the fee.

On September 18, 1996 the applicant wrote to my Office to request a review of the decision by the Ministry to deny his request for a full fee waiver. The ninety-day period for resolving the issue ended on December 23, 1996. With the agreement of the parties, this was extended to January 23, 1997.

3. Issue under review at the inquiry

The issue in this case is whether the applicant, representing the University of Victoria, should be excused from paying all or part of the fees requested by the Ministry under section 75(5)(b) of the Act, which reads as follows:

> ***Fees***
>
> 75(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>
> ...
>
> (b) the record relates to a matter of public interest , including the environment or public health or safety.

The Ministry estimates that 17 hours of staff time will be required for the task of preparing the records for disclosure, which includes the time required to remove staples, copy pages for severing, and put the files back together so that the requested files can be made available for viewing. It has also estimated 7 hours of staff time as necessary to supervise the viewing of the records. Thus 24 hours of staff time are estimated for a total fee of $720.00. Photocopying costs are not included in this estimate, since the applicant and the Ministry agreed that the applicant would request copies of specific records after he had viewed them.

4. The burden of proof

The Act provides no specific guidance on the burden of proof to be applied in a request for a waiver of fees. However, I note that fees may be assessed by a Ministry in accordance with the Act and its regulations. To be excused from paying a fee under the Act is to receive a discretionary financial benefit; conversely, the province foregoes revenue to which it would otherwise be entitled under the Act. Thus it appears logical that the party seeking the benefit should prove its entitlement on the basis of the criteria specified in the Act. This places the burden of proof on the applicant in this inquiry. (See Order No. 90-1996, March 3, 1996, p. 3)

5. The applicant's case

The applicant points out that the "underlying issue in this case is access to information for scholarly purposes .... [I]t is one of the implicit purposes of the *Freedom of Information and Privacy Act* to facilitate legitimate scholarly research." He emphasizes that scholars "are involved in a non-profit activity, and normally cannot expect any 'return,' in a financial sense, for access to fuller and more accurate information .... Scholarly research and scholarly publications are - almost by definition - 'in the public interest,' because they are intended for the public benefit. Their purpose is to advance knowledge, not to secure commercial or partisan advantage." The applicant's access requests are being made on behalf of the academic community in general.

The applicant emphasizes that he is "a well-established and reputable scholar" at a public university in this province. The main purpose of his several access requests (only one of which is at issue in this inquiry) is "to facilitate development of a public archive of materials that would be useful not only to scholars, but also to ordinary citizens in and out of the Clayoquot Region." In his view and that of other academics, the land use disputes in and around the Sound are of great public significance for the present and the foreseeable future. Hence the need for a public research facility of the type that he and his colleagues are designing and promoting:

> The purpose of the prospective archive is to make *all* relevant materials about this matter of public interest available in a timely fashion and to ensure that these materials [are] organized and catalogued in a fashion that makes public use feasible. If, in these circumstances, scholars cannot expect a waiver of fees from the agencies concerned, it is difficult to understand when fee waivers would ever be granted to facilitate scholarly research ....
>
> Public access to information is essential for good government, and access by disinterested *scholars* is particularly important for ensuring that the quality of information available to the public is as high as possible.

6. The Ministry's case

The Ministry submits that the issue in this inquiry is whether it has complied with section 75(5)(b) of the Act with respect to the proper exercise of its discretion in declining to grant a total fee waiver to the applicant. (Submission of the Ministry, paragraph 3.01) Thus, in its view, the issue is not access to information for scholarly purposes but the appropriateness of the exercise of its discretion. (Submission of the Ministry, paragraph 5.01)

The Ministry further submits that there are two steps in making a determination under section 75(5)(b): 1) deciding whether any of the requested records relate to a matter of public interest; and 2) whether or not to waive all or part of the fee if the answer to the first question is yes. (Submission of the Ministry, paragraph 5.02) The Ministry states:

> The head of a public body is clearly not *required* to excuse all or part of a fee. Therefore, even if an applicant cannot afford to pay an estimated fee or a record relates to a matter of public interest, the head of a public body can still exercise his or her discretion to refuse to waive part or all of the fee. (Submission of the Ministry, paragraph 5.03)

The Ministry further interprets my previous Orders to mean that I will not interfere with the discretion of the head of a public body to deny a fee waiver so long as the head has exercised his or her discretion in good faith.

The Ministry concludes that "there is no reason to interfere with the Public Body's decision not to waive all of the fees in this matter." (Submission of the Ministry, paragraph 5.09; Affidavit of Gail Leatherdale, Exhibit D)

7. Discussion

I wish to state for the record that I remain a professor of history and law at the University of Western Ontario.

I accept the argument of the Ministry that the crux of this inquiry is its exercise of discretion to grant only a partial fee waiver. However, evaluating the appropriateness of such a decision is an appropriate activity for me to undertake. I have said in previous Orders that the public body has the authority to determine what, in the head's opinion, is in the public interest under section 75(5)(b), subject to my oversight of any alleged failure to act in a reasoned manner on the issue. I have the authority to monitor suspected abuses of this section, particularly under section 42(2)(c). (Order No. 55-1995, September 20, 1995, pp. 7-9) My role is to ensure that the public body has exercised its discretion under section 75(5) in an appropriate manner. (Order No. 98-1996, April 19, 1996, p. 5)

Where I have been satisfied that the discretion has been exercised properly and in good faith, I have given the public body some leeway in its judgment about public interest, and not interfered with its exercise of discretion. I have also deferred to the head's judgment on public interest where the imposed fee is relatively modest compared to the public body's estimated total costs. (Order No. 90-1996, March 8, 1996, pp. 11, 12)

The discretion of the head of the public body to grant a fee waiver is permissive and not mandatory. (Order No. 90-1996) Thus I agree with the Ministry that there are two steps involved in properly exercising discretion under section 75(5)(b). The first is for the head of the public body to form an opinion about whether all or part of the requested records relate to a matter of public interest. If they do, then the head must decide whether the applicant should be excused from paying all or part of a fee.

However, I disagree with the Ministry's narrow interpretation of the nature of the head's permissive discretion. If the head decides that the records do relate to a matter of public interest, he or she must be guided by proper considerations in deciding whether or not to grant a fee waiver. My previous Orders do not support the Ministry's argument that only an absence of good faith will justify an interference with the discretion of the head of the public body. While I endeavour to defer to the judgment of a public body, I am authorized under section 58(3)(c) of the Act to excuse or reduce a fee. I may do so in a number of instances, in addition to an absence of good faith, such as where the head has taken into account irrelevant or improper considerations or acted with a purpose contrary to the Act.

The actual exercise of a public body's discretion

In this case, the Ministry did not apply the two-step process described in its submission. In its reasons to the applicant, the head combined the issue of the public interest with the discretion to waive fees. It appears that the head was of the opinion that at least some of the records related to a matter of public interest, and she waived fifty percent of the fees on this basis.

The two-step process should be applied as follows:

1. The head must consider the records requested and decide whether, in his or her opinion, they relate to a matter of the public interest. The focus should be on the nature of the information. To give some guidance to public bodies, I suggest that the following kinds of factors should be considered:

- has the information been the subject of recent public debate?
- does the subject matter of the record relate directly to the environment, public health, or safety?
- would dissemination of the information yield a public benefit by
    - disclosing an environmental, public health, or safety concern,
    - contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or
    - assisting public understanding of an important policy, law, program, or service?
- do the records show how the public body is allocating financial or other resources?

2. If the head decides that the records do relate to a matter of public interest, then he or she must then determine whether the applicant should be excused from paying all or part of the estimated fees. The focus here should be on the applicant and the purpose for making his or her request. Factors that should be considered would include:

- is the applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public, or to serve a private interest?
- is the applicant able to disseminate the information to the public?

If the applicant's primary purpose is to serve a private interest, then the head may be justified in refusing to waive fees, even where he or she is of the opinion that the records do relate to a matter of public interest.

The factors described above are not intended to be exhaustive. I have relied to some extent on established criteria in Ontario, as set forth in the leading Ontario case on fee waivers: Information and Privacy Commissioner/Ontario, Order P-474, Ontario Hydro (Irwin Glasberg, Assistant Commissioner, June 10, 1993, pp. 1-3), taking into account the differences in the Ontario legislation. I understand that B.C. Information

Management Services has been developing criteria for waiving fees in the public interest. I encourage it to continue this process.

The Ministry's reasons for its decision

This process of evaluating the appropriateness of a fee requires detailed examination of the reasons given to the applicant by the Ministry in order to evaluate whether the Ministry did indeed make "a conscious and reflective decision" in the matter. (Submission of the Ministry, paragraph 5.09) The main evidence for this purpose is the Ministry's letter to the applicant, dated August 15, 1996, which I will now proceed to analyze in detail. (Submission of the Ministry, paragraph 5.09) The applicant himself produced a detailed refutation of the Ministry's position in this matter in his initial request to my Office for a review, dated September 18, 1996.

1. The applicant stated that he would use the requested material for a projected Clayoquot Archive Project, a projected book, a workshop, and an undergraduate course essentially on "The Politics of Clayoquot Sound." The Ministry accepted that "some portions" of the Archive are in the public interest (making records more available to residents of Victoria and Tofino and providing an index to the records on the Internet, including a World Wide Web Site), but it concluded that the rest of the projected activities "while still of interest to the public will mainly benefit the individuals and organization responsible for the events. In addition, these are revenue generating activities that we feel are subject to fees." The latter comments are relevant to the second step of the process, not to the determination of public interest in the records.

The Ministry's judgment of the applicant's research proposal as a whole appears to indicate a misunderstanding of the nature, character, and funding of academic research activities in this province. As the applicant has suggested, the notion that such activities are "revenue generating" is risible in an academic setting, where fees for participants are normally set at a level to at best recoup the expenses of particular activities such as a workshop. The revenues from writing and publishing a scholarly book in Canada are minimal. In addition, there are no revenues generated from preparing and teaching courses. Essentially, the overhead costs for all of these projected research and teaching activities are such as to render the Ministry's argument about revenue generation untenable. As the applicant specifically stated, "it is absurd to suppose that improved access to information will have any revenue-generating effects in relation to these projects." They are non-profit ventures. It is clear, on the evidence in this case, that the applicant's primary purpose in making his request is not to serve a private interest, but to respond to a public one.

2. The Ministry's second reason for refusing a full fee waiver is that "[a] great deal of information about the issue of the land use decisions in Clayoquot Sound is already public .... The information in the records requested will not raise issues which will increase public concern." Moreover, the Ministry asserts that the media have well

publicized the issues surrounding Clayoquot and that public interest has waned, since the parties involved have resolved problems.

Again, I am of the view that the Ministry has misinterpreted and misapplied the concept of public interest in this respect. I do not accept the view that anything to do with Clayoquot Sound is not a matter of considerable public interest in the broadest sense of the term, which includes the kind of academic analysis, research, and teaching that the applicant is proposing to undertake. It is self-evident from the media, even in 1997, that issues remain to be settled in this controversial domain that much affect the public interest, such as forest renewal and forestry jobs. Moreover, the kind of public attention to these issues in this decade has been primarily in the popular press and not the kind of careful social scientific analysis, after the immediate passage of events, that is ultimately required for public policy debates in this province. As the applicant argued:

> ... the records are still of interest to contemporary political analysts and historians. Part of the point of freedom of information is that it makes it easier for scholars to make sense of things that have happened recently and to publish their findings in a timely way ....
>
> It is certainly in the public interest not to repeat the mistakes of the past. But, we <u>are</u> liable to repeat those mistakes if we--the public--have no access to <u>detailed</u> information about what was done and why.

In terms of establishing the extent of public interest in the proposed Archive Project, which is at the heart of the applicant's proposal, I have examined letters submitted by the applicant from, among others, the Clayoquot Sound Central Region Board; the District of Tofino; The Friends of Clayoquot Sound; the Pacific Rim National Park Reserve, Parks Canada; Professor R. Michael M'Gonigle, Eco-Research Chair of Environmental Law and Policy, University of Victoria; and the President of the Canadian Anthropological Society (also, it should be noted, a professor at the University of Victoria). I have also benefited from a reading of a seven-page project description for the Clayoquot Archive Project. (Affidavit of Gail Leatherdale, Exhibit C)

3. The third reason given by the Ministry is that the request is broad and general, encompassing a wide range and large volume of records. The fee estimate of $720.00, while reasonably high, does not in my view reflect a request so broad as to exclude it from the public interest. This is not a proper consideration in the circumstances of this request.

4. The fourth reason concerns the Ministry's allegation that the "portion of the public that will make use of this information is limited to researchers and a small portion of people in the Tofino and Victoria areas." To quote the applicant's exact reply:

> I suppose the same would be true of the next sighting of Elvis. The fact remains that there are many people who have already indicated that they

> would value the kind of archive we are trying to develop. I might note that these people include important representatives of the First Nations.

I view the academic research community as broadly representative of the interests of the public in their teaching, research, and communication roles. Moreover, as the applicant points out, researchers and students around the world will be able to use the Internet to learn about the Clayoquot Archive project and to then make plans to acquire their own copies of relevant materials for appropriate scholarly purposes. Such activities clearly involve records in the public interest in the sense in which that term is used in the Act.

The Ministry also states that the general public is "well acquainted" with the issues of Clayoquot Sound so that release of these records will be of "lesser interest to the broad majority of the public." This statement does not reflect the nature of scholarship in any discipline. Scholarship is by definition a minority interest, but that does not mean that it is not in the public interest. The province funds colleges and universities as centres of teaching, research, and publication because it is in the public interest to do so.

5. The fifth reason advanced by the Ministry is as follows: "Although the public may be interested in how the government conducted its operations in the Clayoquot Sound area, we feel this is more an argument for the information being of interest to the public, rather than in the public interest." The applicant responded:

> As a political scientist, I find this argument a bit startling. It is always in the public interest for the public to know how the government is conducting its operations. Unless the public has this information, it cannot make informed judgments, and so it cannot hold governments to account. What is at stake is not just a matter of curiosity. The government's management of the Clayoquot Sound dispute has been a major issue in provincial politics for a number of years. The public has a right to know how and why the government made its decisions, and to form political judgments on the basis of that information. The Clayoquot Archive Project will serve these purposes.

I have already indicated my view that research and teaching of the sort contemplated by the applicant clearly concern records that relate "to a matter of public interest, including the environment," to reflect the direct language of the Act.

It is my view that in this case, the Ministry failed to properly apply its own suggested two-step process for determining public interest and exercising the discretion to waive fees under section 75(5)(b) of the Act. While I do not question its good faith, the Ministry appears to have acted with a purpose contrary to the Act, given the evidence provided by the applicant. The head failed to exercise her discretion properly under section 75(5) by misinterpreting the applicant's primary reasons for making the request

and by taking improper considerations into account in deciding whether the records relate to a matter of public interest.

During debates in the Legislature on June 23, 1992, then Attorney General Colin Gabelmann responded as follows to an Opposition question about the meaning of "public interest" in the context of a request for a fee waiver:

> The government and its agencies will develop policy and procedures in respect of this issue. If, in the commissioner's view, these policies are not appropriate, the commissioner will be able to provide advice on that and in the final analysis give direction. So it remains to be seen how this develops; there's not much more I can say than that. (British Columbia Debates, June 23, 1992, p. 2956)

In my reading of this statement, the Attorney General had a clear expectation that I might, and could, play a critical role on this matter, as I am doing in this Order. (Information and Privacy Commissoner/Ontario, Order P-474, June 10, 1993)

Section 42(2)(c): The appropriateness of a fee

The Ministry has reviewed several of my earlier decisions which set forth a standard of deference on my part to the head of a public body with respect to a fee waiver, since he or she is in possession of information and experience on the matter. (Order No. 79-1996, p. 4) I have already indicated in the preceding analysis that that is not the case in the present inquiry. I have also taken notice in other Orders of the limited circumstances (at least as set out by one party) in which a fee required under the Act may be inappropriate; these included bad faith or extraneous considerations. (Order No. 55-1995, p. 8) (Submission of the Ministry, paragraphs 5.07, 5.08) However, none of these previous decisions involved requests for the kind of information sought in this case, and none involved requests by legitimate researchers whose primary purpose is to disseminate information in a way that could reasonably be expected to benefit the public interest.

I do not hold the view that any scholarly request for access to government records necessitates a fee waiver by a public body. I am also aware of the possibility of academic applicants securing outside funding in connection with such requests for access to records from public bodies. As in the circumstances of the present inquiry, an applicant must make a reasonable and reasoned effort to demonstrate why a specific request merits a fee waiver for reasons such as the fact that, to cite the Act itself, "the record relates to a matter of public interest, including the environment or public health or safety." In this inquiry, I find that the applicant has met his burden of proof on this point. Establishing an archive is a particularly useful way to serve the public interest, since such a variety of communities, from First Nations, to local communities, and forest companies, can use it.

I would find the issue of determining the appropriateness of a fee waiver much more worthy of consideration if I had encountered any evidence to date that academics

have been abusing their access rights under the Act for research and statistical purposes. It is also hard to imagine a more timely topic for social science analysis than the politics of land use in Clayoquot Sound. It is possible that with a proper research agreement, at least some of the Ministry's costs for preparation of records, etc. could have been passed on to the applicant, who could have done most of the work for which fees have been charged.

I recognize that the criteria set out above place a substantial burden on an applicant for a fee waiver in the public interest. I do not expect such a fee waiver to be granted very often. For example, this is the first time in more than three years that I have approved the waiver of a fee under section 75(5)(b) of the Act.

8. Order

I find that the head of the Ministry of Aboriginal Affairs failed to exercise her discretion properly under section 75(5) of the Act. Under section 58(3)(c), I excuse the fee charged by the Ministry.

_____

David H. Flaherty March 18, 1997
Commissioner