



Order F21-10

BC FERRIES

Elizabeth Barker
Director of Adjudication

March 18, 2021

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Summary: A complainant complained about BC Ferries' decision to not waive a fee to provide him access to a record about confidential settlement agreements. The adjudicator found the complainant had not proven he could not afford to pay the fee under s. 75(5)(a) or that the record relates to a matter of public interest under s. 75(5)(b). The adjudicator confirmed BC Ferries' decision to not excuse the complainant from paying the fee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 5, 6(2), 58(3)(c), 75(5)(a), 75(5)(b). *Freedom of Information and Protection of Privacy Regulation*, s. 13 and Schedule 1.

INTRODUCTION

[1] This order decides a dispute over a fee assessed by BC Ferries for access to information under s. 75 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The complainant requested “[t]he total number of confidential settlement agreements or releases involving cash amounts and their overall dollar value entered into by BC Ferries”¹ (April Request).

[3] BC Ferries responded that it did not have a specific record containing the requested information and it had no ability to generate the details from its databases (May Response).² However, it offered to search its records and compile the requested information into a one-page record for a fee. It estimated a fee of either \$712.60 or \$2137.60, depending on the date range the complainant wanted.

¹ Complainant's April 26, 2019 request.

² BC Ferries May 8, 2019 response containing the fee estimates.

[4] The complainant asked BC Ferries to waive the fee under s. 75(5)(b) because the record relates to a matter of public interest.³ BC Ferries denied his request for a fee waiver.⁴

[5] The complainant complained to the OIPC that BC Ferries should have waived the fee under s. 75(5)(b). He also claimed he could not afford to pay the fee so it should also be waived under s. 75(5)(a).⁵ Mediation did not resolve the fee dispute and it proceeded to inquiry. The Investigator's Fact Report and the Notice of Inquiry state that the issues are ss. 75(5)(a) and (b).

Preliminary Issues

[6] BC Ferries' initial submission raises three matters that are not included as issues in the Notice of Inquiry or the Investigator's Fact Report, so I will address them first.

Nature of the request

[7] BC Ferries submits that the April Request is not a request for records under s. 5 of FIPPA, so FIPPA does not apply. BC Ferries says the complainant has asked BC Ferries to undertake research on his behalf and provide him with a report, and FIPPA does not require a public body to conduct research.⁶ Because FIPPA does not apply to requests for research, BC Ferries says, the Commissioner has no authority to rule on BC Ferries' decision to charge a fee to do that research.

[8] BC Ferries characterizes the April Request as a "request for research" because it would have to search a large number of records in order to create a responsive record. BC Ferries says:

From time to time, BC Ferries will likely have entered into settlements and agreements that may or may not include non-disclosure or confidentiality provisions. BC Ferries maintains an extensive filing system throughout the organization, and responsive information may be contained in multiple locations depending on the nature of the underlying document. To determine what responsive information exists, a manual file-by-file, agreement-by-agreement review will be required because such information is not tracked otherwise by BC Ferries in its databases;

The undertaking of such a manual file-by-file, agreement-by-agreement review will involve significant amounts of time and resources on the part of BC Ferries.⁷

[9] In the May Response, BC Ferries told the complainant:

³ Complainant's May 10, 2019 email to BC Ferries.

⁴ BC Ferries' May 23, 2019 fee waiver decision.

⁵ Complainant's May 23, 2019 email to OIPC and Investigator's Fact Report at para. 9.

⁶ BC Ferries' initial submission at paras. 2 and 17.

⁷ BC Ferries' initial submission at para. 27.

Finally, we have previously noted that the FOIPP Act does not require BC Ferries to create a record to respond to a request, unless it can do so from a database using normal expertise. While BC Ferries has appropriate controls in place to manage possible settlement issues, we do not have an operational need to track the details you are seeking. We do not have a specific record containing these details, nor do we have the ability to generate the details from our databases.

However, to assist you with this request, we are willing to conduct the research necessary to compile the details you are seeking. To do so, we must review relevant files to determine if they have the responsive details. As this will be time-consuming, we have approached this request using two time spans...⁸

[10] The letter then sets out how the disputed fee has been calculated, which will be discussed in more detail below.

[11] The complainant's inquiry submission does not respond to BC Ferries' argument that FIPPA does not apply because his request is not an access request under s. 5.

[12] I have carefully considered what BC Ferries says about why the April Request is not an access request under s. 5. However, I am not persuaded by that argument for the following reasons.

[13] Section 4 of FIPPA provides a right of access to any record in the custody or under the control of a public body, subject to certain exceptions listed in ss. 12-22.1. Section 5 says that to obtain access, an applicant has to make a written request that provides sufficient detail to enable the public body to identify the records sought.

[14] The April Request is written and it clearly asks for "the total number of confidential settlement agreements or releases involving cash amounts and their overall dollar value entered into by BC Ferries." While the complainant did not ask for a specific record by name, this is understandable. Applicants cannot be expected to have inside knowledge about which specific records are in the custody or under the control of public bodies. The complainant's request is not framed in a way that is outside acceptable parameters of what makes an access request under s. 5.

[15] The fact that there is no existing record responsive to a request does not render the request any less an access request under s. 5. Section 6(2) of FIPPA (see below at paragraph 16) recognizes and expressly provides for the situation where there is no record that responds to a request made under s. 5. In conclusion, BC Ferries' explanation that it would have to search its records in order to compile the requested information into a responsive record does not persuade me that the April Request is not a request under s. 5 of FIPPA.

⁸ May Response at p. 2.

Section 6(2) of FIPPA

[16] BC Ferries' submission raises s. 6(2) as an issue. Section 6(2) says that a public body must create a record for an applicant if the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and creating the record would not unreasonably interfere with the operations of the public body.

[17] BC Ferries submits that it does not have a specific record containing the details the complainant seeks, nor does it have the ability to generate the details from its databases. BC Ferries says it would have to create a record by researching its records manually in order to compile the requested information into a single record, and s. 6(2) does not require it do that. BC Ferries told the complainant this when communicating with him about the April Request.

[18] The complainant's inquiry submission does not dispute what BC Ferries says about what BC Ferries is required to do (or not do) under s. 6(2). Importantly, the complainant did not complain to the OIPC that BC Ferries has not met its duty under s. 6(2). Further, s. 6(2) is not listed as an issue in the Investigator's Fact Report or the Notice of Inquiry.⁹ Therefore, I decline to add it as an issue in the inquiry.

Fee waiver under s. 75(5)(a)

[19] BC Ferries says that when the complainant asked for a fee waiver, he did not say he could not afford to pay and was requesting the fee be excused under s. 75(5)(a). He raised his inability to pay for the first time when he asked the OIPC to review the fee dispute. BC Ferries says, accordingly, it did not have the opportunity to consider a fee waiver under s. 75(5)(a).¹⁰ BC Ferries submits, "It is not reasonable that BC Ferries' decision to decline to waive fees should be reviewed based on matters that the applicant did not raise at the time of his fee waiver request."¹¹

[20] I can see that when the complainant complained to the OIPC, he asserted he was entitled to a fee waiver because the information is in the public interest and because he could not afford to pay.¹² I do not know the details of what was said during mediation and investigation. However, based on what is in the Investigator's Fact Report, I conclude that BC Ferries was well aware that it was being asked to consider waiving the fee under both ss. 75(5)(a) and (b). The Investigator's Fact Report says:

On May 23, 2019, the complainant complained to the OIPC that the public body failed to grant a fee waiver under section 75(5)(b) of FIPPA. The complainant also raised the inability to pay, pursuant to section 75(5)(a) of FIPPA.

⁹ The complainant also did not dispute BC Ferries calculation of the fees and how many hours it estimated it would take to create the requested record.

¹⁰ BC Ferries' initial submission at para. 42.

¹¹ BC Ferries' reply submission at para. 7.

¹² Complainant's May 23, 2019 email to OIPC and Investigator's Fact Report at para. 9.

Mediation did not resolve the matter and it is proceeding to inquiry.

At the inquiry, the Adjudicator will consider whether a fee waiver is warranted under sections 75(5)(a) and 75(5)(b) of FIPPA.¹³

[21] The Notice of Inquiry also states that both ss. 75(5)(a) and 75(5)(b) are at issue in this case.

[22] I am satisfied that BC Ferries had an opportunity to consider a fee waiver under s. 75(5)(a) and it also received fair notice that s. 75(5)(a) was an issue to be decided in this inquiry. Therefore, I will consider s. 75(5)(a).

ISSUE

[23] The issue to decide in this case is whether BC Ferries was justified under ss. 75(5)(a) or (b) of FIPPA in refusing to waive the estimated fee for the April Request.

[24] FIPPA does not say which party has the burden of proof in inquiries regarding s. 75(5). However, previous orders have said that the burden lies with the complainant,¹⁴ and I agree.

DISCUSSION

Background

[25] Prior to making the April Request, the complainant made three very similar requests:

- “the total number of non-disclosure agreements and their dollar value, entered into by BC Ferries from January 01, 2008 - December 31, 2018.”¹⁵
- “Does BCF use Non Disclosure Agreements [NDAs] when entering into legal monetary settlements? How many legal settlements involving both a NDA and cash payment have been entered into by BCF for the last 5 years Jan 01, 2014 - Dec 31, 2018.”¹⁶
- “Copies of any documents, emails, letters, telephone logs, diary/journal/daily planner entries, meeting minutes, committee agendas, briefing notes, financial statements, spreadsheets or any other correspondence or record that mention or pertain to Non-Disclosure Agreements and/or the value of any payments of a settlement, for cash or other considerations, in the

¹³ Investigator’s Fact Report at paras. 9 and 11.

¹⁴ Order 332-1999, 1999 CanLII 4202 (BC IPC); Order 01-04 2001 CanLII 21558 (BC IPC); F20-14, 2020 BCIPC 16.

¹⁵ Complainant’s February 27, 2019 request.

¹⁶ Complainant’s March 1, 2019 request.

possession of BC Ferries and its employees and/or management, between January 1, 2013 – December 31, 2018.”¹⁷

[26] BC Ferries’ response for the first two requests was that it did not have a specific record containing the requested information, nor did it have the ability to generate the information from any of its databases. For the third, larger request, BC Ferries assessed a \$13,676.40 fee and denied the complainant’s request for a fee waiver under s. 75(5)(b). The complainant brought none of those matters to the OIPC for a review.¹⁸

[27] Only the May Response’s fee estimates and BC Ferries’ decision not to waive them are the subject matter of this inquiry.

Section 58(3)(c)

[28] As the commissioner’s delegate, under s. 58(3)(c), I have the authority to confirm, excuse or reduce the disputed fee in the appropriate circumstances. The jurisdiction to intervene under s. 58(3)(c) is broad and it enables me, in appropriate cases, to substitute my decision for that of the head of the public body.¹⁹

Section 75

[29] Section 75 of FIPPA allows a public body to require an applicant to pay a fee for access to records subject to certain exceptions.²⁰ Section 75(5) permits the head of a public body to waive an otherwise applicable fee in certain circumstances:

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,

- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or
- (b) the record relates to a matter of public interest, including the environment or public health or safety.

[30] Section 13 of the *Freedom of Information and Protection of Privacy Regulation* (Regulation) says the maximum fees for services provided to different categories of applicants are set out in Schedule 1 of the Regulation.²¹

¹⁷ Complainant’s email requested dated March 18, 2019.

¹⁸ The complainant’s requests are dated February 27, March 1 and March 18, 2019. BC Ferries’ responses are dated February 28, March 15, March 28 and April 15, 2019.

¹⁹ Order 332-1999, *supra* note 14 at p. 3; Order 01-04 *supra* note 14 at para. 14; Order 01-24, 2001 CanLII 21578 (BC IPC) at p. 8.

²⁰ No fee can be charged for the first three hours spent locating and retrieving a record, severing information from a record, or for an applicant’s own personal information.

²¹ B.C. Reg. 155/2012. Section 13 and Schedule 1 (Schedule of Maximum Fees).

[31] The complainant says he is entitled to a fee waiver under both ss. 75(5)(a) and (b). I will address s. 75(5)(b) first.

Public interest fee waiver, s. 75(5)(b)

[32] Previous orders have said that there is a two-step process for deciding if a public interest fee waiver under s. 75(5)(b) is warranted.²² The first step is to decide if the records relate to a matter of public interest. The test is not whether a matter is “sufficiently” of public interest or to what degree a matter is of public interest. The question is simply whether the record can be said to “relate” to a matter of public interest.²³ If the records relate to a matter of public interest, the second step is to decide whether the applicant should be excused from paying all or part of the estimated fee.

Do the records relate to a matter of public interest?

[33] The following is a non-exhaustive list of factors that should be considered when deciding if records relate to a matter of public interest:²⁴

1. Has the subject of the records been a matter of recent public debate?
2. Does the subject of the records relate directly to the environment, public health or safety?
3. Could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
 - a. disclosing an environmental concern or a public health or safety concern?
 - b. contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue? or
 - c. contributing to public understanding of, or debate on, an important policy, law, program or service?
4. Do the records disclose how the public body is allocating financial or other resources?

Complainant's submission

[34] The complainant said the following when he asked BC Ferries to excuse him from paying the estimated fees in the May Response:

I request a fee waiver based on the facts that the requested information is in the public interest as it will allow the public to ascertain if the frequency and use of Non Disclosure Agreements, their appropriateness as a vehicle to avoid accountability vis-a-vis the secret disbursement of public monies, and the use of

²² Order No. 332-1999, *supra* note 14 at p. 5; Order F17-38, 2017 BCIPC 42 at para. 11.

²³ Order 03-19, 2003 CanLII 49192 (BC IPC) at paras. 36–37.

²⁴ Order No. 332-1999, *supra* note 14 at p. 5.

NDA's to shield proper and transparent accountability of public servants and public bodies, with access to the public purse, is appropriate, and to make available this information to assist in the further development of laws, policy and regulations in the public's interest.²⁵

[35] In his inquiry submission, the complainant says the following about why the record he requests relates to a matter of public interest:

This request is part of my attempt to assist in using information about the use of Non Disclosure Agreements, (NDA's) and to develop policy regarding their use that strengthens our democratic institutions.

Donald Trump uses them. The National Enquirer uses them. And several of our own democratic institutions in BC use them. After learning of the frequent use of NDA's by Craig James, former Clerk of the BC Legislature, currently facing criminal charges, I undertook a macro level study of several Provincially regulated entities to ascertain the frequency of use, and costs of NDA's by our civil servants. I will share this information with the below named entities [BC Legislature, Bowen Island Municipality, Islands Trust and Metro Vancouver²⁶], to assist in the development of policy and procedures for the proper use of these inherently secretive, mostly unregulated and anti-democratic instruments.

...

I am making a request for fee waiver of my FOI under section 75(5) and 75(6) of the act.^[27] My request; how many Non Disclosure Agreements, and their total dollar value, have you entered into in the last 5 years, is for the benefit of the public interest as this information will be shared in the attempt to develop policy and regulations and strengthen the democratic institutions with regards to the use of NDA's. As well I am indigent and cannot afford to pay any amount due to my personal financial situation.

[In camera evidence of his monthly income] and own a 19 year old car. I am poor in financial assets. Personal banking information/car registration are included as attachments and were accepted *in camera*.

I would appreciate a decision that reflects the Act and it's intentions of making important information available to the public, and respects the requesters [*sic*] ability to pay. I am not a large financially supported organization or political party, but rather an economically challenged member of the public attempting to further strengthen our democratic institutions with my inquires [*sic*].²⁸

²⁵ Complainant's May 10, 2019 email to BC Ferries (at BC Ferries' Senior Manager's affidavit, exhibit M).

²⁶ The applicant also asked these four public bodies how many NDAs they had entered into during the last five years and what the total dollar value was. The omitted portions of his submission explain how he was not satisfied with their responses.

²⁷ Section 75(6) says that prescribed categories of applicants may be required to pay different fees than other applicants pay but that these fees may not be greater than the actual costs of the services.

²⁸ Complainant's January 29, 2021 inquiry submission.

BC Ferries' submission

[36] BC Ferries says it is self-evident the information does not relate directly to the environment, public health or safety. It also says there is no evidence that the topic of confidential settlements and releases was the subject of a recent public debate around the time of the April Request.

[37] BC Ferries says, “The number of confidential settlements or releases and the total dollar values associated with them may satisfy the Complainant’s curiosity in the most general of senses, but that information does not pertain to any matter of public interest as that concept is understood under section 75(5).²⁹ It disputes the information would contribute to the development or public understanding or debate about an important issue of public interest, any policy, law, program, or service.³⁰”

[38] BC Ferries says confidential settlement agreements and releases are a customary business practice used to reduce disclosure of the “going rate” for settlements that could be used as leverage against a public body. It disputes the complainant’s claim that they are a tool to avoid accountability and it says disclosing the number of settlements and their total cash value will not provide any insight into that issue.

[39] BC Ferries submits that its refusal to waive the fees was “appropriate and there is no error here or reviewable conduct which would justify intervention by the Commissioner.”³¹

Analysis and finding, s. 75(5)(b)

[40] The record the complainant would like BC Ferries to create for him would contain the number of confidential settlement agreements or releases involving cash amounts and their total dollar value.

[41] The complainant’s evidence in support of a fee waiver consists of his assertion that various individuals and institutions use these kinds of agreements. He says that he has been looking into the frequency of their use and their costs and is attempting to assist with the development of policy regarding their proper use by civil servants.

[42] Although the complainant is personally concerned about this matter, he provides no evidence that the use of such agreements, in particular BC Ferries’ use of them, is a matter of interest to the broader public or the subject of recent public debate.

[43] I recognize that the requested information would disclose some information about how BC Ferries is allocating its financial resources.³² However, the complainant

²⁹ BC Ferries’ initial submission at para. 55.

³⁰ BC Ferries’ initial submission at para. 54.

³¹ BC Ferries’ initial submission at para. 41.

³² The record clearly does not relate to the environment, public health or safety.

does not explain how knowing that BC Ferries entered into X number of agreements that total Y number of dollars could reasonably be expected to contribute in any useful or consequential way to the public's understanding or discourse about that topic.

[44] I find the complainant has provided insufficient evidence and argument to establish the information he seeks relates to a matter of public interest under s. 75(5)(b).

Fee waiver based on inability to pay, s. 75(5)(a)

[45] Under s. 75(5)(a) the head of a public body may waive a fee if the applicant cannot afford the payment. This section is intended to ensure that fees do not become a barrier to access, a principle that is fundamental to FIPPA's operation. However, FIPPA does not provide an unlimited right of access for someone who is not able to afford to pay.³³ Past OIPC orders have made it clear that an applicant must do more than assert an inability to pay a fee. Applicants must provide some kind of evidentiary support for their claims, including sufficient evidence of their financial circumstances.³⁴

[46] BC Ferries says that the fees it estimated were assessed in accordance with the Regulation.³⁵ The May Response contains a detailed breakdown of how the fees have been calculated. The complainant was offered the following two options:³⁶

A. For Responsive details for the date span January 01, 2017 to December 31, 2018

Locating and retrieving the records	26.5 hours, less the 3 free hours provided in the FOIPP Act = 23.5 hours @ \$30.00/hour	\$705.00
Preparing records for disclosure	0.25 hours @ \$30.00/hour	\$7.50
Scanned electronic copies of paper records	1 page @ \$0.10/page	\$0.10
	TOTAL	<u>\$712.60</u>

B. For Responsive details for the date span January 01, 2014 to December 31, 2018

Locating and retrieving the records	74 hours, less the 3 free hours provided in the FOIPP Act = 71 hours @ \$30.00/hour	\$2,130.00
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³³ Order 01-04, *supra* note 14 at para. 25.

³⁴ Order F05-36, 2005 CanLII 46569 (BC IPC) at para. 35; Order F20-14, *supra* note 14 at para. 15.

³⁵ BC Ferries' initial submission at paras. 34 and 39.

³⁶ The May Response also informs the complainant that he can request a fee waiver under s. 75(5) and request a review by the OIPC.

Preparing records for disclosure	0.25 hours@ \$30.00/hour	\$7.50
Scanned electronic copies of paper records	1 page@ \$0.10/page	\$0.10
	TOTAL	<u>\$2,137.60</u>

[47] Based on my review of the May Response, I can see that the fees are based on the maximum \$7.50 per ¼ hour, with the first three hours free, permitted under the Regulation.

Parties' submissions

[48] The complainant says the following about why he cannot afford the fees set out in the May Response:³⁷

- He is “a person with disabilities on a very small pension.”
- He is “indigent and cannot afford to pay any amount due to [his] personal financial situation”;
- He is “poor in financial assets”;
- He is “not a large financially supported organization or political party, but rather an economically challenged member of the public attempting to further strengthen our democratic institutions”; and
- He owns a 19 year old car.

[49] The complainant also provided the following supporting documentation with his inquiry submission:³⁸

- The approximate amount of his monthly pension (*in camera*);
- An undated screen print of how much money is in his chequing account and his savings account (*in camera*); and
- A photograph of his ICBC Owner’s Certificate of Insurance and Vehicle Licence form (*in camera*).

[50] BC Ferries says:

The evidence is that BC Ferries’ time, work and effort to identify the information sought by the Complainant would be time-consuming and laborious. This is not the kind of work or services that FIPPA requires BC Ferries to perform or even offer to applicants. Nonetheless, BC Ferries

³⁷ All of the quotes and information in this list come from his May 23, 2019 request for review and his January 29, 2021 inquiry submission.

³⁸ Complainant’s January 21, 2021 inquiry submission.

remains willing to undertake and perform such “extra-statutory” services. BC Ferries is simply not willing to do so for free, which would effectively only transfer to the travelling public the costs associated with the Complainant’s private research project.

It is unreasonable to expect that BC Ferries would do so, and BC Ferries is entitled to charge a fee for undertaking such work. The fee it proposes to charge is reasonable and appropriate in the circumstances.³⁹

Analysis and finding, s. 75(5)(a)

[51] I accept the complainant’s evidence about the approximate amount of his monthly pension, that he drives an old car and, and on an undisclosed date his bank accounts had very little money in them. The information he provides, however, leaves an incomplete picture of whether he could afford the fees. In particular, he provides no information about his expenses or financial obligations. He also does not say if he has access to other sources of income, such as spousal/family income.

[52] The complainant’s assertions about his financial wherewithal, combined with the limited concrete evidence he provides about his income and financial obligations, are simply insufficient to establish that he cannot afford to pay the fees set out in the May Response. Therefore, I find the complainant has not established that he should be excused from paying the estimated fees under s. 75(5)(a).

CONCLUSION

[53] Pursuant to s. 58(3)(c) of FIPPA, I confirm BC Ferries’ decision not to excuse the complainant from paying the estimated fees set out in the May Response.

March 18, 2021

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F19-79311

³⁹ BC Ferries’ reply submission at paras. 9-10.