Order 02-15

DISTRICT OF SQUAMISH

David Loukidelis, Information and Privacy Commissioner
March 15, 2002

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Summary: Applicant requested a refund of fees paid for records. Applicant did not provide sufficient evidence to demonstrate records relate to a matter of public interest or environmental concerns. No other basis was established for the refund of the fee.

Key Words: fee waiver – public interest – environmental reasons.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 75.

Authorities Considered: B.C.: Order No. 155-1997, [1997] B.C.I.P.C.D. No. 13; 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 332-1999, [1999] B.C.I.P.C.D. No. 45; Order 01-04, [2001] B.C.I.P.C.D. No. 4; Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order 01-35, [2001] B.C.I.P.C.D. No. 36.

INTRODUCTION

[1] This order results from the inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act") that Lorrainne Dixon conducted under the authority I delegated to her, on August 27, 2001, under s. 49(1) of the Act.

[2] Lorrainne Dixon conducted the inquiry delegated to her and prepared a report, dated March 14, 2002, of her findings and her recommendation for an order under s. 58 of the Act. A copy of that report is appended to this order. I have read her report and make this order on the basis of, and without variation from, the findings and recommendation in that report.

2.0 CONCLUSION

[3] As recommended by Lorrainne Dixon, by order under s. 58(3)(c) of the Act, I confirm the fee estimated by the head of the District of Squamish and the decision to refuse the applicant a refund of the fee.

March 15, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 02-15

**INQUIRY REGARDING THE REQUEST FOR REVIEW
BETWEEN AN APPLICANT AND THE DISTRICT OF SQUAMISH**

***REPORT OF THE DELEGATE
OF THE INFORMATION AND PRIVACY COMMISSIONER***

As permitted by section 49 of the *Freedom of Information and Protection of Privacy Act* ("Act"), the Commissioner delegated to me the power, duties and functions necessary to deal with this inquiry (other than the power to make an order under s. 58 of the Act) on August 27, 2001.

I have concluded the inquiry and am reporting my findings, reasons and recommendation to the Commissioner in this report.

1.0 INTRODUCTION

[1] This is an inquiry under the Act to determine whether the District of Squamish ("the District") should have waived its fee for locating, retrieving, preparing, copying and handling records. The District is a municipality incorporated pursuant to the *Local Government Act* and is a public body for the purposes of the Act.

[2] The applicant has made several requests for information to the District. The requests are part of a series of concerns regarding the issuance of building approvals in the applicant's neighbourhood going back to 1997. In March 2000, the applicant made a series of requests to the District for records of:

- "a schedule "B" exemption",
- any Board of Variance papers,
- the survey of non-encroachment for a sundeck and house at a particular address,
- building plans for a sundeck,
- correspondence with the Department of Fisheries and Ministry of Environment regarding the sundeck's approval,
- building plans, survey of non-encroachment and Board of Variance papers of a further 15 decks allowed by the District,
- original house plans and building permits for a particular address,
- Board of Variance minutes,

- any Department of Fisheries and Ministry of Environment correspondence relating to that address, and
- building plans, building permit, survey of encroachment, Board of Variance minutes, Department of Fisheries and Ministry of Environment correspondence for another particular address.

[3] In May 2000, the District informed the applicant that it considered the various requests for records as one request, and that the fee for access to the fifty-four pages of records was $209.45. The applicant paid the fee in full.

[4] The applicant wrote to this office asking for a review of the District's processing of his request and requesting a refund of the fee that he paid for the records.

[5] During mediation the District agreed to review their assessment of the fee. The District stated that they found no reason to excuse the fee due to affordability, public interest or any other reason.

2.0 ISSUES

[6] The matter before me is the District's decision to charge a fee and its refusal to refund its fee for access to records responsive to the applicant's request. The applicant considers the information to be in the public interest, and believes that the fee should have been waived or refunded.

[7] In previous orders the Commissioner has held that the applicant bears the burden of persuading him that a fee waiver should be granted. See for example, Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45, and Order 01-04, [2001] B.C.I.P.C.D. No. 4. In this case, the fee had already been paid and the Applicant was requesting a refund. The Notice of Inquiry states that s. 57 of the Act is silent with respect to a request for a review of a public body's decision to levy a fee, which was subsequently paid, and for which a refund is being requested. The Notice of Inquiry further stated that submissions were invited from both parties as to who should bear the burden of proof. I note that the District argued only that, as established in previous fee waiver cases, the applicant had the burden of proof. The applicant did not argue this issue. In order to be consistent with the earlier orders, I find that the burden of proof is correctly on the applicant in the case where a fee has been levied and paid and a refund is requested.

[8] The District raised a procedural objection that the applicant carried the burden of proof and was required to discharge that burden of proof in his initial submissions. The District submitted that the applicant's reply materials and evidence should only be considered to the extent that they are relevant to rebutting the initial submissions of the District. They argued they should be inadmissible to discharge the applicant's initial burden of proof in this case.

[9] Even though I find that generally the burden of proof is on the applicant in this type of case, in this particular case it was not clearly stated in the Notice of Inquiry that

the applicant would bear the burden. Therefore, it would not be fair or appropriate to penalize the applicant and say that only his initial submissions can be used to discharge the burden of proof. I have read all of his submissions with a view to his bearing the burden of proof, and have accepted the "reply" submission as well as the "initial" submission to this end. Having said this, I can also add that even reading both initial and reply submissions of the applicant, I do not find that he has discharged the burden of proof, for the reasons given below.

[10] The public body raised other objections. First, it stated that much of the applicant's reply argument and evidence is irrelevant to the issues in the inquiry. Both parties to the inquiry submitted information about the applicant's complaint to the Ombudsman's Office. I do not find that material from either party relevant to the issues at hand.

[11] I have also not relied on the applicant's sur-reply, and do not need to hear from the District in this respect.

3.0 DISCUSSION

[12] **3.1 Authority to Review Fee 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.

[13] The public body argues that the fee it has charged is appropriate and reasonable. It argues that pursuant to s. 75 of the Act, the head of a public body may require an applicant to pay fees for the locating, retrieving and producing of a record, preparing the record for disclosure, shipping and handling the record, and finally providing a copy of the record. Those fees cannot include the first three hours spent locating and retrieving a record or time spent severing information from a record.

[14] Trudy Coates swears in her affidavit that the fee was calculated at $209.45. This was calculated pursuant to s. 75 of the Act and the District of Squamish Freedom of Information and Protection of Privacy Bylaw No. 1327, 1993. The fee was for 6½ hours of the more than 10 hours of staff time locating, retrieving and preparing the records for disclosure, and photocopying costs of 54 pages at $.25 per page. The fee estimate did not include her time, or that of other staff. It also did not include the first three hours of time spent locating and retrieving the documents (affidavit of Trudy Coates, sworn and dated July 25, 2001 para. 17).

[15] Further to the power to require payment of a fee, s. 75(5)(b) also provides that 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."

[16] This provision gives a discretion to the head to determine whether or not a fee should be waived in any particular case on the basis of public interest. However, the

Commissioner also has a wide discretion to review the fees imposed and to "confirm, excuse or reduce a fee, or order a refund in the appropriate circumstances" under s. 58(3)(c) of the Act. See Order 01-35, [2001] B.C.I.P.C.D. No. 36, for example.

[19] **3.2 Public Interest Waiver** – In Order No. 332-1999, the Commissioner indicated that s. 75(5)(b) triggers a two-part process and, with certain qualifications, he adopted the tests outlined in Order No. 155-1997, [1997] B.C.I.P.C.D. No. 13, 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. The two-step process is summarized in the following passage from para. 16 of Order No. 332-1999:

> 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?;
>
> (iv) 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] As the Commissioner emphasized in Order 01-24, [20001] B.C.I.P.C.D. No. 25, at para. 33, references in this passage to the environment and public health or safety "do not exhaust the scope of what may be a matter of public interest." In addition, see Order 01-35.

[20] First, do the records received by the applicant relate to a matter of public interest? The applicant argues that he gathered the information regarding these properties to let the public know how Bylaw 4.20 ("Watercourse Setback) was being enforced. His argument involves alleged impropriety by the District in awarding building permits for decks and hot tubs that do not enforce the setbacks stated in the Bylaw. He argues for a fee refund on the basis of the "environment". He states that he gathered the information regarding these 16 properties in order to let the public know about the lack of bylaw enforcement by the District. He states that he did so in a public meeting with the District twice. He also states that he is a member of the "Streamkeepers Club" in Squamish. He states that the building of decks and hot tubs beside creeks has been discussed as having a negative impact on the environment and the fish habitat in the streams.

[21] The District argues that the subject of the records has not been the matter of recent public debate, and therefore does not meet the criteria set out in para. 1(a) of the test. It goes on to state that there were 47 documents identified as responsive to the request, and 46 of those documents fall into one of the following categories: building permits, building permit applications, building plans and Board of Variance minutes. These documents do not mention any environmental concerns, and an objective observer would not draw from them any conclusions with respect to their impact on environmental issues.

[22] One record, from the Ministry of Environment, also does not disclose, the District says, any environmental concerns with respect to the one property that it considers. The District concludes that none of the records relates directly to the environment, public health or public safety under para. 1(b) of the test. It further argues that dissemination or use of the information in these records could not reasonably be expected to yield a public benefit under para. 1(c) because the records do not disclose any environmental, public health or safety concerns. They also do not contribute to the development of public understanding of these issues, or contribute to public understanding of important policy, law, programs or services. Finally, the District argues, the records do not disclose how the public body is allocating financial or other resources (paras. 34-39, initial submission of the District).

[23] I accept the District's arguments that the records do not relate directly to a matter of public interest. While I agree with the applicant that building too close to stream setbacks could be a topic of public interest, I find nothing in these particular records that meets the test set out by the Commissioner.

[24] I also find that the applicant provided no evidence that the subject matter of the records has been the subject matter of recent public debate or that the records relate directly to an environmental or other public concern. The applicant did not establish that

the primary purpose of the request was for a public, and not a private, interest. The applicant also did not show that he has the means to disseminate the records to the public in a meaningful way. The applicant made no direct reference to the content of any of the records in the submissions nor were there any links made as to how the records themselves actually support his arguments about environmental risks. Having reviewed the records, I conclude they do not, on their face, contain any evidence with respect to either environmental damage or improper activity.

[25] I find that the actual records do not relate to a matter of public interest. I recommend that the fee not be refunded to the applicant by the District.

4.0 CONCLUSION

[26] For the reasons given above, I recommend to the Commissioner that under s. 58(3)(c) of the Act he confirm the decision of the head of the District under s. 75(5) of the Act not to refund the fee in this case.

March 14, 2002

ORIGINAL SIGNED BY

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Lorrainne A. Dixon
Executive Director