OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 332-1999

INQUIRY REGARDING A MINISTRY FOR CHILDREN AND FAMILIES FEE WAIVER DECISION

David Loukidelis, Information and Privacy Commissioner
December 22, 1999

Order URL: http://www.oipcbc.org/orders/Order332.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: Applicant B.C. Liberal Caucus requested a copy of Ministry's 1998 legislative session ministerial briefing book. Ministry gave fee estimate and subsequently refused applicant's request for fee waiver. Ministry argued information in record did not adequately relate to matters of public interest. Applicant argued some aspects of record related to public interest matters of recent public debate. Applicant's status only one factor relevant to whether information would be disseminated to public. Ministry's decision upheld.

Key Words: Fee waiver – public interest – dissemination of information – use of information – partial fee waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 58(3)(c), 75(5)(b).

Authorities Considered: Alberta: Order 96-022. **B.C.:** Order No. 55-1195; Order No. 90-1996; Order No. 137-1996; Order No. 154-1997; Order No. 155-1997; Order No. 293-1999; Order No. 298-1999. **Ontario:** Order P-474.

Cases Considered: B.C.: *Minister of Forests et al.* v. *Information and Privacy Commissioner et al.* (B.C. Supreme Court, Victoria Registry No. 99-1290, August 13, 1999).

1.0 INTRODUCTION

The dispute in this inquiry is over a fee estimate provided by the Ministry for Children and Families ("Ministry") to the British Columbia Liberal Caucus relating to an access to information request made by the Liberal Caucus. The parties agree the Liberal Caucus is the applicant for purposes of this inquiry. On September 24, 1998, the applicant made an access to information request to the Ministry, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for "a copy of the Minister's briefing book for the 1998 Legislative Session estimates of the Ministry for Children and Families."

On February 16, 1999, an employee of the Ministry's Information and Privacy Branch wrote to the applicant and provided an estimate of the fees the Ministry proposed to charge for the applicant's access request. The Ministry estimated the fees at $30.00 for preparing the record for disclosure and $299.50 for copying the record. The next day, the applicant wrote to the Ministry and asked for a fee waiver under s. 75 of the Act. The Deputy Minister of the Ministry rejected this request on March 29, 1999. On April 29, 1999, the applicant asked for a review of this decision under s. 52 of the Act. This order results from the inquiry held in this case under s. 56 of the Act.

Before turning to the merits, I should stress that – as is always the case in fee waiver orders, especially – the result in this inquiry turns on the circumstances before me. This order gives guidance to public bodies and applicants on principles relevant to public interest fee waiver requests. The result, however, is very much confined to the facts in this inquiry.

2.0 ISSUES

I have been asked in this inquiry to review the Ministry's decision to refuse to waive its estimated fee for access to a copy of the Ministry's 1998 Legislative session briefing book. Both parties accept that the Liberal Caucus bears the burden of persuading me that the fee waiver should be granted. I agree the burden lies with the applicant. See Order No. 137-1996 and Order No. 293-1999.

A preliminary issue, relating to my jurisdiction to review the Ministry's fee waiver decision, must be dealt with first.

3.0 DISCUSSION

3.1 Commissioner's Power to Review Fee Waiver 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.

A sizeable portion of the Ministry's initial submission dealt with the power under s. 58(3)(c) to review a public body's fee waiver decision. The Ministry characterized that power as a limited power of review that should be used only where a public body has

acted inappropriately in refusing a fee waiver. The Ministry argued the commissioner should extend a "high degree of deference" to the public body's decision (p. 7).

By contrast, the applicant argued the commissioner can substitute his or her judgement for the public body's judgement. The applicant noted that s. 58(3)(c) gives the commissioner the power to excuse a fee in the appropriate circumstances. It also observed that my predecessor's views on the s. 58(3)(c) jurisdiction had evolved over time. In earlier orders, such as Order 90-1996, my predecessor's approach to his s. 58(3)(c) powers was similar to the Ministry's approach in this case. In later orders – such as Order No. 293-1999 and Order No. 298-1999 – he took a broader view of those powers.

There is no doubt my predecessor's approach to such fee waivers changed over time. In his early decisions regarding fee waivers, he was deferential in reviewing fee waiver decisions. See, for example, Order No. 55-1995, where he said his intervention would be warranted only if the public body had failed to act in a reasoned manner. See, also, Order No. 90-1996. My predecessor's approach evolved, over time, to the point where he was prepared, in appropriate circumstances, to substitute his decision for that of the public body. See, for example, Order No. 293-1999 and Order No. 298-1999. In my view, the legislative scheme of the Act as a whole leaves no doubt that s. 58(3)(c) gives the commissioner the power to substitute his or her decision for that of the public body.

In *Minister of Forests et al.* v. *Information and Privacy Commissioner et al.* (B.C. Supreme Court, Victoria Registry No. 99-1290, August 13, 1999), Wilkinson J. dismissed an application by the Ministry of Forests for judicial review of Order No. 293-1999. That decision was handed down just after the close of submissions in this inquiry. The judgement in that case confirms that s. 58(3)(c) gives the commissioner a broad power to confirm, excuse or reduce a fee "in the appropriate circumstances". It is not necessary to establish that the head of a public body has acted irrationally or in bad faith before the commissioner can excuse a fee. The jurisdiction to intervene under s. 58(3)(c) is broad. It may well enable me, in appropriate cases, to substitute my opinion – *i.e.*, my discretion – for that of the head. In other cases, however, it will not be appropriate to do that.

It should be noted again that, in seeking fee waivers under s. 75(5)(b), applicants bear the burden – both at the time they seek a fee waiver and in an inquiry such as this – of establishing that a fee waiver should be granted in the circumstances of each case.

3.2 Initial Positions On the Fee Waiver Request – Before turning to the parties' arguments, it could be said – as an aside – that the debate in this inquiry is whether British Columbia's taxpayers should pay the fee through the Ministry or through taxpayer funds provided to the Liberal Caucus in connection with its work as the Official Opposition.

The applicant's request for a fee waiver was essentially based on the role of the Official Opposition. The grounds advanced in the request to the Ministry can be summarized as follows:

- Ministerial briefing books provide lots of information about the Ministry's operation and outline in detail the Ministry's activities for the upcoming year.
- Debate in the Legislature over the ministry spending estimates is an important aspect of our political system.
- Access to briefing books helps the Official Opposition prepare for debate in the Legislature, including about spending estimates.
- Briefing books give a history of ministry activities from year to year and therefore show long term trends in ministry performance.

The applicant argued a fee waiver was, for these reasons, in the public interest.

The Ministry's original reasons for rejecting the fee waiver request were as follows:

> We have evaluated the information provided in your letter according to criteria established in government policy, and in accordance with the criteria established in previous orders made by the Information and Privacy Commissioner, specifically order numbers 154 and 155.
>
> The criteria established by the Commissioner states [*sic*] that the applicant must make arguments as to why the information requested relates to public interest. The Ministry feels that you have not provided sufficient reasons as to why the records requested relate to a specific matter of public interest. The Minister's briefing book covers a broad range of issues involved in the operation of the Ministry and we do not believe that all of the issues are of sufficient importance to be considered to be "in the public interest."
>
> Issues included in the Minister's briefing book have been debated in the House. As indicated in your letter, this included over 280 hours of debate. The debates of the House are published on the Internet and are available to the public. Once the estimate debates are completed, and budgets approved, the approved budgets are available to the public. The information can also be obtained publicly in the Hansards, Annual Reports, Internet sites, etc.

3.3 Applicable Principles – The parties' submissions in this inquiry generally followed the positions they originally took when the fee waiver was sought. The applicant argued that the criteria expressed in Order No. 154-1997 and Order No. 155-1997 should be used to determine if a fee waiver is in the public interest here. These criteria were, of course, cited by the Ministry in its decision not to waive the estimated fee. The Ministry presented its case using those criteria.

In Order No. 155-1997, my predecessor articulated a two-step process to be followed by the head of a public body in deciding whether to grant a fee waiver. As was acknowledged in Order No. 155-1997, that approach was, to some extent, borrowed from the analysis

developed in Ontario Order P-474. That approach was further developed by the previous commissioner in Order No. 293-1999 and Order No. 298-1999. My perspective on that two-step process – which public bodies must follow in determining whether a fee waiver is to be granted under s. 75(5)(b) – is as follows:

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?;

   (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?

Some comments about these principles are necessary before I address the merits of this case.

First, it must be remembered that s. 75(5)(b) contemplates a possible fee waiver where a record "relates to a matter of public interest, *including* the environment or public health or safety" (emphasis added). It is clear that the concept of "public interest" is not, for the purposes of the section, limited to the environment or public health or safety. Even if a

record relates to matters that have nothing to do with the environment, or with public health or safety, the record may still relate to a "matter of public interest" for the purposes of s. 75(5).

The second comment is related to the first. Any attempt to define exhaustively or finally what is meant by the term "public interest" is doomed to failure. There is some truth to the saying that a matter that is of interest to the public is not necessarily a matter of public interest, but it is impossible to provide definitive guidance on the point. In any case, it is not desirable to attempt an exhaustive definition of the concept. Accordingly, the factors summarized in paragraph 1, above, give public bodies *non-exhaustive* direction on how to determine whether something is a "matter of public interest". Those factors will address most cases. In some cases, however, requested records will relate to a "matter of public interest" for the purposes of s. 75(5)(b) even though the factors in paragraph 1 are not present or do not describe the contents of those records. For this reason, the head of a public body must, in determining whether requested records relate to a matter of public interest, consider whether any other relevant factors raised by the applicant reasonably support such a finding.

The third preliminary comment relates to application of the factors summarized in paragraphs 1(a) through (d). Public bodies should bear in mind that it is not necessary for all of those factors to be present in order for records to relate to a matter of public interest. For example, a requested record might satisfy the factors in paragraphs 1(a) through (c), but not disclose how the public body is allocating financial or other resources. A decision that the records do not relate to a matter of public interest because the factor in paragraph 1(d) is not present would, in my view, be incorrect.

Fourth, the above summary expands somewhat on the principles found in Order No. 155-1997. In that case, my predecessor limited the relevant considerations in paragraph 1, above, to whether dissemination of the information would yield a public benefit. He also limited the consideration in paragraph 2(a), above, to dissemination of the information. It seems to me a public body should also consider the applicant's stated proposed use, if any, and not just his or her stated proposed dissemination, of the information. In the case of the factor in paragraph 1, above, the public body should consider whether use of the information can reasonably be expected to yield a public benefit as outlined above. In the case of paragraph 2(a), above, the public body should ask whether the applicant's primary purpose is to use or disseminate the information in a way that can reasonably be expected to benefit a public, and not a private, interest.

For clarity, a public body cannot require an applicant to reveal the purpose for which requested information is to be used. Applicants are not obliged, legally or practically speaking, to reveal such information for the purposes of a fee waiver. Nor can a public body draw an adverse inference from the fact that no use is stated by an applicant. It should also be made clear that the head of a public body cannot pass subjective judgement on whether the proposed use is desirable or worthy in and of itself. The head should consider the proposed use objectively. Would a reasonable person conclude that the proposed use of the record can reasonably be expected to benefit a public interest? If

an applicant happens to support its case for a waiver by revealing the proposed use of the information, the head of the public body should only consider that use in the way just described.

Fifth, public bodies should remember that s. 75(5) authorizes the head of a public body to waive all *or* part of a fee. In this case, of course, the fee was smaller than some. There will be cases where a large fee estimate has been given and, although the head correctly concludes that the records relate to a matter of public interest, the head can waive only part of the fee. This is not an all-or-nothing exercise.

3.4 Does the Record Relate to a Matter of Public Interest? – Again, the first stage of the analysis is for the public body to decide whether a record requested by an applicant relates to a matter of public interest. At p. 11 of its initial submission, the Ministry provided the following description of the 1998 ministerial briefing book requested by the applicant here:

> The Briefing Book requested by the Applicant is prepared for the Minister for Children and Families in anticipation of the estimates debates. Each Branch of the Public Body is asked to prepare issue papers for inclusion in the book. The Corporate Policy Branch of the Public Body is, and was, responsible for coordinating the preparation of the Briefing Book. Typically, the Briefing Book starts to be prepared in the January prior to the commencement of estimates debates. The Briefing Book requested by the Applicant started to be compiled in March 1998 and consists of the following types of documents:
>
> - *Issue Papers*: Notes are prepared about issues about which there is perceived to be a possibility of the matter being raised during the estimates debates. These include the following types of issues: (1) issues that may have been in the press during, or prior to, July 1998; (2) issues that had been brought up in the past by the official opposition; (3) issues that had been brought up in the past by individual Members of the Legislative Assembly (often these are issues raised by a constituent); and (4) matters that have been raised through correspondence with the Minister.
> - *Summaries of specific program areas*: These notes present a 'snapshot' of activities in each program area for, what was then, the upcoming 1998/99 fiscal year.

At pp. 12 and 13 of its initial submission, the Ministry listed the following headings for some of the documents contained in the briefing book:

- "1998/99 Budget – Administrative Budget Changes by STOBS";
- "Adoption – Hague Convention";
- "Asset Transition";
- "Case Conference";
- "Community Living – Overview";

- "Contract – Foster Parents"
- "Hearing Aid Program";
- "School Based Support Services; and
- "Vision Screening".

Parties' Arguments – It is useful to summarize, at this point, the parties' main arguments on whether the records relate to a matter of public interest. For its part, the Ministry said the briefing book does not include records relating to a matter of public interest. It noted, first, that the briefing book contains no issue papers concerning proposed legislation or initiatives of the Ministry. The Ministry estimated that 75% to 80% of the issues dealt with in the briefing book "do not concern particular issues that have been the subject of recent public debate" (p. 13). It estimated that only 20% to 25% of the briefing book's contents concern issues that were actually raised by the Official Opposition during the Ministry's estimates debates. The Ministry also contended that issues addressed in the briefing book were perceived to be current roughly a year and a half ago. According to the Ministry's evidence, by October 1998 most of the issues in the briefing book had been replaced by other issues and were no longer current.

The Ministry also argued the briefing book's contents are generally summaries of information about programs or issues. Since most of the summarized information is publicly available for other sources – including the Ministry's Web-site, annual reports and news releases – disclosure of the briefing book would not, the Ministry argued, contribute to an understanding of the issues disclosed in it.

As for the applicant's status as the Official Opposition, the Ministry argued this is not determinative of the applicant's entitlement to a public interest waiver under s. 75(5). The Ministry cited Order 96-022 of the Alberta Information and Privacy Commissioner on this point. That case dealt with a fee waiver request. At p. 7, the Commissioner said the status of an applicant – including as a member of Alberta's Legislative Assembly – is not a "direct consideration". It is only a factor that may be considered in deciding whether the record's contents will be disseminated or whether the applicant's motives are commercial.

For its part, the applicant argued that the Ministry's head had not approached the matter properly. It argued that the head should have examined the records themselves to decide whether they relate to a matter of public interest. Instead, the applicant argued, the head simply said the applicant had not put forward evidence to establish that fact. In my view, the Ministry's fee waiver refusal letter establishes that its head properly considered the matter.

Next, the applicant argued, at p. 4 of its initial submission, that the contents of the briefing book must have been selected for inclusion in the binder "because they are of importance to the operations of the Ministry." Although the applicant conceded that "not every single document" in the briefing book may be of public interest, when considered

as "a set of documents", the briefing book clearly falls within the scope of a record relating to a matter of public interest.

Moreover, the applicant argued, the fact that it raised only 20% to 25% of the issues covered in the briefing book in debate works against the Ministry. If the book had been released in time, the applicant said, it would have been in a better position to raise more issues.

The applicant also argued it is irrelevant that legislative debates are published or that, once estimates debates conclude, the approved budgets are publicly available. Nor did the applicant acquiesce in the Ministry's contention that the records do not relate to matters of current debate. The applicant pointed out that it had made its access request on September 24, 1998, but it took the Ministry almost five months to respond with a fee estimate. That led to the applicant's fee waiver request, to which the Ministry responded a month later. In this light, it is hardly surprising, the applicant argued, that the briefing book's contents are no longer current.

Discussion of This Case – The following discussion follows the criteria summarized in paragraphs 1 and 2, above. A comment is in order before turning to that analysis.

It must be remembered that this case does not concern whether the applicant is entitled to have access to the requested record. The Ministry has given a fee estimate and the dispute is only about the applicant's request that the fee be waived. There will be cases where a public body arrives at a fee that will, on its own, be an effective barrier to the right of access. This is not such a case, of course, since the fee estimate here is relatively modest. But in cases where a large fee estimate is involved, and there are grounds for concluding that a fee waiver is appropriate, the head of a public body must not deny the fee waiver on the ground that the estimated fee is too high for the public body to bear alone. Again, fee waivers are not all-or-nothing. In such cases, a partial fee waiver may well be the appropriate approach in the circumstances.

Turning to the factor in paragraph 1(a), above, I think the Ministry is wrong to say that, at the time of the applicant's request, the briefing book's contents do not relate to matters that had recently been debated. Even if one views the matter from the time the Ministry responded to the applicant – some months after the request had been made – the correct view is that the subject of the records had recently been publicly debated. This is even clearer when viewed from the date of the access request. When one refers to "recent" public debate, the distinction is not between months, but between months and years.

By contrast, the Ministry's evidence that something like 75 or 80% of the materials in the briefing book relate to matters that were not raised by the Official Opposition in the debates is relevant. This evidence was given in an affidavit sworn by Valerie Hamilton on July 22, 1999. Ms. Hamilton is a Policy Analyst with the Ministry's Corporate Policy Branch and she reviewed the briefing book before arriving at her conclusion about the Official Opposition's use of the briefing book. Ms. Hamilton's assessment necessarily

involves her judgement, or opinion, on the matter. Nonetheless, I accept that evidence and give it some weight.

The applicant pointed out, quite rightly, that the Ministry cannot take this point too far. As the applicant noted, it does not know what is in the briefing book. So the fact that as much as 80% of the matters dealt with in it were not raised in debate arguably simply reflects the applicant's ignorance of the book's contents. If the Official Opposition had received a copy before the debates, perhaps more issues in it would have been raised. Of course, the fact that the Official Opposition raises an issue in debate does not mean the issue is necessarily one of public interest.

The Ministry noted that a good deal of the information in the briefing book is already publicly available, including through the Ministry's Website and its publications. In this light, the Ministry implied, the Official Opposition could have informed itself, before the debates of issues, that should be raised in the Legislature.

The consideration in paragraph 1(b) is not in issue here. In this case, the relevant factor is found in paragraph 1(c)(iii). Would dissemination of the information in the records yield a public benefit by assisting public understanding of an important policy, law, program or service? Of course, the applicant has not seen the 1998 briefing book, so it is at some disadvantage in making its case on this point. It is clear, however, that the applicant has seen the 1997 Ministry briefing book. Further, the Ministry's initial submission described the 1998 version in some detail, so the applicant was in a good position to make its case on this issue.

Having considered all of the evidence, I cannot say the Ministry's head was wrong in deciding that the criterion in paragraph 1(c)(iii) has not been met. The briefing book contains summaries – for the Minister's information – respecting a variety of matters that involve the Ministry. But this does not necessarily mean dissemination of that information to the public or use of the information – including through its use by the Official Opposition in legislative debates – will assist "public understanding" of an "important policy, law, program or service" as contemplated by the factor in paragraph 1(c)(iii). The evidence before me supports the Ministry's conclusion that the requested record is a relatively routine document. To find otherwise would come perilously close to saying that public dissemination, or use, of any record created by the Ministry that in any way explains, summarizes or comments on its activities, policies or challenges, in a given year, by definition assists public understanding of an important policy, law, program or service for the purposes of a s. 75(5) fee waiver. This would make it difficult, to say the least, ever to say that the first part of the fee waiver test has not been met. I cannot, in the end, conclude that dissemination or use of the information found in this briefing book can reasonably be expected to yield a public benefit by assisting public understanding of an important policy, law, program or service.

The Ministry has also established that a good deal of the information in the briefing book is already publicly available, including through the Ministry's Website and publications. In this light, public understanding of the issues can be furthered by gaining access to the

same information outside the Act's channels. For the purposes of paragraph 1(c)(iii), the briefing book is not the only source of the information it contains. Other convenient means exist to obtain this information and disseminate it to the public in order to contribute to public understanding of a matter of public interest.

For the reasons just given, I cannot conclude that the first part of the test outlined above has been satisfied. This means the second part of the analysis, found in paragraph 2, above, does not need to be considered. In any case, even if the requested record did relate to a matter of public interest as contemplated by the first part of the test, I cannot conclude, in light of paragraph 2, above, that the fee should be waived. This part of the analysis requires the head to decide if the fee should be waived and, in doing that, to "focus on who the applicant is and on the purpose for which the applicant made the request." Paragraphs 2(a) and (b) set out factors relevant to this exercise. There is no doubt in my mind that the primary purpose for the access request here was not to serve a private interest. I am satisfied that the purpose for the Liberal Caucus' request here was to prepare for debates in the Legislature and to otherwise fulfill its role as Official Opposition. That is primarily a public purpose and not a private purpose.

The status of the applicant as the caucus of the Official Opposition is relevant, but not determinative, on this point. Similarly, if a public interest fee waiver is requested by a member of any of the media, her or his status is relevant to the public body's consideration of the matters raised in paragraph 2, above. As for the analysis under paragraph 1, a media representative may be more likely to request records that relate to matters of public interest, but that person's status is not, on its own, determinative of the paragraph 1 analysis.

4.0 CONCLUSION

For the reasons given above, under s. 58(3)(c) of the Act, I confirm the decision of the head of the Ministry under s. 75(5) of the Act not to waive the estimated fee in this case.

December 22, 1999

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