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

Order 01-04

INSTITUTE OF CHARTERED ACCOUNTANTS OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
January 29, 2001

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Summary: Applicant requested records relating to revocation of his membership in the Institute of Chartered Accountants of BC. Applicant requested waiver of Institute's fee estimate, for copying, of "several hundred dollars", based on 25 cents per page. Applicant did not provide sufficient evidence to demonstrate records relate to a matter of public interest. There was also insufficient evidence to find that the applicant cannot afford the payment or to excuse payment for any other reason. No other basis was established for waiver of the fee.

Key Words: fee waiver – public interest – cannot afford – any other reason.

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

Authorities Considered: B.C.: Order No. 79-1996, [1996] B.C.I.P.C.D. No. 5; Order No. 155-1997, [1997] B.C.I.P.C.D. No. 13; Order No. 156-1997, [1997] B.C.I.P.C.D. No. 14; Order No. 293-1999, [1999] B.C.I.P.C.D. No. 6; Order No. 298-1999, [1999] B.C.I.P.C.D. No. 11; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45.

1.0 INTRODUCTION

[1] This case stems from a long-standing matter regarding a former member of the Institute of Chartered Accountants of British Columbia ("Institute"). (The Institute is the governing body in British Columbia for chartered accountants. It is a public body under the *Freedom of Information and Protection of Privacy Act* ("Act").) As part of the long-running matter just described, the applicant made a request for access to information under the Act. The Institute issued a fee estimate for "several hundred dollars", based upon a photocopying charge of 25 cents per page. The Institute has estimated that

there may be between 1,000 and 5,000 pages of responsive records. The applicant has requested a waiver of the fee, based upon his inability to pay and on the ground that the records relate to a matter of public interest.

[2] The applicant made three access requests under the Act for copies of records of a complaint against the applicant and records with respect to the conduct of five members of the Institute. These were dated September 10, 1999, October 12, 1999 and January 12, 2000. The Institute responded, on November 12, 1999, by requesting a deposit of $250. The Institute estimated that the responsive records appear to "exceed over 1000 pages" and said the "fee may be several hundred dollars", based upon 25 cents per page for photocopying.

[3] On April 12, 2000 the applicant requested a fee waiver from the Institute. The Institute does not appear to have answered that request, but has provided affidavit evidence from Brian Gardiner, its Director of Ethics, attesting to its decision not to waive the fees. On June 6, 2000 the applicant requested that the fee waiver issue be sent to inquiry, as the applicant had not received a response to his April 12, 2000 request.

2.0 ISSUE

[4] The only matter before me is the Institute's decision to refuse to waive its estimated fee for access to records responsive to the applicant's request.

[5] Consistent with previous orders, the applicant bears the burden of persuading me that the fee waiver should be granted. See, for example, Order No. 332-1999. The applicant argues that the onus should shift to the public body in this case, as "the Public Body has not acted in good faith". No evidence is offered to support this contention. In any case, I confirm that the burden of proof here lies on the applicant.

[6] Both parties have provided me with copies of records, or references to records, created during mediation by this Office. The Notice of Written Inquiry issued by this Office includes the following:

> If a party includes, without the written permission of the other party, any record generated by the Office of the Information and Privacy Commissioner during the mediation process or a record provided by any party related to the mediation process, the Office will remove that mediation record and return it to the party submitting it. It will not form part of the record of proceedings before the Commissioner in the inquiry.

[7] The Institute submitted a copy of a letter dated March 29, 2000 from one of this Office's Portfolio Officers. It also refers to communications from a Portfolio Officer. While the applicant has not objected to the inclusion of this material, I find no indication that he has consented. The applicant, for his part, refers in his submissions to statements allegedly made by the Portfolio Officer in this case. There is no evidence the Institute has consented to this. None of this mediation-related material is properly before me. I have not considered any of it in reaching my decision.

3.0 DISCUSSION

[8] **3.1 Authority to Review Fee Waiver Decisions** – Section 58(3)(c) of the Act says the Commissioner can

> … confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met.

[9] At p. 1 of its initial submission, the Institute characterizes this inquiry as being

> … limited to the question [of] whether the Commissioner should override the exercise of discretion by the Institute to determine not to grant a fee waiver to the Applicant.

[10] The Institute argues that it "appropriately considered the request for a waiver and determined, in the particular circumstances, that a fee should be levied for photocopying the requested documents." The Institute says it considered several factors to determine that the applicant requested the records to pursue a private interest, and then turned its attention to several other factors. It concluded that

> … [e]ven if [the applicant's] financial circumstances were such that he could not afford it, this would not be a case in which to waive fees, given that the only fee sought is for photocopying and the amount of the fee is very modest.

[11] The Institute says I should defer to its decision and decline to interfere with it.

[12] The applicant, by contrast, argues I should substitute my opinion for the Institute's. He alleges the Institute deprived him "of a means of livelihood by stopping me from practicing my profession" without allowing him a chance to respond to allegations against him and concludes "the Institute is in the wrong".

[13] This is not the first time a public body has argued that deference should be given to its fee waiver decision. In Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45, I reviewed previous decisions that discussed different approaches taken to the commissioner's powers to review fee waivers. The following passage appears at p. 3 (para. 9) of that decision:

> … 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 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.

[14] As *Minister of Forests* establishes, s. 58(3)(c) gives me the authority to substitute my decision for that of the public body in appropriate fee waiver cases. My role is not restricted to reviewing the public body's discretion and intervening only, as the Institute argues, where a public body has improperly exercised its discretion.

[15] **3.2 Public Interest Waiver** – The applicant's position is that, as the Institute allegedly did not act in good faith in its previous dealings with the applicant, the fee should be waived. He submitted many pages of material documenting the injustices he believes the Institute has visited on him. This material has no bearing on the issue before me, *i.e.*, the Institute's fee waiver decision under the Act.

[16] Closer to the point, the applicant argues that, since the Institute published notice of his expulsion from the Institute in newspapers, and communicated that fact to at least one other professional body, this issue is in the public domain. He says he wishes an opportunity to correct the Institute's "misinformation". The applicant also says – as I understand his argument – that, since the matter was subject to court proceedings, it is a matter related to the public interest.

[17] The Institute submits that the requested records relate to a private matter and not a matter of public interest, such that a public interest fee waiver is not in order. At p. 2 of its initial submission, the Institute lists the following factors to support its decision:

> (a) The records do not appear to relate to any matter of public interest.
>
> (b) The records in issue do not relate to any matter that is the subject of public debate, nor do they relate to matters of the environment, public health or safety.
>
> (c) There is no appreciable public benefit that would be achieved by the release of the records.
>
> (d) … [The applicant] has not articulated a coherent basis upon which to suggest that these records relate to a matter of pubic interest. In fact, the only basis upon which the fee waiver is sought to be justified is a wholly unfounded assertion that the Institute participated in or was party to a fraud perpetrated against … [the applicant].

[18] In Order No. 332-1999, I indicated that s. 75(5)(b) triggers a two-part process and, with certain qualifications, adopted the tests outlined in Order No. 155-1997, Order No. 293-1999 and Order No. 298-1999. The two-step process is summarized in the following passage, from p. 5 (para. 16) of Order No. 332-1999, which bears repeating here:

> 1. The head of the public body must examine the requested records and decide whether they relate to a matter of public interest (a matter of public interest may be an environmental or public health or safety matter, but

matters of public interest are not restricted to those kinds of matters). The following factors should be considered in making this decision:

(a) has the subject of the records been a matter of recent public debate?;

(b) does the subject of the records relate directly to the environment, public health or safety?;

(c) could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:

(i) disclosing an environmental concern or a public health or safety concern?;

(ii) contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue?; or

(iii) contributing to public understanding of, or debate on, an important policy, law, program or service?;

(d) do the records disclose how the public body is allocating financial or other resources?

2. If the head of a public body, as a result of the analysis outlined in paragraph 1, decides the records relate to a matter of public interest, the head must still decide whether the applicant should be excused from paying all or part of the estimated fee. In making this decision, the head should focus on who the applicant is and on the purpose for which the applicant made the request. The following factors should be considered in doing this:

(a) is the applicant's primary purpose for making the request to use or disseminate the information in a way that can reasonably be expected to benefit the public or is the primary purpose to serve a private interest?

(b) is the applicant able to disseminate the information to the public?

[19] First, do the records sought by the applicant relate to a matter of public interest? The applicant gives two reasons why the records relate to a matter of public interest: (1) the Institute's process in deciding to revoke his membership was flawed or "wrong", such that the Institute did not act in the public interest; and (2) the matter has been put into the public realm by the Institute and the court process. The Institute responds that the records do not relate to any matter of public debate, and do not relate to matters of the environment, public health or safety.

[20] The records in issue here relate to the complaint, investigation and hearing of a professional disciplinary matter involving the applicant. The applicant's efforts in this inquiry have been directed to demonstrating that he suffered from a miscarriage of justice in the Institute proceedings. The fact that the Institute published newspaper ads, and notified another professional body of its disciplinary action, does not make this a matter of public interest. The fact that proceedings were taken in the Supreme Court of British Columbia and Court of Appeal does not change this. Dissemination of the information in

the records could not reasonably be expected to yield a public benefit. Nor would the records disclose how the Institute is allocating its financial or other resources.

[21] There may well be cases where a particular decision-making body is proven to have engaged in behaviour of a kind that makes records relating to its conduct a matter of public interest. This is not such a case. Based upon the above discussion, I decline to find that the requested records relate to a matter of public interest for the purposes of s. 75(5) of the Act.

[22] Since I have found that the records do not relate to a matter of public interest, I do not have to decide the second step in the process, *i.e.*, whether this applicant should be excused from paying the fee. Were it necessary to do so, I would be inclined to the view that there are insufficient grounds to excuse the applicant from paying the fee.

[23] **3.3 Fee Waiver Because Applicant Cannot Afford to Pay** – The applicant further argues that the Institute took away his livelihood (by expelling him in 1992 from its membership) and thereby made him "impecunious". He says he does not have a job and is therefore unable to pay the fee. Despite this, the applicant says, at para. 13 of his reply submission, that he would pay 25 cents per page for copying some of the records. At para. 4 of his affidavit, he deposes that he has "agreed" to pay 25 cents for copying charges, but wishes to stipulate the "caveat" that copied documents, of a description he specifies, "have to be relevant to the issues in dispute" between himself and another individual.

[24] The Institute argues that, even if the applicant's financial circumstances were such that he could not afford it, this case would not be an appropriate one to waive the fees, as the "only fee sought is for photocopying and the amount of the fee is very modest". It notes that between 1,000 and 5,000 pages of records are involved here.

[25] The issue of a fee waiver on the basis of inability to pay was considered by the previous Commissioner in Order No. 156-1997. I am mindful of the fact that this section is intended to ensure that fees do not become a barrier to access, a principle that is fundamental to the Act's operation. On the other hand, the Act does not provide an unlimited right of access for someone who is not able to afford to pay (see Order No. 79-1996, at p. 4). Before I can consider this ground for a waiver of the fee, the applicant must present evidence as to his inability to pay. He has asserted that he cannot pay some of the fee, but he has not presented sufficient evidence about his financial circumstances for me to conclude that he cannot afford the fee. I note, also, that he has agreed to pay part of the fee, apparently on the basis that he can pick and choose which documents he will pay for.

[26] I conclude that the applicant has not established that part or all of the fee should be waived on the basis of his inability to pay the estimated fee.

[27] **3.4 Fee Waiver on Other Grounds** – The applicant appears to raise several other reasons to waive the fee. Section 75(5)(a) contemplates that a fee may be excused "for any other reason it is fair to excuse payment". The applicant alleges, at para. 11 of

his reply submission, that the Institute "has assisted a [third party] and has supported his malicious and false allegations against me." He also says, again, that the Institute has acted unfairly in expelling him from its membership.

[28] The Institute strongly denies all of this. It suffices to say that the applicant's underlying concerns respecting the Institute appear to have their own life in the judicial system. Any eventual resolution of the dispute lies in that forum. These allegations do not form the basis for a fee waiver under s. 75(5)(a).

4.0 CONCLUSION

[29] For the reasons given above, under s. 58(3)(c) of the Act, I confirm the decision of the head of the Institute under s. 75(5) of the Act not to waive the estimated fee in this case.

January 29, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia