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

Order 03-20

MINISTRY OF FORESTS

David Loukidelis, Information and Privacy Commissioner
May 13, 2003

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Summary: The Ministry initially attempted to charge Sierra fees for creating records on the basis that the Act did not apply. Sierra paid the Ministry's estimated fee under protest and requested a public interest fee waiver under s. 75(5)(b) of the Act. The Ministry conceded that the two parts of the public interest fee waiver test have been met, but argued that a partial or full fee waiver would shift an unreasonable cost burden to it. The Ministry has not provided evidence to support its assertion that a waiver of any degree would shift an unreasonable cost burden to it. The fee is excused completely and the Ministry must refund the fee.

Key Words: fee waiver – public interest – unreasonable cost burden.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 75(1), 75(5)(b); *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93, Schedule of Maximum Fees.

Authorities Considered: B.C.: Order 02-43, [2002] B.C.I.P.C.D. No. 43.

1.0 INTRODUCTION

[1] On February 21, 2002, the Sierra Legal Defence Fund ("Sierra") made the following request to the Ministry of Forests ("Ministry"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for access to records:

> As discussed on the phone today, I am requesting updates to an existing database in the same format provided in the past to Bruce Bressette. The time period would be from the third billing quarter of 2000 to present, inclusive, for TFL's, FL's, Small business and woodlots. We are using Microsoft Access 97 – if you email the zipped data in that format I would be most grateful.

[2] On March 1, 2002, the Ministry responded as follows:

> Thank you for your email of February 22, 2002, requesting updates for billing and harvesting data for the six quarters: 2000 quarter 3, through 2001 quarter 4. Please note that 2001 quarter 4 data is not releasable until February 28, 2002. As discussed on the telephone, your request will be processed after February 28, 2002. As requested, the updates will be sent in the same format as previous requests made by Bruce Bressette, and sent to your e-mail address at: … .

[3] The March 1, 2002 response stated a "fee" – which the response later described as an "estimate" – of $2,471.70, and set out a table that broke the fee estimate down. The estimate included $1,500 for "machine charges", $810.00 for 27.5 hours of "analyst time", and $161.70 for goods and services tax.

[4] This prompted Sierra to request, on April 26, 2002, a fee waiver under s. 75(5) of the Act. Sierra's request referred to the two-step approach to public interest fee waivers established in decisions regarding s. 75(5)(b) of the Act and explained why it believed a fee waiver was warranted. In a separate April 26, 2002 letter to the Ministry, Sierra paid the $2,471.70 fee under protest, saying "such data should be made available to the public without cost."

[5] The Ministry responded to the fee waiver request on May 10, 2002, but for the first time took the position that the Act did not apply to the records Sierra had requested. In doing so, the Ministry referred to ss. 2(2) and 71 of the Act. (Section 2(2) of the Act says the Act does not replace other procedures for access to information, while s. 71 authorizes the head of a public body to prescribe "categories of records" that are "available to the public, on demand, without a request for access under this Act.") The Ministry said the requested records were "routinely releasable" and that its policy was to charge fees for "all such requests."

[6] On June 7, 2002, Sierra requested a review, under Part 5 of the Act, of the Ministry's decision. The Portfolio Officer's Fact Report in this inquiry confirms that, during mediation, the Ministry abandoned its position that the Act does not apply. In a January 21, 2003 letter to Sierra, the Ministry denied Sierra's fee waiver request. The Ministry's decision acknowledged the factors relevant to fee waiver decisions and went on to say the following:

> On the first step in the process the Ministry agrees that stumpage rates charged by the Ministry are a matter of public interest. On the second step in the process the Ministry is satisfied that the purpose of the SLDF's request is to disseminate information to contribute to the discussion regarding stumpage rates, and that the SLDF has the capacity to disseminate the information.
>
> However, noting that the Information and Privacy Commissioner in Order No. 154-1997 also said that the factors are not intended to be exhaustive, the Ministry has considered some additional factors which lead to the refusal to excuse the SLDF from paying the fee, as follows.

> First, it is our view that excusing the SLDF from paying the fee on the basis of the two-part process would create unfairness in the administration of the *Freedom of Information and Protection of Privacy Act*. An individual with the exact same request as the SLDF would be charged the fee because the individual does not have the capacity to disseminate the information to the public. Thus, large, well-financed organizations would be excused from paying the fee, while others would pay.
>
> Second, the Ministry has considered the nature of your request. You have not requested copies of existing documents. Rather, you have asked that we use our computers to create a database for all stumpage rates in the Province for the last 3 months of 2000, and all 12 months of 2001, and provide you with that electronically. Therefore, your request is more in the nature of a request for service than a request to disclose documents.
>
> The Ministry needs to balance the broad purposes of the Act with the responsibilities to utilize public resources effectively and efficiently. In the case of your request, it is not felt that this fee is a barrier, but instead an offset to recover some of the costs to the taxpayer of satisfying your request.

[7] Because the matter did not settle in mediation by this office, a written inquiry was held under Part 5 of the Act.

2.0 ISSUE

[8] The only issue here is whether the estimated fee that Sierra has paid under protest should be reduced in whole or in part under s. 75(5)(b) of the Act. Sierra accepts that, as previous decisions confirm, it bears the burden of establishing that a partial or complete fee waiver is warranted.

[9] The Notice of Written Inquiry issued by this office says the issue in this case is a consideration of the Ministry's "decision to deny a fee waiver requested by the applicant." The Portfolio Officer's Fact Report states the issue as being a "review [of] the application of the Act to the SLDF's request for a waiver of fees." At para. 2.04 of its initial submission, the Ministry says the "matter under review in the inquiry, as stated in the Notice, is narrower" than the issue as stated in the Portfolio Officer's Fact Report. The Ministry says that it accepts the version in the Notice of Written Inquiry "as defining the scope of the inquiry." The issue as I have stated it above does not differ from the issue stated in the Notice of Written Inquiry.

3.0 DISCUSSION

[10] **3.1 Applicable Principles** – The principles to be applied in public interest fee waiver cases have been stated on a number of occasions. I have applied here, without repetition, the approach taken in Order 02-43, [2002] B.C.I.P.C.D. No. 43, to public interest fee waivers.

[11] **3.2 Is a Fee Waiver Warranted?** – As it did in its January 21, 2003 fee waiver decision, the Ministry concedes, at para. 5.10 of its initial submission, that the requested records relate to a matter of public interest, as contemplated by the first part of the above-stated s. 75(5)(b) analysis. Also consistent with its decision, the Ministry concedes, at para. 5.13 of its initial submission, that both factors set out in the second stage of that analysis have been met. The Ministry nonetheless argues that a fee waiver is not justified, referring to Order 01-35, [2001] B.C.I.P.C.D. No. 36.

Would a fee waiver create unfairness in the Act's administration?

[12] The first ground stated in the Ministry's January 21, 2003 decision letter denying the requested fee waiver is that reduction of the fee would, as the Ministry now puts it, "amount to an unfair administration of the Act", since organizations such as Sierra "would generally not have to pay, whereas individual applicants generally would have to pay, for the same records" (para. 5.17, initial submission).

[13] The Ministry's position necessarily assumes – clearly incorrectly – that individuals do not have the capacity to disseminate information to the public, meaning they cannot be eligible for a fee waiver under s. 75(5)(b) on the basis of the above-quoted test. The Ministry then says that organizations such as Sierra, which are able to pay a fee, should be denied fee waivers because to grant them would treat individuals – who cannot get such waivers – unfairly. By this reasoning, individual applicants would be denied fee waivers on (supposedly) the merits and organizations that are able to pay fees would be denied waivers in the interests of some generalized concern for fairness. The difficulty with this position is that it logically would result in fee waivers never being granted, which would render s. 75(5)(b) of the Act a dead letter, ostensibly in the interests of fairness. There is no basis in the Act for the Ministry's submission.

A request for services or for records?

[14] The Ministry's January 21, 2003 refusal of the requested waiver set out the following second ground for refusing the requested waiver:

> Second, the Ministry has considered the nature of your request. You have not requested copies of existing documents. Rather, you have asked that we use our computers to create a database for all stumpage rates in the Province for the last 3 months of 2000, and all 12 months of 2001, and provide you with that electronically. Therefore, your request is more in the nature of a request for service than a request to disclose documents.

[15] The Ministry continues to argue here that Sierra's request was "really more in the nature of a request for service than a request for access to records" (para 5.19, initial submission). The Ministry says the following at para. 2.09 of its reply submission:

> It was not the fact that the records were requested in electronic form that led the Ministry to deny the Applicant's fee waiver request. That fact, *per se*, was not a factor considered by the Ministry. What was considered by the Ministry was, rather, the fact that in this case producing the records to the Applicant in electronic

> form entailed a significant amount of service provision to the Applicant, at significant cost to the Ministry.

[16] The Ministry relies on three affidavits sworn by William Howard, who is the Director of the Ministry's Revenue Branch. At para. 6 of his first affidavit, William Howard, having described the data that had to be retrieved and having described the tasks for which the Ministry estimated fees, deposed as follows:

> Accordingly, I believe the Request is in the nature of a request for service, not a request for access to records. I believe the Ministry should be able to recover its costs for such requests, as the Act allows.

[17] Despite the passing reference in this paragraph of the affidavit to charging fees "as the Act allows", it appears the Ministry believes that Sierra's request somehow triggers different considerations because the Ministry had to perform certain tasks in order to create records for Sierra.

[18] Sierra argues that its request covers records that already exist in electronic form, *i.e.*, this is not a case involving creation of records under s. 6(2). It argues its request is "no different in effect from a traditional request" for paper-based records (para. 18, initial submission). It says this case involves retrieval of electronic records, not creation of records. Even if its request entails creation of records, Sierra says, it remains an access request under the Act and not a request for services.

[19] First, contrary to the Ministry's contention at para. 2.09 of its reply submission, quoted above, it is clear on the face of the Ministry's January 21, 2003 decision letter that it in fact did base its denial of a fee waiver on, in part, "the fact that the records were requested in electronic form".

[20] Second, the fact that services must be performed for an applicant in order to create records from machine-readable records does not warrant applying different standards respecting fee waivers. All access requests require public bodies to provide services of some kind to applicants. The severing of electronic records, using electronic means to sever, is one example of such services. The Act and the FOI Regulation together prescribe what kinds and amounts of fees can be levied for such services, including those performed in creating records from machine-readable records. The Ministry's attempt to characterize this case as involving a "request for service", as opposed to a "request to disclose documents" is not supported by the legislation. The Ministry cannot deny a fee waiver because a request entails creation of records as contemplated by s. 6(2).

Will a fee waiver encourage irresponsibility?

[21] The Ministry's submissions add to the two grounds given in its January 21, 2003 decision. The Ministry says the following at para 5.16 of its initial submission:

> The Ministry regularly receives requests under the Act from the Applicant. If the Ministry were regularly required to waive or reduce the fees assessed for such

> requests, it is quite likely that, unconstrained by considerations about fees, the Applicant or others might make requests that encompass more records than are actually specifically needed or sought. That, in turn, would impair the Ministry's ability to meet its other obligations.

[22] William Howard deposed as follows at para. 3 of his first affidavit:

> Based on my experience in responding to such requests, and on my experience in the Revenue Branch of the Ministry, I believe that if the Ministry were regularly required to waive or reduce fees assessed for such requests the Applicant, or others, unconstrained about considerations of cost, might make requests that encompass more than they actually need or are really seeking. That, in turn, would, I believe, impair the branch's ability to meet its other obligations.

[23] William Howard's affidavit does not elaborate on the assertion that Sierra or other applicants "might", if fee waivers were "regularly required", make access requests that "encompass more than they actually need or are really seeking." First, this speaks to hypothetical regular fee waivers, not the specific matter before me. Perhaps William Howard's opinion evidence is implicitly based on an assumption that, if Sierra were to obtain a fee waiver here, the floodgates would open and fee waivers would necessarily become routine. I see no basis for such an assumption in the material before me.

[24] I do not find William Howard's evidence very helpful on this point. It is an expression of one individual's opinion or conjecture. It is speculative to say that an applicant "might", because there are "no" cost considerations, make an access request that is broader than what the applicant might "actually need" or be "really seeking." Such conjecture assumes that a request for which no fee is paid has no cost to an applicant. One could equally speculate that, if Sierra were to make broader-than-necessary requests, it would have to spend more time and resources in analyzing the additional, but not necessary, information disclosed in response to such broader-than-necessary requests. I do not consider speculation either way to be particularly helpful.

[25] There is insufficient evidence to support the Ministry's contention that the fee in this case should be left undisturbed in order to avoid allegedly irresponsible future use of the Act by Sierra and unidentified third parties that could, in some way that is not described, "impair the Ministry's ability to meet its other obligations." The Ministry's argument that a fee waiver in this particular case will lead to ill-discipline on the part of Sierra or other applicants who make similar requests, thus justifying the Ministry's denial of the waiver, is not persuasive. I do not consider the Ministry's concern about the alleged future burdens of fee waivers that may or may not be sought by Sierra or others to be a proper consideration on the fee waiver issue here.

Would a fee waiver shift an unreasonable cost burden to the Ministry?

[26] The Ministry argues that a full fee refund or even a partial refund – in the latter case, of what extent the Ministry does not say – would "shift an unreasonable cost burden" to the Ministry, a factor mentioned in Order 01-35. The Ministry's January 21,

2003 decision also referred, as a factor in denying a fee waiver, its need to "utilize public resources effectively and efficiently" and to "recover some of the costs to the taxpayer of satisfying your request." The Ministry suggests, at paras. 5.19 and 5.20 of its initial submission, that Sierra's request "entailed the provision of considerable service" to Sierra. At para. 2.09 of its reply submission, the Ministry similarly asserts that producing the records for Sierra "entailed a significant amount of service provision", at "significant cost to the Ministry."

[27] William Howard's first affidavit listed two pages of data types that were retrieved in responding to Sierra's request, which he described, without explaining what he meant, as being of "medium query complexity" (para. 5). He went on to depose as follows respecting the Ministry's response to Sierra's request (para. 5):

> The request involved running five different database programs for each of the six quarter-years run within the time periods specified, for a total of 30 separate machine runs.
>
> All this was done specifically and exclusively in order to respond to the Request.
>
> The fee for this is $50 per run. Thirty runs at $50 each totalled $1,500 machine charges.
>
> Analyst costs are based on the analysis complexity and the analyst submit and package time. For a medium complexity query, such as that embodied by the Request, Analyst time is charged at $30 per hour with the first half-hour free. The Analyst time for the Request was estimated to be approximately 27.5 hours for a total fee of $810. That time is broken down as follows:

Task	Time	Units	Total Time
Modifying and submitting the database programs	15 minutes	30 runs	7.5 hours
Downloading and converting the data from the mainframe to PC environment.	15 minutes	30 files	7.5 hours
Importing of files into Access databases	10 minutes	30 files	5 hours
Testing and packaging for final data	1.25 hours	6 databases	7.5 hours
		Total	27.5 hours

[28] The Ministry did not further elaborate on the amount of effort entailed in actually producing the records. The Ministry also relies on the second affidavit sworn by William Howard, but that affidavit does not speak to the level of effort entailed in responding to the request.

[29] In considering the Ministry's submissions on the cost of responding, I noted that the bulk of its fee estimate was the $1,500 for "machine charges" for a number of "machine runs" (none of these terms was explained in the Ministry's submissions or

evidence). Where records are being created from a machine-readable record, as was the case here, the Schedule of Maximum Fees under the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93 ("FOI Regulation"), permits a maximum charge of "$16.50 per minute for cost of use of central mainframe processor and all locally attached devices". Yet the Ministry's evidence indicated that it levied a flat fee of, as William Howard deposed, "$50 per run" for 30 "runs", and the fee was stated to be for "machine charges" of some unidentified kind.

[30] The Schedule of Maximum Fees permits a maximum $30 per hour charge for "developing a computer program to produce the record". The estimated 27.5 hours of "Analyst" time included 7.5 hours for "modifying and submitting the database programs". But it also included 7.5 hours for "downloading and converting the data", 7.5 hours for "testing and packaging the final data", and 5 hours for "importing of files into Access databases". Some or perhaps all of these activities, it seemed to me, might or might not qualify as "developing a computer program to produce the record", as prescribed in the Schedule of Maximum Fees.

[31] Because of my concern that, on its face, parts of the Ministry's fee estimate might not, in terms of amount or nature, be permitted under the FOI Regulation, I wrote to the Ministry and sought clarification. In doing so, I said the appropriateness of the estimated fee under the FOI Regulation was relevant to my consideration of the Ministry's argument that a fee waiver of any degree would unreasonably shift the cost of responding to the Ministry. Noting that the amount Sierra paid under protest was an *estimate* of the expected fee, but the Ministry had not addressed what the actual fee was, I also invited the Ministry to provide evidence as to whether its actual costs of producing records for Sierra exceeded the Ministry's fee estimate or were less than the estimate.

[32] The Ministry responded with a third affidavit of William Howard, the relevant portions of which are as follows.

> 2. On March 3, 2002, I swore an affidavit in this inquiry, and on March 7, 2003, I swore a second affidavit in this inquiry. As was the case with my second affidavit, all terms as defined in my first affidavit have the same meaning in this third affidavit.
>
> 3. The Ministry has not kept track of all of its actual costs incurred (actual costs of machine use, actual costs of all staff time, etc.) in responding to the Request.
>
> 4. Revenue Branch regularly responds to requests made outside of the Act for information and data regarding stumpage rates and timber harvesting.
>
> 5. Revenue Branch has developed a cost schedule (the "Cost Schedule"), and fees for responding to requests made outside of the Act are charged in accordance with that Cost Schedule. The amount in the Cost Schedule for computer processing was based on our actual costs in 1995 of running reports to obtain one year of invoice data using the Government's Multiple Virtual Systems (MVS) Platform.

6. Revenue Branch does not have a readily available, easy way to exactly measure the actual costs of responding to requests such as the Request on a job-specific basis, because the computer programs necessary to respond to the Request are run on the Government's Virtual Machine (VM) Platform which does not automatically provide a report of the processing time for a specific program.

7. The Ministry initially regarded the Request as falling outside of the Act, and therefore charged a fee (the "Fee") that was calculated in accordance with the Cost Schedule, rather than in accordance with the Schedule of Maximum Fees that forms part of the Regulations to the Act (the "Schedule of Maximum Fees").

8. In the course of mediation, the Ministry changed its position, and since then is of the view that the Request did fall under the Act. That being so, the Ministry acknowledges that the Schedule of Maximum Fees applies to the Request.

9. To determine if the Fee was within the fees permitted by the Schedule of Maximum Fees, Revenue Branch staff ran 5 of the 30 computer programs used for the Request overnight on April 16 and 17, 2003. Revenue Branch staff who ran those 5 programs then reported to me that the 5 programs took 198.44 minutes to run from the start time for the programs to the end time, to gather the data for one quarter (i.e., 3 months).

10. Therefore, for the 6 quarters of data in the Request, it is estimated that the 30 programs would take a total of 1,190.64 minutes to run. Using the Schedule of Maximum Fees, the cost of the 30 runs is calculated at 1,190.64 minutes multiplied by $16.50 per minute; totalling $19,645.56.

11. I believe the Fee is less than the maximum fees permitted in the Schedule of Maximum Fees.

[33] This evidence yields the following observations:

- Although the Ministry's statement that it has not tracked "all" of its actual costs – in responding to Sierra's request, implies that some costs may have been tracked, the Ministry has not, despite my invitation to do so, provided evidence as to any costs that it actually incurred in responding to Sierra's request, whether costs for computer processing or for any programming that may have been needed to respond to the request.

- This may be because the Ministry cannot, it appears, readily measure exactly what are the actual costs of responding to a request such as Sierra's. This is because the computer programs necessary to respond are run on the provincial government's Virtual Machine Platform (VMP"), which does not – "automatically" at least – report the processing time for a specific program. The Ministry does not say whether it is charged at all for use of the provincial government's VMP and I am not, absent evidence on the point, in a position to find that it bears any cost for VMP use.

- The Ministry's fee estimate, which Sierra paid, was not developed in compliance with the FOI Regulation. It was based on a cost schedule the Ministry developed based on its 1995 experience in running reports for "invoice data". (The Ministry does not say what "invoice data" are.) The Ministry cannot, of course, charge fees under the Act other than as permitted under s. 75 of the Act and the FOI Regulation.

- It was only after I sought further particulars from the Ministry that its staff made the effort to determine if the estimated fee actually "was within the fees permitted by the Schedule of Maximum Fees." Ministry staff are said to have run five of the 30 computer programs involved in Sierra's request and, extrapolating from that trial run, the Ministry estimates that it could actually have charged a fee of close to $20,000. This is an after-the-fact justification of a fee estimate the Ministry admits was not created, as required, in accordance with the Schedule of Maximum Fees.

[34] Sierra's submission in response to this further Ministry evidence and argument reads as follows:

> With regard to the Ministry's fee estimate, Sierra Legal takes the position that the fee was not properly calculated under the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93. As our request was simply for records that already exist in electronic format, the appropriate fee under the Regulations would be $7.50 per quarter hour after the first 3 hours, under s. 7(1)(a).
>
> Further, the Ministry failed to keep a record of the hours spent retrieving the records, and the Ministry's time estimate after the fact is not acceptable. Thus, it would be appropriate for the Commissioner to waive or significantly discount the fee if he determines that the fee should not be waived in its entirety under section 75(5)(b).

[35] The Ministry's belated attempt to support its fee estimate does not assist its contention that a full or partial fee waiver would shift an unreasonable cost burden to it. Its assertion that, based on its test run of some of the programs involved, it could have charged some $19,645.56 in fees is merely another fee *estimate*, based on the $16.50 per minute that is the *maximum* a public body can charge "for cost of use of central mainframe processor and all locally attached devices" permitted under the Schedule of Maximum Fees.

[36] A further fee estimate, using the maximum permitted fee for certain computer activities, is not evidence of actual cost to the Ministry. It is simply another estimate, again using the statutory maximum. (Nor, I should say, has the Ministry established that the VMP is a "central mainframe processor" or a "locally-attached device" as contemplated by the Schedule of Maximum Fees. This further evidence of William Howard does not support the Ministry's position on the cost burden point.) Nor is the fact that the Ministry's fee schedule for requests outside the Act is based on actual costs incurred in 1995 for certain data transactions helpful on the issue of actual cost.

[37] Of course, neither the amount nor the nature of the Ministry's estimated fee is in issue here. The Ministry has, however, based its decision to deny Sierra a waiver of any amount in part on the basis that a waiver of any amount would shift an unreasonable cost burden to the Ministry. The Ministry's fee estimate alone is not sufficient to support this contention, despite the Ministry's backfill-effort at justifying (and even exceeding) its original estimate. The Ministry obviously incurred costs in responding to Sierra's request. But it has not provided evidence regarding actual computer-processing costs – which accounted for $1,500 of the $2,471.70 fee estimate that Sierra paid – that supports its contention that the burden of the cost to respond would be shifted unreasonably to the Ministry if any waiver were given. Nor is there any evidence as to the actual cost of computer programming – which accounted for $810.00 of the Ministry's fee estimate – necessary to respond to Sierra's request. In the absence of any such evidence as to the burden of the actual costs of responding, the Ministry's submission that it will bear an unreasonable cost burden if the fee is waived in whole or in part is not persuasive and the Ministry's assertions to that effect do not support its decision to deny a waiver.

A complete fee waiver

[38] In light of the Ministry's acknowledgement that the two parts of the public interest fee waiver test are met here, and having considered above the Ministry's other arguments and evidence, I consider that, in all of the circumstances, this case presents appropriate circumstances under s. 58(3)(c) to order that the fee be excused.

4.0 CONCLUSION

[39] For the reasons given above, under s. 58 of the Act, I excuse the fee and order the Ministry to refund to Sierra the $2,471.70 that Sierra paid to the Ministry. As a condition under s. 58(4), I require the Ministry to refund that amount to Sierra within the time mentioned in s. 59(1) of the Act.

May 13, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia