



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

Order F09-11

MINISTRY OF LABOUR

Michael McEvoy, Adjudicator

June 22, 2009

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Summary: The applicant requested the Ministry waive the estimated fees for records he said related to a matter of public interest. The applicant's helpful conduct, combined with the unsatisfactory manner in which the Ministry prepared its fee estimate and responded to the applicant's request, were circumstances resulting in the estimated fee being excused.

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

Authorities Considered: B.C.: 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; Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order 03-28, [2003] B.C.I.P.C.D. No. 28; Order F05-21, B.C.I.P.C.D. No. 29.

1.0 INTRODUCTION

[1] The applicant, a researcher, requested copies of the following records from the Ministry of Labour (the "Ministry")¹ that are in issue here:

- All "Determinations" issued to Farm Labour Contractors ("FLC") by the Director of the Employment Standards Branch in respect of the conditions of employment of farm workers since January 1, 1997;
- All 2001 and 2002 branch reports of Agriculture Compliance Team leader Jim Walton ("Walton Compliance Reports");

¹ The Ministry's name changed to the Ministry of Labour from the Ministry of Labour and Citizens' Services as of June 10, 2009.

- All applications for FLC licenses filed with the Employment Standards Branch (“ESB”) by current FLCs, and the bonding level established for each.

[2] The Ministry ultimately responded to these requests with the following fee estimates:

- Items 1 and 2 combined — \$3,865.00 for 104 hours of search time and copying costs.²
- Item 3 — \$377.50 for the six hours in excess of the three hours free search time and copying charges.

[3] The applicant asked the Ministry to waive the fees under s. 75(5)(b) because he believes the records relate to a matter of public interest. The Ministry denied the request and a written inquiry was held because attempts to mediate the matters by this Office were not successful.

2.0 ISSUES

[8] The issue is whether the records requested by the applicant relate to a matter of public interest and, if they do, whether the applicant should be excused from paying all or part of the fees for services cited above.

[9] The Ministry argued that the applicant bears the burden of proof in this case.³ I reject this argument because the legislation does not expressly impose an evidentiary burden on either party. The Commissioner has held that, in such cases, as a practical matter, it is in the interests of each party to present argument and evidence as to whether the provision in issue applies.⁴

3.0 DISCUSSION

[10] **3.1 Public Interest Fee Waivers**—The relevant section of FIPPA reads as follows:

75(5) If the head of a public body receives an applicant’s written request to be excused from paying all or part of the fees for services, the head may excuse the applicant if, in the head’s opinion, ...

(b) the record relates to a matter of public interest, including the environment or public health or safety.

² The Ministry’s initial submission, paras. 1.06 and 1.07, note that the original estimate for these two items was \$3,120.00 but a revision to production and copying charges for the Determinations brought the total to \$3,865.00.

³ Ministry’s initial submission, para. 3.

⁴ See Order 03-28, [2003] B.C.I.P.C.D. No. 28, for example.

[11] Many orders have considered whether fee waivers in the public interest are merited.⁵ I have applied the approach taken in those orders.

[12] **3.2 Do the Records Relate to a Matter of Public Interest?**—The applicant submits that the provincial government made significant changes to the *Employment Standards Act* (“ESA”) and Regulations in 2002 and 2003. His research, funded by the Social Sciences and Humanities Research Council, involves investigating those changes and the enforcement of the ESA in relation to the working conditions of farm workers in the Fraser Valley.⁶

[13] He argues that the requested records relate to his research, which in turn relates to a matter of public interest. The applicant submits that approximately 6,000 farm workers harvest fruits and vegetables in the Fraser Valley annually. He argues that

... it is widely recognized that these farm workers are among the lowest paid in Canada, lacking in employment security due to the seasonal and/or casual nature of their employment, subject to very poor working conditions, exempted from or subject to lower employment standards, income tax and employment insurance laws, and often suffer from inadequate law enforcement.⁷

[14] The applicant contends that the issue of employer abuse of farm workers continues to be a matter of public concern and debate. He cites a number of newspaper articles, studies, debates in the Legislature and media coverage, especially of the 2007 tragic van crash that killed three farm workers and critically injured eight others. “Yet”, the applicant submits, “the vulnerability of farm workers’ health, safety and working conditions continue[s] to remain hidden from the public eye.”⁸

[15] The applicant argues that because of all of this, the enforcement of the ESA and Regulations is an important policy issue and the research he is doing and the records he has requested relate directly to this matter of public interest. He submits the “Community–University Research Alliance project administered jointly by Simon Fraser University and the Canadian Centre for Policy Alternatives”⁹ has approved his research and that he intends to publish it.¹⁰

⁵ See, for example, Order 01-24, [2001] B.C.I.P.C.D. No. 25, and Order 01-35, [2001] B.C.I.P.C.D. No. 36.

⁶ Applicant’s initial submission, p. 2.

⁷ Applicant’s initial submission, p. 3 in which the applicant was quoting from a previous study he did for the Canadian Centre for Policy Alternatives BC Office.

⁸ Applicant’s initial submission, pp. 5 and 6.

⁹ Applicant’s initial submission, p. 2.

¹⁰ After the inquiry closed, the Ministry filed what it said was a research report by the applicant. The Ministry did not say so explicitly, but I take it to suggest that this report renders this matter academic. I do not agree. The fact the applicant wrote a report without the benefit of the

[16] The Ministry argues that “all or even most of the records at issue”¹¹ do not meet the public interest fee waiver test. The Ministry says the ESB made 437 “Determinations” from 1997 to 2006. The Ministry argues these Determinations relate to administrative contraventions of the ESA, which do not on their face, involve public interest issues. It also contends that the Determinations are “unlikely” to reveal any discussion in the public interest because the

...rendering of Determinations does not involve the analysis of facts or issues that do not [*sic*] bear directly on the issues before the adjudicators, namely whether there has been a contravention of provisions in the [ESA] or Regulations.¹²

[17] The Ministry notes a lengthy list of sections of the ESA and Regulations concerning farm labourers and FLCs and states that the Determinations concern contraventions of these sections that are “administrative” in nature.¹³ The Ministry submits, for example, that the ESB issued 120 of the 437 Determinations against FLCs concerning a failure to register their vehicles. The Ministry argues these Determinations do not “go further to address the safety of farm vehicles.”¹⁴ The Ministry also opines that “the tight regulatory framework and monitoring have had their desired effect, which is to minimize the exploitation of farm labour workers.”¹⁵

[18] The applicant submits the Ministry incorrectly characterizes his arguments as only focusing on the health and safety of farm workers. He argues that his request encompasses an investigation of the impact of changes to the ESA and its enforcement on the working conditions of Fraser Valley farm workers.¹⁶ The applicant also replies that the Ministry has not addressed his request for the Walton Compliance Reports.¹⁷

[19] **3.3 Analysis**—In my view, the applicant’s research relates to a matter public interest. The evidence before me is that the enforcement of laws relating to farm workers, and changes to such legislation, is a matter of recent public debate, both in the media and the Legislature. The issue received intensive coverage because of the van tragedy that took the lives of three farm workers in 2007.

[20] However, while the issues identified by the applicant for his research relate to a matter of public interest, this is not the test under s. 75(5) of FIPPA.

requested records is no reason to conclude he would not use the requested information for further publication if he obtained it.

¹¹ Ministry’s initial submission para. 4.17.

¹² Ministry’s initial submission para. 4.23.

¹³ Ministry’s initial submission para. 4.29.

¹⁴ Ministry’s initial submission para. 4.30.

¹⁵ Affidavit of Pat Cullinane, para. 23.

¹⁶ Applicant’s reply submission, para. 3.

¹⁷ Applicant’s reply submission, para. 2.

I must determine whether the requested records themselves specifically relate to this matter of public interest.

Walton Compliance Reports

[21] At first blush, it seemed that the supposed subject matter of the Walton Compliance Reports met the public interest test. For reasons it did not explain, the Ministry did not make any argument with respect to these records, a shortcoming the applicant made note of in his submissions. I determined that additional evidence was required to assess whether the Walton Compliance Reports met the public interest test. Accordingly, I wrote to the Ministry seeking a sample of the records for review. The Ministry replied “there were no records responsive to that part of the [a]pplicant’s request”.

[22] This disturbing reply suggests the Ministry determined these records did not meet the public interest test without examining even a sample of them. I have more to say on this below.

FLC License Applications

[23] I conclude that the applicant has not shown that these records directly relate to the issue of the working conditions of farm workers or the enforcement of a legislative framework. I also note the Ministry directed the applicant to the ESB website to find the requested information. The Ministry submits that the site includes the name, address and phone numbers of currently registered FLCs, along with the number of bonded employees.¹⁸ The applicant did not take issue with this nor did he argue that this information failed to satisfy his request. In any event, and as I note above, the applicant has not demonstrated that these requested records meet the public interest test. Therefore, these records are not the subject of the fee waiver order I make below.

The Determinations

[24] It is my view the Determinations relate to a matter of public interest. Individually the records speak to the issue of legal enforcement of matters relating to working conditions of farm workers. Collectively, the Determinations serve as a basis for analyzing whether or not changes to the ESA have affected its enforcement, given that the records both pre- and post-date those changes.

[25] The Ministry attempts to minimize the import of the Determinations by describing the violations recounted therein as “administrative contraventions” which do not relate to health and safety issues and thus do not relate to matters of public interest.

¹⁸ Affidavit of Pat Cullinane, para. 44.

[26] I do not agree. First, past orders make clear that records relating to the public interest are not limited to those concerning public health or safety. The public interest also extends to records that contribute to public understanding of, or debate on, an important policy or law, for example. Taken together, the records in this case would contribute to public understanding of the important policy and legal issues that I have identified.

[27] Second, in characterizing most of the records as “administrative contraventions” of the ESA and its Regulations, the Ministry draws subjective conclusions that risk trivializing issues affecting the lives of farm workers. Twelve of the Determinations involve the employment of children. Up to 90 of them relate to wage issues,¹⁹ which I took from the evidence to be the non-payment of wages.²⁰ Farm workers of less than substantial means are unlikely to consider the non-payment of wages a mere administrative contravention. I also do not agree that the remaining subject matter of the Determinations, including the necessity to register a vehicle for transporting farm workers, falls short of the public interest test. The purpose of these provisions, identified in the ESA, is to ensure, among other things, that employees receive fair treatment and have the benefit of at least basic standards of compensation and conditions of employment.²¹ The Ministry’s opinion that the regulatory framework and monitoring of the regulations have had the desired effect of “minimizing the exploitation” of farm workers is not the final word on this matter of public interest. Read together, I am satisfied the Determinations are records that will contribute to the public debate and understanding of the important matter of the enforcement of the law as it concerns some of BC’s farm workers.

[28] **3.4 Should the Fee be Waived?**—Although I have concluded that the Determinations relate to a matter of public interest, I must also decide whether this is an appropriate case in which to reduce or excuse the estimated fee.

[29] The Ministry submissions indicate that it gave scant consideration to this aspect of s. 75(5)(b), largely, I suspect, because it believes the records do not relate to a matter of public interest. However, the Ministry did consider one factor in concluding was there no basis to reduce or waive the fee. The Ministry submits the applicant unreasonably failed to work with it to reduce the costs of responding to the request.

[30] I do not agree with the Ministry on this point. The evidence shows that the applicant’s discussions with the Ministry resulted in the narrowing of his request from Determinations involving all farm workers to only those concerning FLCs.²²

¹⁹ Affidavit of Pat Cullinane, para. 29, in which the affiant states that, while it is “difficult to estimate”, he suggests approximately 15-20% of the Determinations are related to wages.

²⁰ Affidavit of Pat Cullinane, paras. 28 and 29.

²¹ *Employment Standards Act*, s. 2(a) and (b).

²² By way of further clarification, I find the applicant’s FLC Determination request pertains only to farm workers in the Fraser Valley region. This is based upon the applicant’s submission that the

The Ministry contends that this modification “did not alter the resources required to obtain the requested documents”.²³ This assertion is, at the very least, counter-intuitive. In the absence of further explanation,²⁴ the Ministry’s continued claim to require 104 hours, or approximately three weeks’ work by one employee, to retrieve the narrowed list of Determinations and the non-existent Walton Compliance Reports, is contrary to reason.

[31] The Ministry also suggests the applicant should have accepted a summary spreadsheet of the requested Determinations instead of asking for all of the FLC Determinations. The spreadsheet lists the Determinations by employer and contravened section of the ESA. The Ministry told the applicant that this would have allowed him to select specific Determinations of interest, thus reducing the time and resources required to retrieve the requested records. However, it is apparent to me that, if the applicant had accepted this proposal, it would have defeated one purpose of his research which I take to be the quantitative analysis of the comprehensive ESB data to determine enforcement trends over time. It is also evident to me that the summary does not reveal certain information that may be of significance.

[32] For example, the summary does not reveal what aspects of ESA Regulation s. 6 were contravened during the two-year period when the Ministry’s recording system did not make distinctions between contraventions under that provision. This is important because, among other things, ESA Regulation s. 6(e) requires that any vehicle transporting farm workers carry an unexpired inspection certificate.²⁵ Without looking at the original Determinations, it is not possible to glean this information.

[33] For the above reasons, it was reasonable for the applicant to reject the Ministry’s offer of the summary spreadsheet to satisfy his request. The Commissioner noted in Order 01-35²⁶ that it would 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.

[34] The Order just cited also states that among other factors for consideration in the confirmation, reduction or excusing a fee is the manner in which a public

working conditions of Fraser Valley farm workers are the matter of public interest here. In addition, the Ministry noted in its correspondence to the applicant that its estimate was for files related to farm workers in the Fraser Valley only and that additional charges applied if he required records outside of this area. The applicant did not indicate at any point that he wished to expand the scope of his request beyond the Fraser Valley region.

²³ Ministry’s initial submission, para. 4.37.

²⁴ At para. 15 of her Affidavit, Linda Brandie states that Kash Basi, a Ministry information and privacy analyst, sent her an email that set out the reasons why the applicant’s “modified” request would not minimize the retrieval time. I was not provided the Basi email or the reasons contained therein.

²⁵ Affidavit of Pat Cullinane, para. 31.

²⁶ Order 01-35, [2001] B.C.I.P.C.D. No. 36.

body attempts to respond to an applicant's request.²⁷ I have considered several factors in this regard.

[35] First, when the applicant asked for a fee waiver, the Ministry was required to examine the requested records, or at least a representative sample of the records, in deciding whether they related to a matter of public interest. The Ministry obviously failed to do this in respect of the Walton Compliance Reports.

[36] Second, the Ministry's fee estimate is based, in part, on the alleged existence of the Walton Compliance Reports. The fee estimate's veracity is now in doubt with the revelation these records do not exist. I also consider that the Ministry compounded its shortcomings by failing to justify or correct its estimate of the time for processing the remainder of records in light of the new information.

[37] I would also note that the Ministry's summary spreadsheet also calls into question its fee estimate calculation. The Ministry claims that locating the Determinations requires searching "through the files of all FLCs."²⁸ I fail to see the necessity for this because the spreadsheet summarizes the FLC Determinations by employer and contravention. Presumably, the Ministry can use this information to search only the files of FLCs that have generated Determinations, thus reducing search time.

[38] Finally, and this relates to the first point, the Ministry allowed this matter to go to inquiry without properly searching its records. This failure revealed itself only because I asked for a sample of the Walton Compliance Reports. The inadequacy of the Ministry's search for the records and its failure to respond to the applicant openly, accurately and completely are relevant circumstances I have taken into account in making this decision. Indeed, these just mentioned circumstances alone warrant excusing the fee in this case.

[39] I have carefully considered the parties' arguments and all of the circumstances in this case. These include the applicant's cooperation, the Ministry's failure to examine the records prior to exercising its discretion and the unsatisfactory manner in which the Ministry prepared its fee estimate and responded to the applicant's request. I conclude that a complete waiver of the fee for the time spent retrieving, preparing and copying the Determinations, as they relate to farm workers and FLCs in the Fraser Valley, is appropriate in this case.

4.0 CONCLUSION

[40] I order that the estimated fee be excused under s. 58(3)(c) for the reasons set out above.

²⁷ See Order 01-35 para. 46.

²⁸ Affidavit of Pat Cullinane, para. 9.

[41] I also specify, under s. 58(4), that the Ministry of Labour is to provide the applicant and me with evidence of its compliance with this order within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before August 5, 2009.

June 22, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC Files: F06-30368 & F06-30369