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

Order F05-22

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Celia Francis, Adjudicator

July 12, 2005

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Summary: Applicant requested records related to a property. Ministry responded nine months later. Ministry found not to have fulfilled its duties under ss. 6(1) and 7. Ministry ordered under s. 58(3)(c) to refund fees applicant paid.

Key Words: duty to assist – respond without delay – respond openly, accurately and completely – every reasonable effort – confirm, excuse, refund or reduce fees.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7, 58(3)(c).

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 04-30, [2004] B.C.I.P.C.D. No. 31; Order 04-31, [2004] B.C.I.P.C.D. No. 32; Order 04-32, [2004] B.C.I.P.C.D. No. 33; Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order 03-06, [2003] B.C.I.P.C.D. No. 6; F05-21, [2005] B.C.I.P.C.D. No. 29; F05-023, [2005] B.C.I.P.C.D. No. 31.

Cases Considered: *Lavigne v. Canada (Office of the Commissioner of Official Languages),* [2002] S.C.J. No. 55, 2002 SCC 53.

1.0 INTRODUCTION

[1] This order is a companion to Orders F05-21[1] and F05-23[2] which I am issuing concurrently with this order. All three concern the same applicant and related records, although the public bodies are different.

[1] [2005] B.C.I.P.C.D. No. 29.
[2] [2005] B.C.I.P.C.D. No. 31.

[2] On February 18, 2004, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to the Ministry of Public Safety and Solicitor General ("PSSG") for records related to a particular property. PSSG realized subsequently that the Ministry of Attorney General would also have records responsive to the request and the two public bodies proceeded to deal with the request jointly.

[3] On March 25, 2004, PSSG, responding on behalf of itself and the Ministry of Attorney General, sent the applicant a fee estimate of $510 (for preparing and copying approximately 1,300 pages of records). It requested a deposit of $255 before it would proceed with work on the request. On April 21, 2004, the applicant paid the requested deposit. On April 27, 2004, the public bodies took a 30-day extension on the grounds that there was a large volume of records to process and told the applicant that they would respond by June 11, 2004. On June 10, 2004, PSSG, on behalf of itself and the Ministry of Attorney General, requested a 60-day extension from this office, citing the volume of documents ("two bankers boxes") and the need to consult with other public bodies. This office granted the extension which made the new deadline September 9, 2004. The office instructed the Ministries to reply as soon as possible to the applicant's request and to release the records in stages wherever possible.

[4] On August 27, 2004, PSSG wrote to the applicant to say that it had located additional records and had determined that a revision to the fee estimate was appropriate. The letter stated on p. 2 that the fee was $3,153 (now for preparing and copying approximately 3,910 pages of records, apparently in addition to the 1,300 pages noted in the first fee estimate letter) and requested an additional deposit of $1,576.50 before it would continue processing the records. (I note that p. 1 of this letter says that the new fee was $5,150.)

[5] On September 1, 2004, PSSG wrote to this office requesting another 60-day extension, due to the volume of records and the need to consult other public bodies. It also mentioned having located records in other branches of the Ministries. It did not specify the quantity of records but attached a copy of its fee estimate letter of August 27, 2004 to the applicant.

[6] On September 9, 2004, this office granted a 30-day extension to process the second set of records (making the new deadline October 22, 2004) and instructed the Ministries to withdraw the request for the additional deposit. This office also instructed the Ministries to provide an immediate response respecting the first set of records. On September 10, 2004, the applicant paid the additional deposit. On September 16, 2004, the applicant requested a review by this office of the Ministries' failure to respond by the September 9 deadline respecting the first set of records.

[7] In early November 2004, this office scheduled an inquiry under Part 5 of the Act to deal with this matter, as the Ministries had not yet responded to the request. Although the Ministries were dealing jointly with the request, a separate inquiry took place for each Ministry. The Ministries provided access to the requested records on December 16, 2004 (apparently waiving the rest of the fee), by which time the inquiry process was complete. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

2.0 ISSUES

[8] According to the notice that this office issued for this inquiry, the issues before me in this case are as follows:

1. Did PSSG make every reasonable effort under s. 6 to respond to the applicant openly, accurately, completely and without delay; and

2. Did PSSG fail to respond in accordance with the timelines for a response set out in s. 7 of the Act.

[9] In its initial and reply submissions, the applicant asked for a remedy under s. 58(3)(c) of the Act, that is, that the fees be excused, refunded or reduced in this case. The public body asked for an opportunity to make representations on this matter, as it had not been listed as an issue in the notice for this inquiry. I decided to consider the applicant's request and therefore gave PSSG an opportunity to provide additional representations on whether excusing, refunding or reducing the fee under section under s. 58(3)(c) was an appropriate remedy.

[10] Accordingly, the third issue is:

3. Is this an appropriate case under s. 58(3)(c) in which to excuse, reduce or refund the fees?

3.0 DISCUSSION

[11] **3.1 Compliance with Sections 6(1) and 7** – The Information and Privacy Commissioner has considered a public body's compliance with ss. 6(1) and 7 in numerous orders, for example, Order 02-38[3], Order 04-30[4], Order 04-31[5] and Order 04-32[6]. I have applied here, without repeating it, the approach taken in those orders.

[12] The relevant parts of ss. 6(1) and 7 read as follows:

> **Duty to assist applicants**
>
> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[3] [2002] B.C.I.P.C.D. No. 38.
[4] [2004] B.C.I.P.C.D. No. 31.
[5] [2004] B.C.I.P.C.D. No. 32.
[6] [2004] B.C.I.P.C.D. No. 33.

Time limit for responding

7(1) Subject to this section and sections 23 and 24 (1), the head of a public body must respond not later than 30 days after receiving a request described in section 5(1).

(2) The head of the public body is not required to comply with subsection (1) if

(a) the time limit is extended under section 10, …

(4) If the head of a public body determines that an applicant is to pay fees for services related to a request, the 30 days referred to in subsection (1) do not include the period from the start of the day the head of the public body gives the applicant a written estimate of the total fees to the end of the day one of the following occurs: …

(c) the applicant agrees to pay the fees set out in the written estimate and, if required by the head of a public body, pays the deposit required.

[13] In its initial submission, PSSG set out the chronology I outline above and added that, towards the end of July 2004, it learned that additional records responsive to the request had been located in a particular office within the Ministry of Attorney General. It says that the analyst responsible for processing the request had, based on his knowledge of the Ministry, originally believed that any responsive records would be located in two particular offices. Upon reviewing the first set of records, the analyst realized that two other offices potentially had responsive records. The analyst learned at the end of August 2004 that there were an additional 7,910 pages of records responsive to the request.

[14] PSSG acknowledges that the actual number of records located is much greater than the "original estimate" referred to in the "initial fee estimate" to the applicant (apparently referring to the first estimate of 1,300 pages of records, not the second estimate of 3,910 pages; see para. 4.11, initial submission). PSSG does not explain why its second fee estimate mentioned the location of 3,910 additional pages in July-August 2004, while its initial submission and affidavit evidence say it located approximately 7,910 additional pages at this point.

[15] PSSG says this office denied it a second 60-day extension for processing the first 1,300 pages of records, although it received a 30-day extension to process the new records that it had located. It says that the total number of pages responsive to the request within the two public bodies was approximately 9,910, of which 2,000 were found in PSSG (paras. 4.01-4.15, initial submission; paras. 6-20, Street affidavit).

[16] PSSG says the subject matter of the records within the public bodies was intertwined, on which basis the two Ministries processed the applicant's requests together. PSSG also says that considerable consultations were required, both within the two Ministries and with the Ministry of Sustainable Resource Management, in order to determine what records could be disclosed. It says, without being specific as to the time required, that the consultation process was very time-consuming, given that almost 10,000 pages of records were involved, the number of public bodies involved in the consultations and the potential application of a number of exceptions.

[17] PSSG says that the analyst did not track his time spent on processing the requests but that it was considerable. In addition, it says six staff in one program area alone spent 39 hours going through responsive records. (PSSG provides no information on the time spent by other program areas within the Ministries.) PSSG also says it was processing other requests at the same time but gives no details as to the time and effort required in those cases, nor how these other requests may have interfered with its ability to process this request. PSSG says that, given the size and complexity of the records, there is no reason to believe that staff involved in processing the request could have processed it any more quickly than they did (paras. 4.16-4.22, initial submission; paras. 20-31, Street affidavit). PSSG does not explain what it means in referring to the "complexity" of the records.

[18] PSSG says that its request for a second 60-day extension was reasonable and that the request was inappropriately rejected by the Commissioner's delegate. It noted that the request involved just under 10,000 pages of records and, having been allowed only another 30 days to respond to the requests, the public body was now in a situation where its response would be outside the s. 7 deadline in this case. While it concedes that it would not meet the s. 7 deadline in this case, PSSG says this is only because of a failure by the Commissioner's delegate to approve an extension it believes was warranted by the volume and complexity of the records (paras. 4.23-4.24, initial submission).

[19] PSSG acknowledges that the Commissioner has previously found that, if the public body responds after the s. 7 deadline, it must necessarily have breached its s. 6 obligations. However, it argues that a determination of the s. 6 issue requires a consideration of circumstances that would not necessarily be relevant to a consideration of the s. 7 issue. It suggests that, through inadvertence or because of circumstances beyond its control, a public body may fail to meet the s. 7 deadline, despite having taken all reasonable efforts to respond without delay. For example, it said, it may be denied what it believes is a reasonable request for an extension under s. 10 of the Act, it may inadvertently or through oversight fail to take an extension or it may not receive input on its consultations with other public bodies until after the expiry of the s. 7 deadline (it does not say whether the last occurred in this case and indeed provides no information on the timelines involved in the consultations). In such cases, PSSG suggests, a public body has done everything it could to respond without delay but has nevertheless breached the section 7 deadline. As the applicant notes, PSSG's arguments echo those the public bodies made in Order 02-38 and Orders 04-30 to 04-32 and which the Commissioner rejected.

[20] The Commissioner made his findings on ss. 6(1) and 7 in Order 02-38 in light of the circumstances of that case, where the Ministry said that it had done its best to meet its timelines given its workload and demands on its resources. I do not understand the Commissioner to mean that a public body would always have breached its s. 6(1) duty where, due to circumstances truly beyond a public body's control—such as loss of the records, earthquake or destruction of its premises by fire—it has not been able to meet its s. 7 deadline.

[21] Without suggesting it definitively, it is also possible that obtaining timely input from another public body during consultations might truly be beyond a public body's control. I note however that consultations with other public bodies are not statutorily mandated, although the Act contemplates such a process in providing for extensions under s. 10 for

consultations with other public bodies. In such cases, a public body processing a request should establish reasonable time frames with the other public bodies for completing the consultations so that the first public body may meet its ss. 6(1) and 7 obligations. The public body should also take steps to follow up vigorously with the other public bodies to ensure that they are dealing with the consultations in a timely manner. Ministries of the provincial government that consult with each other on a frequent basis may even wish to consider setting up a protocol under which, among other things, they undertake to process each other's consultations in a timely fashion. I also note that a public body experiencing consultation delay beyond its control should seek an extension under s. 10 in any event.

[22] Here, PSSG says that, given the complexity and volume of records involved in this case and the denial of a further extension, it did not fail to make reasonable efforts to respond to the applicant's request without delay. It says it could have done nothing to process the request any more quickly without potentially disclosing information subject to the Act's exceptions. It says it would likely have needed more time than the second 60-day extension it was refused. It did not seek a further extension as it considered it unlikely that it would obtain one, given the past refusal (paras. 4.25-4.32 & 4.34, initial submission).

[23] PSSG goes on to suggest that the only remedy for me is to order it to fulfill its duty to respond to the request, as the Commissioner did in Order 00-31. At the time of the inquiry, it believed it would be in a position to respond fully by mid-December 2004. Alternatively, it said, no order would be necessary if it had responded before this order was issued (paras. 4.33 & 4.35-5.02, initial submission). (As noted above, the Ministry responded to the request in mid-December 2004.)

[24] The applicant provides much the same chronology. It understands that, in granting the 30-day time extension in September, this office refused to extend the time limit for the public body's response on the first set of records, would grant no further extensions regarding the second set of records and instructed the public body to withdraw the request for the second deposit. Unaware of the last instruction, the applicant paid the second deposit as requested and did not receive a refund. It says that over nine months had passed since it made its request and it had not, as of the date of its submission in this inquiry, received any of the 5,000 pages of records PSSG claimed to have located. It points to Orders 04-30 to 04-32, in which the Commissioner found that the public bodies had failed to meet their obligations under s. 6 in much the same circumstances as this case. Moreover, it says, PSSG also failed to provide the applicant with records in stages, as directed by this office.

[25] The applicant suggests that PSSG has shown a pattern of disregard for the Act, the directions of this office and for the applicant. (PSSG rejects this last argument in its reply at para. 6, saying the applicant has provided no evidence of these assertions.) In the applicant's view, PSSG has effectively obtained a further extension by not replying within the time limits.

[26] The applicant also expresses incredulity that, 25 weeks after its access request and near the end of the original extended deadline, the public body located an additional 3,910 pages of records (paras. 1-31, initial submission). The applicant thus questions the adequacy

of PSSG's original search for records, pointing out that almost half a year went by before PSSG realized that thousands of additional pages existed (paras. 1-12, reply submission).

[27] PSSG replies that it is not incredible that it would find additional records after that amount of time. It says staff must make judgements about where responsive records might be while processing requests and then request the records from the appropriate program areas. Where there are large numbers of records, as is the case here, it will take staff longer to locate and retrieve responsive records and provide them to the information and privacy staff. Upon reviewing those records, PSSG says, the information and privacy staff may then become aware of still other responsive records which will take time locate and retrieve. PSSG said that it is not reasonable to require it to always identify and locate all responsive records at the beginning of processing requests. It notes that the search standard imposed by s. 6 of the Act is one of reasonableness, not perfection (paras. 1-4, reply submission).

[28] PSSG concedes that it failed to meet the extended deadline granted by this office, although it attributes this failure to this office's denial of what PSSG considers to be a reasonable extension to process almost 10,000 pages of records. It is not at all evident from the material before me whether, at the time PSSG sought the second 60-day extension, it verbally told the Commissioner's delegate that it had located 7,910 additional pages—and not 3,910—before the delegate decided to grant a 30-day extension rather than a 60-day extension. Certainly, the applicant's initial submission indicates that it then understood that a total of approximately 5,000 pages had been located (see para. 21, initial submission).

[29] It is thus possible that—the Ministry's criticism in this inquiry of the delegate's decision to grant a 30-day extension and not a 60-day extension aside—there was a lapse in communication between PSSG and this office as to the estimated total number of records. For all PSSG knows, this office might have granted the 60-day extension if the delegate had known that the additional records comprised almost 8,000 pages rather than 4,000 pages, the latter number being, I acknowledge, a significant number of records.

[30] There is no evidence before me that, rather than throwing up its hands and failing to comply with its obligations under the Act respecting the response timeline, PSSG objected to this office's refusal to grant a 60-day extension, that it asked for a reconsideration or that it asked for another extension. Any of these steps might have cleared up any misunderstanding regarding the actual number of pages involved. In addition, as the applicant suggests at para. 6 of its reply, PSSG could have applied for judicial review of the decision not to grant a further 60-day extension. PSSG apparently chose to do none of these things. In any case, as the applicant points out, this inquiry is not a review of this Office's decision to grant a 30-day extension rather than the 60-day extension the Ministry asked for.

[31] A number of other unanswered questions arise from a careful review of PSSG's submissions on its processing of this request (regardless of the number of pages involved) and those questions do not assist its position in this inquiry:

- I can understand that, for reasons PSSG suggests, the existence of responsive records might become obvious only later in a request process. Still, it is not at all apparent

why it took until late July for PSSG to learn of the existence of the additional records—and such a large quantity—when, as noted above, it had apparently been reviewing and otherwise processing the first set of records for almost half a year;

- Why did it take still another month (late July to late August 2004) for PSSG to locate and retrieve those additional records?
- Apart from PSSG's general explanation that the requests involved complex and voluminous records, as well as consultations with two other public bodies (one of which was the Ministry of Attorney General, with which PSSG was jointly processing the request), why was PSSG unable to release the records in stages? I can understand that a public body might want to complete its consultations with other public bodies before it responds to a request. Without more and without seeing the records, however, I have difficulty accepting that every single page of the 9,000 to 10,000 pages of records in this case required such consultations and, even if they did, why PSSG could not have disclosed at least some records earlier than it did.
- What, if anything, did PSSG do to expedite the consultation process internally and with the other public bodies (one of which, as already noted, was the Ministry of Attorney General)? Not all consultation processes are the same, including because the number of public bodies will differ.
- Most importantly, why did PSSG choose not to devote additional resources to completing the request within the 30-business day (or six calendar week) extension that it was granted? Why, instead, did it apparently continue to work on the request as before, apparently ignoring this office's instructions and responding two months after the extended time limit (more or less on the date by which it would have responded if it had received the second 60-day extension it requested)? While I make no finding on the point, an observer might wonder whether PSSG, having failed to get the further 60-day extension it sought, simply ignored the 30-day extension this office gave it and carried on processing the request as if it had been given the 60-day extension. Whatever happened, the upshot is that PSSG took nine months to respond to the applicant's request, a significant period of time for even a large number of records.

Conclusion on ss. 6(1) and 7

[32] There may be reasonable explanations for these gaps and delays, but PSSG has not provided them. Viewed against the reasonableness standard of s. 6(1), PSSG has not shown that it met its statutory duty to respond without delay, accurately and completely. For the reasons discussed above, therefore, I find that PSSG did not comply with its duty under s. 6(1) to make every reasonable effort to respond without delay, openly, accurately and completely. I also find that PSSG failed to respond by the extended deadline and thus did not comply with s. 7 of the Act. As PSSG has already responded to the applicant, however, there is no point in ordering it to respond.

[33] **3.2 Is it Appropriate to Excuse, Reduce or Refund the Fee?** – PSSG argued in its initial submission (at paras. 5.01-5.02) that there was no need for me to issue any order at all. In its further submission it said it had waived the balance of the fee and that I should not order a refund. The applicant acknowledged that PSSG had waived any further fees but

argued that, under s. 58(3)(c), I should order a refund or reduction of the fee deposit that it paid, of approximately $1,800. Section 58(3)(c) reads as follows:

> **Commissioner's orders**
>
> 58(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following: …
>
> (c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met; …

[34] The Commissioner mentioned the possibility of this type of remedy at para. 23 of Order 02-38, noting that, in that case, he could not order a waiver or refund, as the public body had not charged a fee. However, he has not to date considered it as a remedy in an order.

[35] The applicant suggested a number of factors (some overlapping) for me to consider in deciding what if any s. 58(3) remedy is appropriate, including: whether a time limit was met and, if not, how long after the expiry of the time limit it responded; the manner in which the public body responded to the request; whether the public body took every opportunity to obtain an extension; whether the public body complied with the directions given to disclose the records in stages; whether PSSG contacted the applicant to specifically request that it narrow the scope of the request or reduce costs and assisted the applicant in doing so; whether the applicant unreasonably rejected such a proposal by the public body; and whether a refund would shift an unreasonable burden of processing the request from the applicant to the public body (para. 1, further submission).

[36] In the applicant's view, all of these factors favour an order to refund the fees it has already paid. It points out that PSSG did not respond for several months after the extended deadline and says PSSG never contacted the applicant to discuss narrowing the request. (As discussed elsewhere, PSSG's fee estimate letters invited the applicant to narrow the request as a way of lowering the fees. The applicant does not appear to have done so.) The applicant also argues that the public body failed to comply with this office's direction to disclose the records in stages.

[37] The applicant also does not accept that a fee refund would unreasonably shift a financial burden onto the public body and says the public body did not present any evidence as to how shifting the costs would affect its operations. It believes PSSG has overstated the legislative intent behind s. 75 and says that the ability under s. 58 to order a fee refund, "including if a time limit is not met", is a clear acknowledgement that there are circumstances in which a public body ought to bear the full costs of responding to a particular request. It points out that fees are not mandatory and that s. 75 gives a public body discretion both to charge and waive fees on various grounds (paras. 4-18, further submission).

[38] PSSG accepts that I may, under s. 58(3)(c) of the Act, confirm, refund, reduce or excuse fees, including where a time limit is not met, and says that this is a case where I should confirm the fees. It also points out that it has since responded to the request and that it waived

the remaining half of the estimated fee (approximately $1,800) in this case (paras. 1-5, further submission).

[39] PSSG refers to "*Lavigne*", in which the Supreme Court of Canada said that the words of a statute are to be read in their context and harmoniously with the scheme and object of the Act and Parliament's intentions[7]. PSSG adds, at para. 8 of its further submission, that it is appropriate for me to

> … consider the scheme of the Act as a whole, including the fact that the Legislature intended, in passing section 75, that public bodies should not be required to bear the entire financial burden of responding to requests for large amounts of records where there were not compelling public interest reasons for doing so. The Public Bodies submit that the intent of section 75 is that public bodies should be able to recover some of the costs of processing requests for large amounts of records, i.e. records involving more than three hours of search time. This is just such a request. In fact, the volume of records requested by the Applicant in this case is incredible, namely, over 9,000 pages of records.

(I do not consider a request that involves "more than three hours of search time" necessarily involves "a large amount of records" and, although 9,000 to 10,000 pages are a large number of records, that number is not "incredible".)

[40] PSSG says that the issue here is whether it (and thus the taxpayers of British Columbia) should bear the entire financial burden of processing the request because it was late (in spite of, PSSG argues, its having responded without delay) or whether the applicant should bear some of the costs. It makes a number of general arguments around "significant demands for government services and limited government resources", wise spending of government funds and fiscal responsibility. (PSSG provided no details about "limited government resources" or "significant demand on government services", either generally or in relation to itself, or any other evidence to back up this point.) It points out that it has already waived half the fee and says that, under s. 75 of the Act, it is entitled to recoup some of its costs of processing requests. It argues that waiving the rest of the fee would unreasonably shift the burden of responding to the request to PSSG and be at odds with the Legislature's intention. PSSG provided no support for its contention that having to absorb a $1,800 fee would result in an unreasonable shifting of costs to it. I do not accept PSSG's argument on this point.

[41] In its submissions on the fee refund issue, PSSG repeats comments from its initial submission regarding what it says was the unreasonable refusal of the Commissioner's delegate to approve a 60-day extension. As such, it says, it was placed in a position of responding past the s. 7 deadline on a request involving complex and voluminous records. It says again that it could not have responded any more quickly in the circumstances and that the only way it could have met the deadline was if it had abandoned efforts to review the

[7] PSSG's reference to the Supreme Court of Canada decision "*Lavigne*" gives no citation. It is clear, however, that PSSG is referring to *Lavigne v. Canada (Office of the Commissioner of Official Languages),* [2002] S.C.J. No. 55, 2002 SCC 53. The Commissioner has acknowledged this approach to the interpretation of the Act in many decisions. See, for example, Order 03-06, [2003] B.C.I.P.C.D. No. 6.

records properly and apply the Act's provisions, possibly resulting in disclosure of information that should have been withheld (paras. 9-19, further submission). The Ministry does not explain why additional resources could not have been devoted, even on an emergency basis, to meeting its statutory obligations. Indeed, it does not address this point at all.

[42] PSSG continues by saying that ordering a refund in this case would frustrate the Legislature's intention that it be able to recoup some of its costs of processing requests, particularly large requests such as this one. It would "send a message to public bodies that if they wish to recoup some of the costs of processing requests they must respond, regardless of whether they have had an opportunity to make a fully considered decision concerning the application of the Act's exceptions to the requested records" (para. 20, further submission). PSSG also suggests that it is appropriate to consider whether the applicant was willing to narrow the request, a factor the Commissioner considered in Order 02-43, a fee waiver case. It remarks again, and again without specifics, on the voluminous and complex nature of the records and that extensive consultations were required. At no point, it says, did the applicant offer to narrow the request to reduce the fee or to allow PSSG to process the request in a more timely manner. This weighs in favour of confirming the fee, in its view (paras. 20-23, further submission).

[43] It seems that neither party took the initiative to follow up on the fee estimates to discuss the scope of the request or ways of narrowing it to reduce the fees. In fact, there appears to have been no meaningful communication at all between the applicant and PSSG on the request, whether to narrow the request, reduce fees and speed response times, or to ensure that the applicant received the records it wanted.

[44] In considering public interest fee waivers, the Commissioner has said public bodies should consider the following factors, among others, in exercising discretion: whether the applicant has co-operated reasonably with the public body, where the public body has requested it, including by narrowing the request where it is reasonable to do so; and whether the applicant has unreasonably rejected a proposal by the public body to reduce costs (the Commissioner acknowledged that it would be reasonable for an applicant to reject such a proposal where it would "materially affect the completeness or quality of the public body's response) (see, for example, Order 01-35[8]).

[45] PSSG's invitations to the applicant to narrow the request in order to lower fees were included in passing in its fee estimate letters, the first in late March 2004 (where PSSG said it had located approximately 1,300 pages of records) and the second in its letter of late August 2004 (where it told the applicant it had located approximately 3,910 records, apparently in addition to the first 1,300, for a total of approximately 5,000 pages of records—not 9,000 to 10,000 pages, as PSSG is now saying).

[46] It is possible that the applicant did not wish to narrow the request, as it wanted all responsive records. The applicant may also not have been in a position to suggest ways of narrowing the request, since there is no evidence here to suggest that PSSG told the applicant

[8] [2001] B.C.I.P.C.D. No. 36.

the nature of the records. In any case, I infer from the applicant's submissions that it would have been content to pay the fees, if only PSSG had responded within legislated timelines. In the absence of any evidence as to what if anything the applicant might have refused or agreed to in the way of narrowing the request to lower the fees and speed processing (noting again that the applicant was under the impression that PSSG had located approximately first 1,300 and then 5,000 pages of records—not the 9,000 to 10,000 pages PSSG is now saying it located), I do not find PSSG's arguments on this point to be persuasive.

[47] I suggested above that, among other things, PSSG could have devoted more resources to completing the request within the time allotted and that it apparently chose not to. I also do not accept that the inevitable consequence of not receiving the second 60-day extension or of not being able to charge fees was the likely disclosure of information that should be withheld. Public bodies in the ordinary course will take care in assessing records for exceptions. They are also entitled to charge certain types of fees. They should, however, also ensure that their freedom of information offices are adequately resourced to process requests within legislated time limits, a point the Commissioner has made on a number of occasions, at least as early as Order 02-38. In cases where public bodies receive an unanticipated peak in request numbers or in requests involving complex and voluminous records, it seems to me they should take appropriate steps to deal with those situations in a timely way, rather than allowing their response timelines to lag interminably or rushing their responses without proper consideration of whether exceptions apply.

[48] I consider that the Legislature worded s. 58(3)(c) as it did for a reason. I believe the Legislature intended to establish that, while public bodies may charge fees, they may be penalized by forgoing those fees in certain cases, including in appropriate cases where they fail to meet time limits. Indeed, in a case such as this, where the public body has already responded, excusing, refunding or reducing the fee may be the only possible remedy.

Conclusion on s. 58(3)(c)

[49] I will not repeat the above discussions about the lengthy delay in responding and the unanswered questions, although I have considered them here. As I discussed above, PSSG has not, in my view, satisfactorily accounted for its handling of the request both before and after the expiry of the extension that this office approved. Nor has it adequately explained why it did not disclose the records in stages. I acknowledge that PSSG has waived half the fee, but I do not consider that, in this case, this argues against my excusing the rest of the fee. The factors I have discussed above lead me to the conclusion that this is an appropriate case in which to order a complete refund of the fees the applicant has paid.

Criteria for a decision under s. 58(3)(c)

[50] Although the list of factors to consider will never be exhaustive, I consider the following criteria to be relevant in making an order under s. 58(3)(c):

- Was the time limit met? If not, how long after the expiry of original or extended timelines did the public body respond?
- How complete was that response?

- What efforts did the public body make to comply with its s. 6(1) obligations, including:
  - reasonable efforts to locate responsive records as soon as possible;
  - allocation of additional resources to process the request in as timely a way as possible;
  - timely follow-up on consultations;
  - release of records in stages, where practicable; and
  - contacting the applicant to discuss ways of narrowing the request to reduce fees and speed response times;
- Did the public body seek extensions under s. 10 of time limits?
- Would excusing, refunding or reducing the fee result in an unreasonable shift in the cost burden to the public body?
- Were the final chargeable costs the same as the original estimated costs? If not, in what way did they differ?
- Did the applicant, viewed reasonably, co-operate 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?
- 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.

4.0 CONCLUSION

[51] For the reasons given above, under s. 58 of the Act, I order PSSG to refund to the applicant the fees the applicant has paid in this case.

July 12, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator