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

Order 01-35

MINISTRY OF FORESTS

David Loukidelis, Information and Privacy Commissioner
July 25, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 36
Document URL: http://www.oipcbc.org/orders/Order01-35.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: Applicant requested all records relating to a forest company's proposals for construction of logging roads and cutting of timber in a specific watershed. Applicant's request was the latest in a series of over 30 requests he had made for access to records. Many of his requests sought updated disclosures of same types of records. Ministry had charged modest fees for a small number of earlier requests. Ministry refused to waive the fee for this request on the basis that the records did not relate to a matter of public interest. Although the Ministry's conclusion is incorrect, the Commissioner confirms the estimated fee on the basis of other factors.

Key Words: fee waiver – public interest – cannot afford – any other reason – dissemination of information – use of information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 58(3)(c) and 75(5)(b).

Authorities Considered: B.C.: 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; Order 01-24, [2001] B.C.I.P.C.D. No. 25. **Alberta:** Order 97-001, [1997] A.I.P.C.D. No. 5.

Cases Considered: *Minister of Forests and the Attorney General of British Columbia* v. *The Information and Privacy Commissioner of British Columbia and The Sierra Legal Defence Fund* (13 August 1999), Victoria 99-1290 (B.C.S.C.).

1.0 INTRODUCTION

[1] This inquiry has to do with logging by Slocan Forest Products Ltd. ("Slocan") in the Hasty-Vevey-Aylwin Watershed, which is located in the Ministry's Arrow Forest District. Some 40 families take water for domestic uses from various creeks in the watershed. Because watershed residents are concerned that logging in the watershed has affected, or might adversely affect, the quality of the water on which they depend, some of them have tried either to stop logging in the watershed or to ensure that any adverse effects are mitigated. They have participated in public consultation processes run by the Ministry and processes run by Slocan. The Ministry says that it has, outside the Act, disclosed ample information to residents respecting Slocan's activities and proposals. It also says that Slocan has given the residents plenty of information in those matters. The Ministry questions the relevance or utility of the records requested by the applicant as regards water quality issues in the watershed.

[2] The applicant, who is associated with the Red Mountain Residents Association ("RMRA"), has evidently been active in this matter. Since 1997, he has made roughly 33 access requests to the Ministry. The Ministry says those requests are, if not identical, more or less the same. They merely update the applicant's immediately preceding request, apparently so that the applicant has a current dossier of records at any given time.

[3] The October 10, 2000 access request that led to this inquiry was for "all documentation relating to the Hasty-Vevey-Aylwin Development Proposal from 13 June 00 to 6 Oct. 00". The following passage, taken from the request, non-exhaustively lists the various kinds of records the applicant requested:

> 1. Correspondence, meeting notes (including correspondence and meeting notes within the Arrow Forest District, with other MOF personnel, with other government agencies, and with Slocan Forest Products).
>
> 2. Field notes, field inspections (including both routine and "special"), technical reports, recommendations and discussions.
>
> 3. Forest licenses, road permits (submitted), road permits (approved), cutting permits (approved), silviculture prescriptions (submitted), silviculture prescriptions (approved), rationales for decisions, amendments/variances (submitted and approved) to any permits or prescriptions.
>
> 4. Changes to the Forest Development Plan relevant to this area.
>
> 5. Estimated and actual costs for roads and the entire construction project.
>
> 6. Budget working papers, including development packages.

[4] On October 23, 2000, the Ministry wrote to the applicant and told him that it proposed to charge a fee for his request "because the volume of records and time needed to compile the request exceeds the total chargeable threshold". The Ministry estimated the fee at $109.90. Of this amount, $44.95 was for providing copies of records and

$60.00 was for locating and retrieving records and preparing them for disclosure. The $4.95 balance consisted of shipping costs.

[5] The applicant, in a letter dated November 17, 2000, asked the Ministry for a fee waiver on the basis that the records relate to a matter of public interest. He cited the fact that the "drinking water of about 40 families is threatened by this development" and added that the

> …evidence of active public interest in this matter is voluminous, as you are well aware. I trust that you have all of the lengthy correspondence and substantial court records on file.
>
> Public interest in this development proposal has been keen for at least 15 years and is not confined to the local residents and water-users. In the last two years there have been numerous articles about this precise issue in **The Valley Voice**, **Nelson Daily News**, even **The Vancouver Sun** and **The Globe and Mail**. In addition, there have been numerous broadcasts and news releases by local radio stations and **CBC**. [original emphasis]

[6] The Ministry was not moved by this to waive or reduce the fee. On November 29, 2000, Brian Simpson, District Manager of the Ministry's Arrow Forest District, wrote to the applicant and denied the fee waiver request. In his letter, the District Manager said he would "outline" his reasons for denying the request. The second paragraph of his letter reads as follows:

> Section 75(5) of the *Freedom of Information and Protection of Privacy Act* (the Act) provides the head of a public body the discretion to excuse an applicant from paying all or part of a fee, if the applicant cannot afford the payment, or if the record relates to a matter of public interest, including the environment or public health or safety. In determining whether disclosure (without a fee) is in the public interest, I have considered such factors as whether disclosure sheds light on expenditures, whether it discloses a health, safety or environmental concern, whether it would foster accountability and transparency to the public, and how large a portion of the public will be affected or is concerned with the issue.

[7] The letter went on to acknowledge that

> … local residents and water users in the Hasty Creek area have a keen interest in knowing and providing input on forest development proposals, and in understanding whether proposed forest developments might present a risk to their domestic water supplies.

[8] The letter also referred to attempts to "share and communicate information with water users" through "meetings and field reviews with the Red Mountain Residents' Association, Forest Development Plan open houses and the Slocan Valley Sector Review process". The District Manager also noted that the Ministry had, to that date, responded to 31 access requests from the applicant and that he had only been asked to pay a fee in three of those cases.

[9] The letter expressed the view that release of the requested information would not "disclose a public health, safety or environmental concern, or foster accountability to the public". It said that the information was "of specific interest to Red Mountain residents but not necessarily to the broader public" and concluded that it was "for these reasons" that the fee waiver request was denied.

[10] In a letter to this Office dated December 6, 2000, the applicant requested a review of the Ministry's decision. Because the matter did not settle during mediation, I held a written inquiry under s. 56 of the Act.

[11] I note at this point the Ministry's objection to the applicant's quote, in para. 19 of his reply submission, of part of a letter from a Portfolio Officer in this Office. The Ministry says this is mediation material and that this Office's inquiry rules do not permit its submission to me in this inquiry. That letter related to a previous request for review, not this case. It is, in any case, not relevant to the issues before me. I have not considered it in arriving at my decision.

2.0 ISSUES

[12] The only issue in this case is whether the fee should be confirmed, reduced or excused. Earlier decisions have established that, in cases such as this, the applicant bears the burden of proof.

3.0 DISCUSSION

[13] **3.1 Commissioner's Role in Fee Waiver Reviews** – Not for the first time since my decision in Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45, it is argued that "some deference" should be given to the Ministry's decision to refuse a fee waiver. The following passage is from the Ministry's initial submission:

> 4.05 The Commissioner has stated in Order No. 332-1999 that his jurisdiction to intervene under s. 58(3)(c) is broad. ... Notwithstanding the Commissioner's above statement that he may substitute his discretion for that of the public body, the Public Body submits that the Commissioner should accord some deference to a decision of a head of a public body under Section 75(5). Under Section 75 of the Act, the capacity of the head to waive fees is permissive and not mandatory. The discretion under Section 75 is lodged solely with the head of the public body. The Public Body further submits that it is the head of a public body who will be most familiar with the contents of the records at issue and will possess expertise, knowledge, information and experience in relation to the subject matter of such records. The head of the public body will normally be in a good position to determine whether the specific records requested relate to a matter in the public interest. In this case the head's familiarity with the records requested by the Applicant is considerable, given his experience as the statutory decision-maker under the *Forest Practices Code of British Columbia* in relation to the forest development in the Hasty-Vevey Watershed.

> 4.06 The Public Body submits that the head's exercise of discretion in favour of not reducing or excusing the fee in this case was reasonable. As such, the Public Body submits that this is not an appropriate circumstance for the Commissioner to excuse or reduce the fee assessed to the Applicant.

[14] At para. 4.31 of its initial submission, the Ministry says that the

> … evidence demonstrates that the head [of the Ministry] acted in a reasoned manner, in good faith and without construing irrelevant or improper considerations in determining that the Applicant's request for a fee waiver should not be granted.

[15] It says there is no evidence that the requested records relate to a matter of public interest and that, even if they did, this is not an appropriate case for a reduction or waiver of the fee.

[16] As I indicated earlier, this is by no means the first time that a Ministry has urged me, despite the views I clearly expressed in Order No. 332-1999, to defer to a head's decision about a fee waiver. Repetition of this argument does not make it persuasive. I continue to view the commissioner's role in reviewing fee waiver requests as being of broader scope than the Ministry suggests. My predecessor held the same view – see Order No. 293-1999, [1999] B.C.I.P.C.D. No. 6, and Order No. 298-1999, [1999] B.C.I.P.C.D. No. 11.

[17] Strong support for my view is, as I noted in Order No. 332-1999, found in the judgement of Wilkinson J. in *Minister of Forests and the Attorney General of British Columbia)* v. *The Information and Privacy Commissioner of British Columbia and The Sierra Legal Defence Fund* (13 August 1999), Victoria 99-1290 (B.C.S.C.). As regards the commissioner's authority under s. 58(3)(c), Wilkinson J. did not agree that the discretion given to a head under s. 75(5) cannot be interfered with "unless abused". He noted, at para. 14, that the

> … difficulty with this argument is that it ignores a host of other provisions in the Act which indicate to me that the intent of the Legislature was to grant very wide powers of investigation, enquiry, review, and supervision over access to information from public bodies, the protection of privacy, and collateral matters such as this one.

[18] He continued by observing that the Legislature intended to create, in the office of commissioner, "a position of some power and expertise in matters under the Act" and that a "wide, general, supervisory jurisdiction was intended rather than any more traditional statutory appellate role". In this light, Wilkinson J. concluded, at para. 16, that the language of s. 58(3)(c) would not support the Ministry's argument that the Legislature intended to restrict the commissioner "to an inquiry as to whether the initial discretion was lawfully exercised or whether there was patent unreasonableness or error below." In the result, Wilkinson J. dismissed the petition, thus upholding Order No. 293-1999, [1999] B.C.I.P.C.D. No. 6.

[19] This issue is ultimately one of statutory interpretation, turning on the wording of the section and the scheme of the Act as a whole. To be clear, there is no doubt in my mind that s. 58(3)(c) gives the commissioner the authority to do what the section says – to confirm, reduce or excuse a fee "in the appropriate circumstances". I decline to interpret s. 58(3)(c) in a way that would, in my view, circumscribe the commissioner's role in a way that does not accord with the language the Legislature used in that provision.

[20] **3.2 The Approach to Public Interest Fee Waivers** – Although I have already set out the two-part test for public interest fee waivers in several cases, I will repeat it here by quoting from para. 32 of Order 01-24, [2001] B.C.I.P.C.D. No. 25:

> For convenience, I reproduce here the two-step process I set out at p. 5 of Order No. 332-1999:
>
> 1. The head of the Ministry 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 Ministry is allocating financial or other resources?
>
> 2. If the head of a Ministry, 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?

[21] The first task for a head in considering a fee waiver request, of course, is to determine whether the requested record "relates to a matter of public interest, including the environment or public health or safety". I will now address the Ministry's assessment of that question.

[22] **3.3 A Matter of Public Interest?** – As I noted earlier, the District Manager decided that the requested records did not relate to a matter of public interest. He concluded that the "information is of specific interest to Red Mountain Residents but not necessarily to the broader public" and, generally, that the matter was not one of public interest.

[23] These reasons are expanded upon in the affidavit sworn by Brian Simpson, the District Manager, for the purposes of this inquiry and at para. 4.12 of the Ministry's initial submission. According to the Ministry, Brian Simpson all along was of the view that the requested records would not disclose a health, safety or environmental concern, that the matter in question did not affect a large portion of the public, that a large portion of the public was not concerned with the matter, that the disclosure would not foster accountability and transparency to the public, and that the disclosure of the requested records would not shed light on the Ministry's expenditures.

[24] This aspect of the case, it should be said, is similar to *Minister of Forests*, above. At para. 11, Wilkinson J. noted that the Ministry's inquiry submission to my predecessor had "expanded considerably upon anything generated by it previously, both in the scope of its grounds for refusing the waiver and in the detail of its presentation". Here, the District Manager's reasons for refusing to waive the fee have also been expanded upon in its materials in this inquiry. I encourage public bodies to give as detailed reasons as possible in their fee waiver decision letters. Doing so may, in some cases, reduce the chances of a request for review.

[25] Returning to the merits, aspects of the Ministry's arguments appear to assume that the records must relate to an "environmental concern" before they "relate to a matter of public interest". The Ministry says that in the roughly one year before the date of this inquiry, during which Slocan had been operating in the area, the Ministry had seen "no evidence of any degradation in the water quality or any interruptions in water flow". In para. 4.15 of the Ministry's initial submission, the Ministry says that:

> It has no doubt that if the forestry operation in the area had resulted in a degradation of the water quality (other than normal seasonal fluctuations) the District Manager or his staff would have been advised accordingly by water users. They have, however, not been so advised.

[26] The Ministry apparently concludes that, because it is not aware of any water quality degradation or other environmental impact from Slocan's operations, the requested records do not relate to a matter of public interest, since they do not relate to or disclose an environmental concern.

[27] I have some difficulty with this. The language of s. 75(5)(b) does not require requested records to relate to a matter of environmental "concern". Paragraph 1(c)(i) of the two-part test offered above refers to an "environmental concern" as *one* factor that should be considered in deciding whether requested records relate to, as the introductory part of paragraph one says, an environmental matter. As the two-part test makes clear, nothing in s. 75(5)(b) requires there to be a "concern" for a record to relate to "the environment". Paragraph 1(b) of the above two-part test confirms this – a record need only relate (directly) to "the environment". This is consistent with the language of s. 75(5)(b).

[28] Further, at para. 8 of its reply submission, the Ministry argues that "it is not enough for records to relate to the environment in order to warrant a fee waiver". It argues that an applicant "must still demonstrate that the records requested relate to a matter of public interest" and says the applicant has failed to do so. The Ministry relies on Alberta Order 97-001, [1997] A.I.P.C.D. No. 5, in support of this argument. I do not, for the following reasons, agree with the Ministry's position.

[29] In referring to a "matter of public interest, including the environment or public health or safety", the Legislature specified "the environment" and "public health or safety" as two non-exhaustive examples of matters that are of public interest. Nothing in s. 75(5)(b) requires an applicant to also show that a record that relates to the environment also relates to a matter of public interest. A record that relates to "the environment" by definition relates to a matter of public interest.

[30] I am not suggesting that the Legislature intended the words "the environment" to mean anything that, in some way – however tangentially or indirectly – has to do with the environment. For example, a record of raw weather observation data for a specific location in the province over the last 10 years is unlikely, without more, to qualify as a record relating to "the environment" in the sense intended by s. 75(5)(b). The Legislature intended "the environment" to mean, I conclude, something that relates to the quality, health, protection, degradation or preservation of the environment. It follows that a record will relate to the environment if it relates, at the very least, to the quality, health, protection, degradation or preservation of the environment.

[31] Accordingly, regardless of whether the Ministry is aware of any degradation in water quality (or other environmental effects) from Slocan's operations, I am satisfied that the requested records relate to "the environment". They clearly relate to Slocan's proposed and actual operations in the watershed and to the Ministry's planning and regulatory activities in relation to Slocan's plans and operations.

[32] This is tacitly acknowledged in Brian Simpson's affidavit. At para. 10, he acknowledged that the records would be of interest to the applicant and the RMRA, but said he could not see how access to the records "could benefit the broader public." The applicant's and the RMRA's concerns undoubtedly have to do with the environmental issue of water quality in the watershed. Despite Brian Simpson's views about benefit to the "broader public", as opposed to merely local benefit, I infer from his affidavit that he agrees the records relate to water quality. The applicant's submissions also support the

conclusion that the records relate to the environment. There is, in my view, a sufficient connection between the requested records and the health, protection or preservation of the environment in the watershed for me to conclude that the records relate to the environment within the meaning of s. 75(5)(b). The first part of the two-part analysis under that section is satisfied.

[33] I also conclude that the records relate to public health or safety, since the domestic water supplies for approximately 40 households are involved. As is the case with records relating to "the environment", records relating to "public health or safety" relate to the public interest. There is no need to show that records are related to public health or safety and that they relate to the public interest. In arguing that the records do not relate to a matter of public interest, the Ministry notes that only 40 households are involved. First, the Ministry's position implicitly acknowledges that the records relate to a matter of health or safety, although the Ministry denies there is any evidence of water quality degradation. Second, the main thrust of the Ministry's position is to suggest that a line must be drawn somewhere – the Ministry does not say how or where – between larger and smaller communities. This suggests that the involvement of larger communities of some undefined size in water quality concerns would qualify, but that a grouping of only 40 households is not large enough. Would 41 households make the grade? Or would it have to be 60, 80 or 100?

[34] Nothing before me suggests that the records relate to a matter of merely private interest. I have no hesitation in concluding that the roughly 40 households located in the watershed qualify as the "public". There is a sufficient connection between the requested records and the health of that segment of the public, since the records relate to, among other things, the quality of water in the watershed and that segment of the public uses that water for domestic purposes. The records are therefore related to public health or safety within the meaning of s. 75(5)(b) and on that added ground satisfies the first part of the two-part analysis under that section.

[35] In addition to the above reasons for concluding that the first part of the test is met, I am satisfied that these records relate to a matter of "public interest" generally. In its initial fee waiver refusal, and in this inquiry, the Ministry has taken the position that this is not a matter of public interest because only a small population is affected. I have already rejected the contention that the "public" is not involved. I have no hesitation in concluding that the records relate to a matter that is of intense, indeed critical, interest to that portion of the public.

[36] There is also evidence before me that, although only one watershed is involved, the matter is of interest to a broader public, as regards logging and water quality issues generally. The applicant has submitted copies of many articles from newspapers that have regional and province-wide circulation. He has noted the involvement of the provincial Ombudsman in the matter and the fact that various court proceedings have been triggered over logging in the watershed. It appears the Forest Practices Board of British Columbia, an independent regulatory agency, has also been involved. The applicant also notes that a 1998-1999 report by the Auditor General of British Columbia, *Protecting Drinking-Water Sources*, estimates (at p. 115) that approximately one out of

seven British Columbians takes her or his drinking water from small systems, including single-household systems. Of these, 60% use surface water sources. He argues, in effect, that what happens in this watershed has been, and continues to be, a matter of public interest because it can demonstrate what will or may happen to surface water quality when logging is carried on without proper safeguards.

[37] I am satisfied that, in this case at least, what happens or does not happen to water quality in this particular watershed is a matter of public interest for the purposes of s. 75(5)(b). I am also satisfied that the requested records relate to that matter of public interest. It should be said that not every watershed issue of this, or similar kinds, will qualify as a matter of public interest. Without in any way comparing the two cases directly, I am of the view that, just as what happened in Walkerton, Ontario, is a matter of national public interest, the almost test-case quality of the situation in the Hasty-Vevey-Aylwin Watershed makes it a matter of public interest in the province.

[38] For the reasons given above, I conclude that the requested records relate to a matter of public interest, to the environment and to public health or safety for the purposes of the first part of the two-part s. 75(5)(b) test.

[39] **3.4 Should the Fee Be Waived?** – In light of my authority under s. 58(3)(c) to confirm, excuse or reduce a fee "in the appropriate circumstances", my view of the first part of the test does not dispose of the matter. It is still open to me to reduce or excuse the fee or to confirm it. This requires me to address the second part of the test.

[40] As I said earlier, the head's reasons for denying the fee waiver appear to be directed almost entirely to the first stage of the two-part test under s. 75(5)(b). Having said that, some of the head's reasons do touch on the second step, *i.e.*, the head's exercise of discretion. In this inquiry, certainly, the Ministry has buttressed its original decision by arguing that, even if the requested records do relate to a matter of public interest, the circumstances are not appropriate for a fee reduction or waiver. The Ministry's arguments on this point can be summarized as follows:

1. The estimated fee is "minimal and reasonable" (para. 4.19, initial submission) and there is no evidence that the fee would constitute a barrier to access to information;

2. On the authority of Order 156-1997, the Ministry is, because the applicant is a "frequent user" of the Act, entitled to take into account its "prior accumulated expenditures" in assisting the applicant (para 4.20, initial submission). The applicant is, the Ministry says, a frequent user, because he has submitted 33 access requests to the Ministry since August of 1997;

3. The Ministry has expended "significant resources" in making records available to the applicant and has only sought to recover fees from the applicant in four cases. Because of the considerable resources it has devoted to responding to the applicant's requests for free, the fee estimated in this case is "not inappropriate or unreasonable" (para. 4.21, initial submission); and

4. Relying on my decision in Order No. 332-1999, the Ministry says that the public availability of information relating to this matter is relevant. It argues that a relevant factor is the extent to which the goal of accountability "has been previously fostered through the use of public consultation processes", (para. 4.22, initial submission). It says that it "already makes a considerable amount of information about forestry operations in the Arrow Forest District available through its consultation processes" and its website, (para. 4.22, initial submission). The Ministry says it routinely makes available technical information relating to water, including hydrologic assessments. This is done through the Ministry's Forest Development Planning process. It claims that both the applicant and the RMRA "have refused to make use of this routine process for accessing information", (para. 4.23, initial submission). The Ministry says a Slocan Valley Sector Review process has been established and gives an opportunity for the public to review and comment on more detailed operational matters before any development proposals are approved by the District Manager, (para. 4.25, initial submission). It also notes that, under the s. 27 of the Operational Planning Regulation, B.C. Reg. 107/98, made under the *Forest Practices Code of British Columbia Act*, licensees are required to advertise their forest development plans and to give the public 60 days to review and comment on those plans, (para. 4.26, initial submission). The Ministry says, relying on Brian Simpson's affidavit, that Slocan has attempted to work with individual water licensees and the RMRA, by "providing those technical reports and opportunities for viewing at their office, distributing reports and maps upon request, and conducting a field review with concerned water users", (para. 4.27, initial submission). The Ministry also says its District Manager has made technical information available to the applicant, at least by giving him the opportunity to view documents free of charge, (para. 4.28, initial submission). Last, the Ministry says it has "offered" water users the opportunity to accompany its inspectors on weekly inspections of forest development activities in the watershed, (para. 4.29, initial submission).

[41] The applicant replies that information routinely made available to water-users is "insufficient", (para. 22, reply submission). He says that planning inadequacies and inconsistencies are often revealed in documents "not normally made available to the public" through such processes. He argues that correspondence, field notes and meeting notes are "especially useful in determining to what extent water and environmental interests are being looked after". These records, he says, "allow residents to hear dissenting voices in discussions of watershed planning", (para. 23, reply submission).

[42] He also strongly rejects the Ministry's claim that watershed residents have not participated in the Forest Development Plan processes described above. He admits, however, that the Slocan Valley Sector Review process is, in the eyes of water-users, "similar to the 'review' procedure of the Forest Development Plan, 'open house'", (para. 30, reply submission). He says that water-users "maintain that true consultation should be a form of participation in decision making, not mere notification that a decision has been made, or is going to be made", (para. 30, reply submission). He also argues, at para. 31 of his reply submission, that the Slocan Valley Sector Review process is "defunct" and has been "abandoned by the Ministry", (para. 31, reply submission).

[43] As for the Ministry's claim that it has distributed maps upon request, he says that the Ministry recently refused to provide colour copies of maps, which meant that it was "impossible" to understand the Forest Development Plan. Black and white copies do not, it appears, suffice.

[44] In Order No. 155-1997, my predecessor made it very clear that in expressing the two criteria set out above, in the second part of the two-part test, he did not intend to exhaust the factors a head could or should consider in exercising his or her discretion to waive a fee. He confirmed this view in other decisions, where he added to the factors that could be considered in deciding whether or not to waive a fee. For example, I have already referred to Order No. 156-1997, where the applicant had been a frequent user of the Act and had previously been given considerable numbers of records for free.

[45] There is no doubt in my mind that the discretion conferred on a head in s. 75(5)(b) is not limited to the two factors set out above in the second part of the test. In Order No. 332-1999, for example, I added to that list. I said that a head should also consider whether the applicant's primary purpose is to use or disseminate the information in a way that can reasonably be expected to benefit a public interest.

[46] Although the list of factors will never be exhaustive, I consider that the following criteria may, in addition to those described or referred to above, be relevant to a head's exercise of discretion:

1. As expressly contemplated by s. 58(3)(c) of the Act, whether "a time limit is not met" by the public body in responding to the request;

2. The manner in which the public body attempted to respond to the request (including in light of the public body's duties under s. 6 of the Act);

3. Did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested during the processing of the access request, including by narrowing or clarifying the access request where it was reasonable to do so?;

4. Has the applicant unreasonably rejected a proposal by the public body that would reduce the costs of responding to the access request? It will almost certainly be reasonable for an applicant to reject such a proposal if it would materially affect the completeness or quality of the public body's response;

5. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?

[47] I have concluded that, although the requested records relate to matters of public interest under s. 75(5)(b), the "appropriate circumstances" exist for me to confirm the fee

estimate given by the Ministry and to require the applicant to pay the $109.90 fee. This conclusion is based on the following considerations:

- Despite the applicant's allegations about the inadequacy and lack of genuineness of other avenues for access to information that exist, it is clear that considerable opportunities have been offered in the past, and continue to exist, for the applicant, the RMRA and other residents to have access to relevant information. I refer here to the Forest Development Plan and Slocan Valley Sector Review processes, as well as to voluntary, informal initiatives by the Ministry. Among other things, a good deal of relevant technical and background information is, commendably, available through the Ministry's website;

- The applicant has made numerous access requests to the Ministry for access to more or less the same records, with his requests essentially being aimed at updates of previous requests. The Ministry has charged modest fees on a few previous occasions, but to date has generally given the applicant information for free; and

- The Ministry has, I am satisfied, devoted considerable resources to providing records to the applicant without, on the vast majority of occasions, charging him any fee.

[48] I should note that the applicant suggests that he has extremely limited finances. He did not ask for a fee waiver on the basis that he could not afford to pay the fee. The Ministry has based its decision, as the applicant asked it to do in the first place, only on s. 75(5)(b). I therefore do not propose to deal with this case under s. 75(5)(a).

[49] The Act's access to information (and privacy protection) provisions represent the floor, not the ceiling. They are the minimum legal requirements laid down by the Legislature. The legislative goal of accountability to the public that is articulated in s. 2(1) of the Act is an important public policy. It is better served – and achieved more cost-effectively – if the reactive process of responding to access requests is the exception and broad, routine disclosure without request is the norm. This is an approach that I continue to urge all public bodies to take.

[50] The Ministry's attempts to routinely make information available to the applicant and other members of the public are commendable. As regards the applicant's requests for successive, updated disclosures of the same kinds of records, I strongly recommend that the Ministry create and maintain a copy file for such records. At the time they are created, field notes, meeting notes and other records periodically requested by the applicant could be copied before they are filed. The copies would be placed in the copy file. The applicant and others could then inspect and copy the copied records. If access requests were made under the Act instead, the Ministry would almost certainly be able to respond more cost-effectively. In this respect, I note that over half of the estimated fee in this case was for locating, retrieving and preparing records for disclosure. The approach just described would, one would anticipate, reduce the efforts required to respond to the requests. This should, one would expect, substantially reduce any future fees the

Ministry might otherwise seek to levy for locating, retrieving and preparing records for disclosure.

4.0 CONCLUSION

[51] For the above reasons, under s. 58(3)(c) of the Act, I confirm the fee estimated by the Ministry.

July 25, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia