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British Columbia

Order 03-19

# MINISTRY OF HEALTH SERVICES

David Loukidelis, Information and Privacy Commissioner
May 13, 2003

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**Summary**: The applicant, a journalist, requested access to records relating to prescription patterns for various drugs in British Columbia. She had made similar requests before and had written a number of newspaper articles about prescription of drugs for children and youth. The Ministry is not excused by s. 6(2) from creating the requested records. The requested records relate to a matter of public interest and the applicant is not making the request for a private purpose. The fee is excused under s. 75(5)(b).

**Key Words:** fee waiver – public interest – public or private purpose – commercial applicant – exercise of discretion.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 6(2), 75(5), 75(5)(a), 75(5)(b); *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93; *Access to PharmaNet Patient Record Information Regulation,* B.C. Reg. 384/99.

**Authorities Considered: B.C.:** Order 01-04, [2001] B.C.I.P.C.D. No. 4; Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order 02-31 [2002] B.C.I.P.C.D. No. 31; Order 02-43, [2002] B.C.I.P.C.D. No. 43. **Alta.:** Alberta Adjudication Order No. 2 (May 24, 2002). **Ont.:** Order P-474, [1993] O.I.P.C. No.145; Order PO-1962, [2001] O.I.P.C. No. 223.

**Cases Considered:** *Crocker* v. *British Columbia (Information and Privacy Commissioner)* (1998), 155 D.L.R. (4th) 220 (B.C.S.C.); *Ettlinger* v. *FBI*, 596 F. Supp. 867 (D. Mass, 1984).

## 1.0 INTRODUCTION

[1] The applicant, a reporter with *The Province* newspaper, has made several access to information requests over the past number of years for access to information about prescription patterns for various drugs. Her previous requests were made to the College of Pharmacists of British Columbia ("College"), a public body under the Act. The College had responded to her previous requests by disclosing records without a fee. Using information obtained through these requests, the applicant published several articles about the prescription of a variety of drugs, including benzodiazepine, Ritalin and Cylert. Her articles on this topic have won journalism awards.

[2] The applicant's access request that is the subject of this decision is, like her earlier requests, for records from the electronic information system known as PharmaNet. PharmaNet is a computerized network established and operated under the *Pharmacists, Pharmacy Operations and Drug Scheduling Act* ("PPODSA") and regulations under PPODSA. Any pharmacist who dispenses drugs prescribed to a patient through a community pharmacy, or through a hospital pharmacy to an out-patient, must enter certain information in PharmaNet.

[3] PharmaNet is comprised of two systems. One, the Drug Information System ("DIS"), contains patient record information, which includes each resident's personal health number, all drugs dispensed, reported drug allergies, reported clinical conditions, name, address and date of birth. The second system, the Pharmacare Central Information System ("PCIS"), contains patient claims and adjudication rules databases. PharmaNet also contains drug information such as drug monographs and drug utilization evaluation information.

[4] Each community pharmacy in British Columbia is linked to the central PharmaNet computer system. The computer hardware and software that make up the PharmaNet system are located in Victoria, within provincial government premises. IBM Canada Ltd. ("IBM") maintains the PharmaNet system under a contract with the Ministry, including by providing services relating to management of PharmaNet facilities and programming resources. The Ministry says IBM has sub-contracted government employees to run the PharmaNet system on a day-to-day basis.

[5] Under PPODSA, the *Access to PharmaNet Patient Record Information Regulation*, B.C. Reg. 384/99 ("PharmaNet Regulation"), regulates access to patient record information on the PharmaNet system for the purpose of providing therapeutic treatment or care to patients. Under s. 61(1) of PPODSA itself, the College's governing council can make bylaws regulating the pharmacy profession. Section 61(2) provides that these bylaws may address the following:

> …
>
> (f) collection, retention, maintenance, correction, protection, use and disclosure of prescription information and patient records including information and records intended for the purposes of PharmaNet;

…

(p) procedural requirements for the operation of the board, the inquiry committee, the discipline committee and the PharmaNet committee;

… .

[6] Section 63(3) reads as follows:

(3) A bylaw made by the council under subsection (2) (f) may include a requirement that a pharmacist, in relation to every prescription dispensed by that pharmacist, obtain and record on PharmaNet the patient record information specified in the bylaws.

[7] The College has made bylaws, which Cabinet has approved as required under s. 61(5), exercising these regulatory powers in relation to use of PharmaNet by pharmacists.

[8] On March 28, 2001, the applicant made an access request to the College, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for data relating to prescriptions for stimulants and anti-depressants for each local health area in British Columbia in calendar 2000. After some back and forth between the applicant and the College, the applicant amended her access request on October 29, 2001. The revised request changed the relevant period from the year 2000 to the preceding 12 months, beginning "on the last current month available when the request is processed" or beginning from the date of the revised request, with the decision as to which date applied being the College's. The revised request read, in relevant part, as follows:

I am requesting the information by year of birth and gender of each individual PHN. My detailed requests are as follows:

1) Sedative/Hypnotic Benzodiazepine Drugs (PTC CODE 28:24:08) – Total number of individual PHNs for all ages by year of birth and gender for each local health area who received at least one prescription for PTC 28:24:08 drugs during the 12-month period.

2) Anti-depressant Drugs (PTC CODE 28:16:04) – Total number of PHNs for all ages by year of birth and gender for each local health area who received at least one prescription for PTC 28:16:04 drugs during the 12-month period.

3) Combined (PTC 28:24:08 and/or PTC 28:16:04) – Total number of PHNs for all ages by year of birth and gender for each local health area who received at least one prescription for either PTC 28:24:08 or PTC 28:16:04 during the 12-month period.

Please note that I am dropping my request for information on stimulant drugs and anti-psychotic drugs.

[9] In a November 17, 2001 e-mail to the applicant, the College said it had "received a cost estimate" for the applicant's request. The estimate included $750 that would be charged by the College, together with $5,375.63 for charges the Ministry of Health Services ("Ministry") indicated it would levy for its work in providing access. The College clarified this estimate in a December 28, 2001 letter to the applicant, saying it was "not prepared to waive the MOH estimated proportion of $5,375.63, should the Ministry of Health charge our College for this amount." (The College's estimate is reproduced below, in the discussion dealing with the public interest fee waiver issue.)

[10] By a letter dated November 19, 2001, the applicant requested a review, under Part 5 of the Act, of the fee estimate. Her request for review said that the $5,375.63 Ministry fee was "both excessive and deliberately prohibitive" and that the applicant wished to object to the fee assessment "under ss. 25 and 75" of the Act. Her request for review went on to contend that there

> … is no question that this is an area of significant public interest, yet that interest is has [*sic*] been entirely ignored by the Ministry of Health, which has failed to consider either Section 25 or 75 in this request.

[11] The applicant also specifically referred to s. 75(5)(b) of the Act and her contention that the PharmaNet database has proved to be, in the past, "an important source of public information" respecting the prescribing practices of doctors. It is also clear from the applicant's request for review that she took issue with the amount of the fee estimate.

[12] Because the dispute over the estimated fee did not settle during mediation, a written inquiry was held under Part 5 of the Act. In its initial submission, the College for the first time contended that I had no authority to make an order respecting the estimated fee, on the basis that the Ministry had custody and control of the requested records, not the College. Accordingly, the College said, I had no jurisdiction to make any order against it.

[13] This fundamental change in the College's position prompted me to give the Ministry notice of the inquiry under s. 54(b) of the Act. I also invited submissions from the parties on the custody or control issue. On November 19, 2002, I issued a preliminary decision, in which I found that the Ministry has custody and control, and the College has control, of machine-readable records from which the record that the applicant has requested can be created. A copy of that decision can be found through www.oipc.bc.ca/orders/other_decisions/14385prelimNov19.pdf.

[14] On December 5, 2002, the applicant made an access request to the Ministry in the same terms as her above-described request to the College. On January 22, 2003, the Ministry responded by saying that s. 6(2) of the Act does not require it to create requested records. The Ministry said that, if it had an obligation to create records, it would assess a fee under s. 75 of the Act and would deny the applicant's request for a fee waiver under s. 75(5)(b) of the Act. The applicant sought a review of this decision the next day, with

the Ministry and applicant then making further submissions on the merits of the s. 6(2) and s. 75(5)(b) issues.

## 2.0 ISSUES

[15] The issues to be addressed here are as follows:

1. Does s. 6(2) of the Act require the Ministry to create requested records?

2. Should the estimated fee be waived in whole or in part under s. 75(5)(b) of the Act?

[16] The Ministry accepts that, consistent with previous s. 6(2) decisions, it bears the burden of establishing that s. 6(2) does not require it to create requested records. Previous orders have established that the applicant has the burden of establishing that a fee waiver is in order under s. 75(5)(b).

[17] As noted above, the applicant's original request for review mentioned both s. 25 and s. 75 of the Act, but it is clear from the material before me that disclosure under s. 25(1) is not an issue that needs to be resolved here.

## 3.0 DISCUSSION

[18] **3.1 Must the Ministry Create Records?** – Section 6(2) of the Act provides that a public body must create a record from a machine-readable record in order to respond to an access request. This obligation is not absolute, however, as the section clearly indicates:

> (2) Moreover, the head of a public body must create a record for an applicant if
>
> (a) 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
>
> (b) creating the record would not unreasonably interfere with the operations of the public body.

[19] The portion of the Ministry's January 22, 2003 response dealing with s. 6(2) reads as follows:

> The requested records do not exist. The Ministry of Health Services has determined that the records can be created, however, [*sic*] doing so would require the use of a significant amount of contractor services. As creating the record would unreasonably interfere with Ministry operations, the Ministry is not obligated to create the records under s. 6 of the Act.

[20] In *Crocker* v. *British Columbia (Information and Privacy Commissioner)* (1998), 155 D.L.R. (4th) 220 (B.C.S.C.), Coultas J. addressed the issue of what constitutes an unreasonable interference with operations in the context of s. 43 of the Act. I consider his following comments, at p. 238, to be of assistance under s. 6(2)(b):

> … What constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers. …

[21] One relevant factor – and there may well be others – will be the burden that creating the record will place on a public body's information systems resources measured in relation to its total resources of that nature. The size of the task, and its complexity, will be relevant to this assessment.

***Ministry's case for not having to create records***

[22] The Ministry concedes that the requirements of s. 6(2)(a) are met here. The requested records can be created from machine-readable records in the Ministry's custody or control using its normal computer hardware and software and technical expertise. It says, however, that creating the records would "unreasonably interfere" with its operations within the meaning of s. 6(2)(b). The Ministry says it is, on this basis, excused from its duty to create the records. The Ministry's arguments respecting s. 6(2)(b) rely on the affidavit of Denise Grady, a Senior Business Consultant with the Ministry. The Ministry's arguments can be summarized as follows:

- The Ministry estimates it will cost the Ministry some $5,280 to have a programmer process the applicant's request. Accordingly, it says, responding would unreasonably interfere with operations since this "would be money the Ministry could not spend on its other responsibilities" (para. 4.13, initial submission).

- Creating the requested records would unreasonably interfere with the Ministry's operations because it would delay other Ministry work. The Ministry receives many PharmaNet queries from researchers and from within the Ministry. Processing the applicant's request would delay the Ministry's responses to other queries.

- Six programmers are assigned to the management of the PharmaNet database. They work for IBM and perform services under IBM's contract to provide management services for PharmaNet. Under that contract, the Ministry has an allotment of a fixed number of programmer hours for each fiscal year. The Ministry says it has exceeded its allotment of programmer time for the last fiscal year and for the fiscal year ending March 31, 2003. It hopes that it will not exceed the contractual allotment for the fiscal year beginning April 1, 2003, but cannot be sure. If it exceeds that allotment, the Ministry must pay IBM $110 for

each hour of programmer time. This would, the Ministry says, be an additional cost to the Ministry to process the applicant's request. This cost would result in the Ministry having to find additional funds, which would mean funds would be diverted from other Ministry projects.

- If the Ministry had to comply with its duty under the Act to produce the requested records within 30 working days, it would have to set new priorities for its other work and might possibly have to dedicate more programmers to the request than would otherwise be the case. This could result in the Ministry paying even more programmer costs, since dedication of more programmers to meet the Act's timeline might force the Ministry to ask IBM to provide more programmers to deal with routine PharmaNet management tasks during that period. This would necessitate a change order under the IBM contract, meaning additional compensation would be payable by the Ministry to IBM.

- Even if the Ministry did not consume its annual allotment of programmer hours in any given fiscal year, responding to the applicant's request would use an estimated 48 of those hours, which the Ministry would otherwise be able to use on other projects.

- The Legislature could not have intended that it is reasonable to expect a public body to dedicate a programmer for 48 hours (or seven days at seven hours a day) in order to create records. The Ministry says that, regardless of the resources available to a public body, it would "almost never be the case that it would be reasonable to expect a public body to expend that level of resources to create a record". The Ministry says this submission is supported by a consideration of the Act's purposes. Access to the requested information will not advance the Ministry's accountability, since the requested prescription information does not relate to the Ministry's activities.

[23] I asked the Ministry for particulars respecting its contention that s. 6(2) does not require it to create a record. The Ministry's response can be summarized as follows:

- The hourly programmer fees and computer fees the Ministry charges are the same for all research queries, whether the queries are made through the PharmaNet Committee or under the Act, as in the applicant's case.

- The Ministry does not track the actual time spent on PharmaNet research queries where charges are not assessed, so it can only offer "a rough estimate" of the total number of programming hours that are spent each year responding to PharmaNet queries. It estimates that between 900 and 1,000 programmer hours are spent each year responding to PharmaNet queries, both recoverable and non-recoverable.

- As well as not tracking the time spent each year on non-chargeable PharmaNet research queries, the Ministry has no specific budget for non-chargeable research

queries. It estimates that "approximately half" of the PharmaNet research queries it receives each year are non-chargeable and that the actual costs of responding to such queries are approximately $50,000 a year. The Ministry says this amount is "not insignificant given recent Ministry budget cutbacks". (The Ministry did not give any particulars of cutbacks to its budget, either generally or in relation to PharmaNet matters.)

- The Ministry does not budget a specific amount for PharmaNet's operation. Its operation is the responsibility of the Ministry's Information Management Group. The Information Management Group's budget is used to "manage hundreds of other Ministry systems as well." Its budget figures are as follows: 2001-2002, $61,757,000; 2002-2003, $57,685,000; and 2003-2004, $51,121,00.

- The Ministry's budgets for services from IBM Managed Operations were: 2001-2002, $13,112,000; and 2002-2003, $10,319,000. The Ministry budgeted, for those two fiscal years, $2,358,000 and $1,445,000 for "IBM Decision Support". The Ministry did not provide budget amounts for IBM services for 2003-2004. These budgeted amounts are used to support "hundreds of different Ministry applications, in addition to PharmaNet."

***Analysis of the s. 6(2) issue***

[24] I will deal first with the last argument summarized above, *i.e.*, that the effort necessary to create records in this case is more than the Legislature would expect a public body to undertake. I agree with the Ministry that the Act is to be interpreted in light of the legislative purposes set out in s. 2(1). The Ministry's submission, however, seeks to establish a more or less absolute limit on what will be an unreasonable interference with a public body's operations for the purposes of s. 6(2). The Act's legislative purposes do not support such a limitation under s. 6(2).

[25] There is no support for the view that the Legislature intended to, through the Act, lay down for the future anything approaching fixed or discernible expenditure levels or resource demands that – regardless of the nature of particular access requests or the size of a public body – can be said to unreasonably interfere with the operations of public bodies large and small, complex or simple. I see no basis in the Act's language, including viewed in light of s. 2(1), to support this contention. The Act contemplates the creation of records, which will always require some effort and institutional resources. What is an unreasonable interference with operations must be assessed on a case-by-case basis under s. 6(2)(b), just as it is under s. 43(b). Both provisions contemplate some interference with operations being acceptable. An assessment of the circumstances of each case is necessary before one can determine whether an interference with operations is or is not unreasonable.

[26] Turning to the Ministry's remaining arguments, it should first be noted that responding to the applicant's request is an activity that falls within the Ministry's usual activities. The Ministry processes some 35 PharmaNet research requests each year, with

roughly six requests under way at any given time. The Ministry uses IBM's programmers to respond to requests vetted and approved through the PharmaNet Committee, which administers PharmaNet. Paragraph 12 of Denise Grady's affidavit indicates that responding to these requests requires the Ministry to create records using programmer time and computer resources. The Ministry indicates that between 900 and 1,000 hours of programming time are required to respond to research queries. This all suggests that responding to requests such as the applicant's – whether made under the Act or through the PharmaNet Committee – is part of the Ministry's PharmaNet operations, not something outside the ordinary scope of what it does. The question remains, of course, whether creating the requested records would nonetheless "unreasonably" interfere with Ministry operations within the meaning of s. 6(2).

[27] The Ministry's remaining arguments and evidence do not greatly advance its contention about the impact creating this particular record allegedly will have on its operations. The Ministry merely asserts that responding will take away from its other activities in terms of staff time that could be spent on other tasks or Ministry budget resources that could be spent elsewhere, apparently minute-for-minute and dollar-for-dollar. It seems to me the Ministry's arguments essentially come down to the proposition that its duties under the Act should take a back seat to its other duties. Taken to its logical conclusion, such a generalized assertion would enshrine a hierarchy of rights and obligations, under which rights and duties under the Act would always take a back seat to every other public body activity or duty, including the Ministry's response to PharmaNet research requests made outside the Act. Nothing in s. 6(2)(b) or the rest of the Act supports such a proposition.

[28] The question here, of course, is whether the evidence before me establishes that spending an estimated 48 hours of programmer time responding to the applicant's request would unreasonably interfere with the Ministry's operations. The evidence shows that, in responding to research requests, the Ministry devotes some 900 to 1,000 hours of programmer time (not to mention resources needed to co-ordinate approvals through the PharmaNet Committee and otherwise administer research queries). The amount of time and effort involved (including computer processing time) does not approach the degree or nature of effort that could be said, in light of the Ministry's (overall or related) operations, to unreasonably interfere with Ministry operations. Even if the Ministry could not recover its costs for responding, in the form of a fee under the Act, I am not persuaded that responding would unreasonably interfere with the Ministry's operations. Nor am I persuaded by the Ministry's generalized arguments as to the effect responding to this request might have on its other tasks or projects. The Ministry has not established that creating records which respond to the applicant's request would, within the meaning of s. 6(2)(b), unreasonably interfere with the Ministry's operations. It follows, therefore, that the Ministry must create the records.

[29] **3.2 Public Interest Fee Waiver** – The next question is whether the fee estimated by the Ministry should be waived under s. 75(5)(b). That section reads as follows:

> (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.

[30] The amount of the Ministry's January 22, 2003 fee estimate is the same as the amount the College originally estimated in its December 28, 2001 letter to the applicant, which set the estimate out as follows:

| | |
|---|---|
| Review Requirements | 7 hours |
| Analysis and design | 10 hours |
| Code and test (unit, unit integration) | 29 hours |
| Closure | 2 hours |
| **Total Hours** | **48 hours** |
| Effort estimate of 48 hours @$110 | $5280.00 |
| System time estimate is 127.5 sec @ $0.75 per CPU sec | 95.63 |
| **Total MoH Estimated Cost** | **$5375.63** |

[31] This estimate was, as indicated by Linda Lytle's evidence, based on an estimate the Ministry had given to the College at the time. The Ministry's January 22, 2003 letter did not break the $5,375.63 estimate down into its components, but expressly relied on the College's December 28, 2001 estimate.

[32] The portion of the Ministry's January 22, 2003 response that is relevant to the applicant's request for a public interest waiver reads as follows:

> You also requested a fee waiver or reduction under s. 75(5)(b) of the Act. In the event that the Ministry had an obligation to create the requested records, which it denies, the Ministry would assess a fee under s. 75 of the Act for providing those records. As indicated in the letter from the College of Pharmacists of British Columbia dated December 28, 2001, the fee for providing those records would be $5375.63. That fee is based on the actual cost of providing the service, as The Province is considered a commercial applicant, in that it intends to use information for the commercial purpose of selling newspapers.
>
> In spite of the applicant's submissions, the Ministry does not consider the records to sufficiently be a matter of public interest to warrant a fee waiver. Although members of the public may have an interest in the incidence of prescription drug

> use, disclosure of the records does not shed light on the over prescription of drugs or potential side effects or addictiveness. Regarding the disclosure of financial allocations, the records will not reveal whether a drug is being overprescribed. The monitoring of prescription drug use falls under the mandate of the College of Physicians and Surgeons of BC and the BC College of Pharmacists. As well, some of the drugs you inquired about fall under the Triplicate Prescription Program, a program under which the use of specific, frequently abused drugs, is monitored by the College of Physicians and Surgeons of BC. The legislation provides that you may apply to the Office of the Information and Privacy Commissioner (OIPC) for a review of our response. This procedure is outlined on the enclosed page.
>
> After considering the above, the Ministry denies the request for a public interest fee waiver under s. 75 of the Act. As well, even if the requested records related to a matter of public interest, which is denied, the applicant should not be excused from paying the estimated fee, on the basis that the applicant is wanting access to the information for a commercial interest.

[33] As this passage indicates, the Ministry assessed the estimated fee based on its position that the applicant is a "commercial applicant" within the meaning of s. 1 of the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93 ("FOI Regulation").

[34] The principles to be applied in considering a public interest fee waiver matter have been set out in many decisions, including Order 02-43, [2002] B.C.I.P.C.D. No. 43. I will apply the approach set out in that decision, as applicable in this case, without repeating the principles here.

***Do the requested records relate to a matter of public interest?***

[35] The first part of the two-stage analysis is whether the requested records relate to a matter of public interest (including an environmental or public safety matter):

(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 Ministry is allocating financial or other resources?

[36] The Ministry's January 22, 2003 decision suggests that it considers the requested records have some public interest significance. Its response acknowledged that "members of the public may have an interest in the incidence of prescription drug use" and that the Ministry nonetheless did not consider the requested records to "sufficiently be a matter of public interest". The Ministry's response also went on to explicitly deny, however, that the records relate to a matter of public interest at all. In the final analysis, the Ministry's decision – which is consistent with its submissions here – was that the records do not relate to a matter of public interest at all.

[37] It should be noted here, in passing, that s. 75(5)(b) explicitly contemplates a public body determining if records relate to a "matter of public interest". There is no room under this aspect of s. 75(5), certainly, for a public body to weigh the degree of public interest in a matter. 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 whether the record can be said to 'relate' to a matter of public interest. If a record "relates to" a matter that the public body concludes is of "public interest", s. 75(5)(b) has been satisfied.

[38] The Ministry says it has no reason to think that what it calls "raw prescription data" would be relevant to a subject of recent public debate. It says that, although the public may have an interest in the appropriate use and prescribing of drugs, disclosure of the requested information "would not shed any light on the over-prescription of drugs or potential side effects or addictiveness of drugs" (para. 4.25, initial submission). The Ministry says it is not clear how disclosure of the number of prescriptions in a given year would shed any light on whether any particular drug has been over-prescribed or whether any of the drugs "were addictive or had side effects" (paras. 4.25 and 4.26).

[39] The Ministry similarly asserts, without elaboration, that the requested records "would not" disclose an environmental or public health or safety concern (para. 4.27). Nor would they contribute to any public understanding of, or debate on, important environmental or public health or safety issues or any important policy, law, program or service (para. 4.27). Last, the Ministry contends that disclosure of the information would not cast any light on how it is allocating its financial resources, including because the requested information "will include prescriptions that have not been subsidized by the Pharmacare program" (para. 4.28).

[40] For her part, the applicant rejects the suggestion, in the Ministry's response of January 23, 2003, that the requested records are not sufficiently a matter of public interest to warrant a fee waiver on the basis that the monitoring of prescription drug policies is carried out by other public bodies. The applicant says this amounts to "a suggestion that government needs no watchdogs because the government is watching itself" (p. 2, initial submission). The applicant says some of the flaws in the system have been exposed by her earlier requests, which led not only to articles that have won "public interest journalism awards but to actual policy changes", thus pointing to the public interest in the "important health issues" associated with the access request (p. 3, initial submission).

[41] In her affidavit, the applicant deposed that she has used information obtained through her previous requests, and an access request to Health Canada, to publicize concerns associated with prescription, or over-prescription, of various drugs. Exhibit "L" to her affidavit consists of copies of the applicant's newspaper articles from 1998, 2000 and 2001 about prescription of drugs such as benzodiazepine, Ritalin and Cylert. The applicant deposed (at para. 19 of her affidavit) that PharmaNet "is the only source available to the public for an independent review of doctors' prescribing practices."

[42] To cite one example of the applicant's published articles about prescription drugs, in December of 2001 the applicant published an article about benzodiazepine use among First Nations across Canada. Her article indicated that up to 30% of First Nations women over 40 were prescribed this "highly addictive" tranquilizer (para. 14, applicant's affidavit). The applicant notes that part of the request in issue here relates to prescription of benzodiazepine in the population at large in British Columbia.

[43] The applicant's articles in this area have won journalism awards and have elicited interest from members of the public. The applicant deposed as follows about this (at paras. 17 and 18):

> 17. These previous articles were based upon records obtained as a result of my previous FOIPPA requests. The articles have been recognized by a number of national health organizations. The ongoing series "Drugging Our Children" won the 2000 Canadian Nurses Association media award for Excellence in Health Reporting. Previous stories in this series won the 1999 Connaught medal for excellent [*sic*] in Health Research journalism, and a Michener award Certificate of Merit for Public Service Journalism – Canada's highest award for public service journalism – which is presented by the Governor General of Canada.
>
> 18. In addition, the public reaction to the series over the past three years has been overwhelming. I have received hundreds of calls and emails from parents and health providers from all across North America. The Chicago Sun-Times is currently completing a similar series on Ritalin use modeled on my work. I helped the Sun-Times obtain data similar to the PharmaNet data from American health agencies. I was advised by the reporter at the Sun-Times that they was [*sic*] charged only a minimal fee for the service, at least in part in recognition of the public interest.

[44] I do not accept the contention in the Ministry's January 22, 2003 letter that, because they do not directly touch on the Ministry's own activities, the requested records do not relate to a matter of public interest. There will be cases in which a public body happens to possess records that disclose or touch on a matter of public interest, but which do not deal with the public body's own operations or activities. A public body may, for example, happen to possess third-party data that disclose serious environmental contamination in an area of the province. The data may not shed any light on the public body's governance or operations, but this does not mean they do not relate to a matter of public interest. The fact that the records involved here will apparently not disclose how the Ministry is allocating financial or other resources is far from determinative.

[45] This issue has arisen in fee waiver decisions under Ontario's *Freedom of Information and Protection of Privacy Act*. Section 57(4) of the Ontario Act authorizes fee waivers. Although the language of that provision differs from s. 75(5)(b), Ontario decisions have adopted criteria similar to those applied in British Columbia and Alberta. In Order P-474, [1993] O.I.P.C. No. 143, Assistant Commissioner Irwin Glasberg set out a number of factors to be considered in determining whether, as contemplated by s. 57(4)(c), dissemination of a record will benefit public health or safety. One of the factors was whether the subject of the records is a matter of public or private interest. Another criterion was whether dissemination of the records would yield a "public benefit" by disclosing a public health or safety concern or by contributing meaningfully to the development of understanding of an important public health or safety issue. These criteria introduce the same public-private interest issue as one finds under the two-part public interest fee waiver analysis in Order 02-43 and other British Columbia decisions.

[46] In Order PO-1962, [2001] O.I.P.C. No. 223, an investigative reporter for a large Canadian newspaper had sought access to serious occurrence reports and annual summaries of the Ministry of Community and Social Services respecting incidents involving adults and children in care. The reporter sought a public interest fee waiver. Assistant Commissioner Tom Mitchinson held that the quality of care and service at group homes funded by the Ministry was a matter of public interest. He noted that, in addition to the fact that taxpayer dollars funded these services, the private agencies and facilities involved provided services to a wide range of people across Ontario. He went on to find that media attention on the issue would publicize concerns about quality of care and accepted that this would shine a spotlight on the conditions in which some individuals in care live. He also accepted that the reporter would disseminate the records' contents, thus yielding a public benefit. He found, in the end, that it was fair and equitable to waive the fee, except for photocopying charges.

[47] Order PO-1962 is an example of a case in which records were found to be of public interest even though the records would not reveal information about how the provincial government ministry itself operated. The records related to living conditions for residents of private care facilities. Here, the applicant's request is not aimed at how the Ministry conducts itself or spends taxpayers' money directly, but it is targeted at prescription drug consumption in British Columbia and the effects these drugs might have. That is a matter of public interest. This perspective is reinforced by the fact that at least some of the cost of the drugs in which the applicant is interested are paid for, one can reasonably infer, by taxpayers.

[48] I am satisfied that the nature of the requested information is such that the requested records relate to a matter of public interest. Because of the nature of the information, the applicant's articles have publicly raised health policy issues respecting segments of the public, including First Nations and young people. I note, in particular, that the applicant has published articles about benzodiazepine use and intends to use information from her present request for further articles about the prescription and use of that drug. I note also the evidence that the applicant's work has also elicited considerable

interest on the part of members of the public and has been of interest, as regards benzodiazepine use, to at least one senior public health official in British Columbia.

[49] I also accept that dissemination or use of the requested information can reasonably be expected to yield a public benefit by contributing to the development of public understanding of, or debate on, important public health or safety issues.

[50] Having considered all of the accepted factors for determining if records relate to a matter of public interest for the purposes of s. 75(5)(b), I find that, in all of the circumstances, the requested records relate to a matter of public interest.

***Is the applicant's purpose a private one?***

[51] The next question is whether the applicant's primary purpose for making the request is to disseminate the information in a way that can reasonably be expected to benefit the public or whether the purpose is to serve a private interest. It is also necessary to consider whether the applicant is able to disseminate the information to the public.

[52] The Ministry says the applicant is a "commercial applicant" within the meaning of the FOI Regulation, on the basis of which it has based its fee estimate on the actual cost of producing the records (as opposed to the maximum fee amounts otherwise permitted under the Schedule of Maximum Fees under the FOI Regulation). The Ministry says it has only passed on the estimated direct costs to the ministry of producing the requested records. At para. 4.36 of its initial submission, it contends that a waiver or reduction of the fee "would constitute an unreasonable shifting of the cost burden from a commercial applicant to the Government of British Columbia." The Ministry's January 22, 2003 decision to deny the applicant a fee waiver says nothing about this and the Ministry's submissions and evidence do not otherwise deal with any cost burden.

[53] In its reply submission, the Ministry argues that, contrary to the applicant's submissions, it is reasonable to infer that the applicant has made the request in her capacity as a reporter for the *The Province* newspaper. Acknowledging that the media play an important role in society, including providing information to the public, the Ministry nevertheless says *The Province* is owned by a "large and powerful" media corporation (para. 6, reply submission) and goes on to say the following (at paras. 7 and 8):

> The owners of The Province and its parent company are, like any other commercial entity, in the business of making a profit, like any other business. Such corporate entities are in the business of maximizing the value of its [*sic*] shares through the maximizing of its [*sic*] revenue, including subscriber and advertising revenue, and achieving cost efficiencies. In the Ministry's submission, it is simply not tenable for the Applicant to assert that The Province is not a "commercial applicant" for the purposes of the Act.
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> … The Ministry submits that it is reasonable to presume that the reason The Province newspaper puts stories on the front page of its newspaper is because it

> believes that such stories will attract the interest of potential readers, thus increasing the chance that people will buy its product. The Act defines a "commercial applicant" as "a person who makes a request for access to a record to obtain information for use in connection with a trade, business, profession or other venture for profit". The Province newspaper charges a fee to someone who wants to obtain a copy of its newspaper. In addition, it is reasonable to presume that any story making use of the requested information in this case would be published exclusively by The Province. The Ministry submits that all the circumstances point to the Applicant being a person who is making a request to obtain information for use in connection with a business and profession. As such, the Ministry submits that it is appropriate for the Commissioner to treat the Applicant as a commercial applicant.

[54] The Ministry also says the following, at para. 12 of its reply submission:

> … a newspaper's status as a commercial applicant does not change depending on the nature of a particular request to access records. The status and objectives of a newspaper will presumably stay the same, regardless of the scope of a particular request. In every case, the objective is to obtain information for publication in the newspaper, in the hopes of increasing readership and maintaining market position, i.e. to increase readership and retain current customers, all of which is necessary to maximize revenues. Let us be clear, there is nothing wrong with such an objective. However, it is clear that access to the information at issue does serve the financial interests of the Applicant's employer. Pure news stories will presumably sell newspapers as much as a news story about financial or commercial issues. The issue in this case, in relation to the section 75 issue, is who should bear the financial burden of processing such a request. Should it be the taxpayers of British Columbia or The Province newspaper? The Ministry submits that The Province newspaper should bear that burden. Moreover, the Ministry submits that imposing such a financial burden on the taxpayers of this province, while allowing The Province newspaper to benefit financially from accessing such information, would be inappropriate.

[55] These submissions conflate the "commercial applicant" issue under the FOI Regulation, which relates to the amount of the fees the Ministry is entitled to charge, with the question of whether a fee should be waived under s. 75(5)(b). The public interest fee waiver analysis does consider the question of whether the applicant's purpose or interest is primarily private and not public, but status as a "commercial applicant" under the FOI Regulation does not automatically dictate ineligibility for a fee waiver.

[56] The Ministry's position amounts to saying that a journalist can always be denied a public interest fee waiver, at least where she or he is employed by a commercial newspaper publisher or other media company. By extension, even a free-lance journalist who requests information for an article for which a publisher has yet to be found would always be denied a fee waiver, since the journalist's motive is to publish an article and to be paid for it. Order 02-43 dealt with an applicant who was a reporter for a Victoria-based newspaper. The public body argued that his interest was a private commercial one, since the applicant's articles would increase the newspaper's circulation and thus its revenues. At paras. 39 and 40, I said the following:

> In my view, while the applicant's proposed use of the information to write stories has a commercial aspect, his intention is evidently to disseminate the information by publishing articles in a newspaper. In light of the nature of the information in this case, this dissemination of information would, in my view, disseminate information in a way that would benefit the public's understanding of UVic activities that are of public interest.
>
> I note in passing that few, if any, professional journalists would escape the consequences of UVic's argument. Taken to its logical conclusion, it would preclude journalists from qualifying for public interest fee waivers, at least where they intend to publish articles using information they have requested. This would approach excluding a class of users under s. 75(5), a result for which there is no support in the language of the section. A journalist is not entitled to a public interest fee waiver because he or she is a journalist, but a journalist is not precluded from obtaining a public interest fee waiver because she or he is a journalist.

[57] The same observation applies here. I also agree with views expressed in Alberta Adjudication Order No. 2 (May 24, 2002), under Alberta's *Freedom of Information and Protection of Privacy Act*. In that case, a reporter with *The Globe & Mail* newspaper had applied for a public interest fee waiver. The request was for records related to legal fees the Alberta government had paid on behalf of Stockwell Day in a defamation lawsuit. The issue arose of whether the applicant's request was motivated by commercial or other private interests. Acting as an adjudicator in the place of the Alberta Information and Privacy Commissioner, McMahon J., of the Alberta Court of Queen's Bench, held (at para. 52) that the reporter was not motivated by commercial or other private interests in making the access request:

> Alberta Justice also argues that this request is about selling advertising and "whether the applicant can turn a profit". That argument characterizes a free and independent press at its basest level. The media, in my view, has a higher role to play. Absent proof of overriding self-interest, I decline to reduce respected print media to this level, or to dismiss its attempts to bring accountability to government management of public funds, as merely an effort to sell advertising. The role of the press in reporting on court proceedings was addressed by the Supreme Court of Canada in *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. The media role in relation to government management of public funds is no less important. Cory J. said at 1339-40:
>
> > That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role…It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution.

[58] Alberta Adjudication Order No. 2 dealt directly with the expenditure of public funds for a very specific purpose. As indicated earlier, the Ministry argues that the Act's accountability goals are not implicated in this case because the applicant's request does not deal with the Ministry's activities, including its use of public funds. This difference

between the cases does not undercut the force of McMahon J.'s observations in relation to the nature of the applicant's request here.

[59] In my view, the applicant's request is not primarily for the purpose of advancing a private interest. This case is to be contrasted with, for example, Order 01-04, [2001] B.C.I.P.C.D. No. 4, where the applicant's public interest argument failed in the face of evidence that his request had been made to establish that he, personally, had suffered what he believed to be a miscarriage of justice at the hands of a self-regulating professional body. That applicant's interest was personal and individual. Nor is this case comparable to Order 02-31, [2002] B.C.I.P.C.D. No. 31, where the applicant business sought information in order to advance its claim for damages, on account of lost profits, against a municipality. Last, I note that, in Ontario Order PO-1962, discussed above, Assistant Commissioner Mitchinson accepted that, even where an applicant is a reporter for a national newspaper, her or his request will not be for a private purpose (on that basis alone, certainly).

[60] I will note here, in passing only, that the United States federal Office of Management & Budget's guidelines for fees under the federal *Freedom of Information Act* give special status to media representatives. They are not treated as commercial applicants and are charged reproduction costs only (with no reproduction charges for the first 100 pages). See 52 Fed. Reg. 10012 (March 27, 1987).

[61] To summarize, I do not consider that, because a journalist makes an access request as part of research for an article that will be published by a for-profit publication, the request's primary purpose is private and not public. The Ministry's arguments in this case would, like the public body's submissions in Order 02-43, in effect relegate all journalists and media companies to a separate class of requesters that could never qualify for a public interest fee waiver. The Act offers no basis for such a discriminatory classification of requesters respecting fee waivers under s. 75(5). Certainly, the FOI Regulation discriminates between commercial and other applicants, but nothing in the Act compels one to carry that distinction over into analysis of public interest fee waivers. There may well be cases where a journalist or media company seeks a fee waiver in relation to an access request that has been made primarily to further a private interest, but that depends on the facts of each case, not the fact that the requester is a journalist or media company. Conversely, the fact that an applicant happens to be a journalist or a media company does not, on its own, suffice to establish that the purpose of the request is primarily public and not private. Again, the facts of each case will govern.

[62] In this case, I do not consider the purpose of the applicant's request to be primarily private. At one point in her materials, the applicant says she made the request for the purpose of incorporating the resulting information into graduate work she is doing, which is not a for-profit or conventionally private purpose. Indeed, even if an applicant's interest in records she requested was part academic research and part personal, it would not necessarily follow that the request's purpose was private. See, for example, *Ettlinger* v. *FBI*, 596 F. Supp. 867 (D. Mass, 1984). In any event, without reciting the supporting evidence here, I accept that the applicant's intention is as much to

publish one or more newspaper articles about the prescription of certain drugs in British Columbia as it is for academic research. This does not suggest an access request for private purposes. Rather, the applicant's request is for public purposes.

***Is the applicant able to disseminate the information to the public?***

[63] As noted above, the public interest fee waiver analysis also considers whether the applicant is able to disseminate the information to the public. For reasons similar to those outlined above respecting the applicant's intended use of the information, I have no doubt this is the case here. The applicant's track record in publishing many newspaper articles on prescription of drugs in British Columbia is clear.

***Summary***

[64] The Ministry's January 22, 2003 decision denied a fee waiver on the basis that the requested records do not relate to a matter of public interest within the meaning of s. 75(5)(b). The Ministry then decided that, even if the records did relate to a matter of public interest, it would not waive the fee because the applicant's request is, in its view, for "a commercial interest". Since no "commercial interest" consideration appears in the language of s. 75(5)(b), one must infer that this aspect of the matter entered into the Ministry's exercise of its general s. 75(5) discretion to waive the fee. The Ministry cited no other factors in its January 22, 2003 decision, including factors mentioned in Order 01-35, [2001] B.C.I.P.C.D. No. 36.

[65] In the Ministry's submissions in this inquiry, counsel to the Ministry mentioned the cost burden of the request as a factor, but this was not developed in any evidence or in any reasons from the Ministry relating to its exercise of discretion to refuse a fee waiver.

[66] I have found that the requested records do relate to a matter of public interest and that the applicant will be able to disseminate the information to the public.

[67] I have explained that the Act does not contemplate, and it is not reasonable to assume, that a request from a "commercial applicant" under the FOI Regulation must be for a primarily private purpose and must be effectively automatically ineligible for a fee waiver under s. 75(5). Yet that is what the Ministry has done here by concluding that it would not waive the fee because the applicant's request is, in its view, for a commercial interest. The Ministry's fee waiver decision cannot be sustained on the basis of the blanket reasoning that it applied.

[68] I have examined the purpose of the access request in this case and concluded that, whether or not the fee was properly assessed on the basis of a request from a "commercial applicant" under the FOI Regulation, the applicant's request is for a public, and not a primarily private, purpose. I consider that, in all of the circumstances, this case presents appropriate circumstances under s. 58(3(c) to order that the fee be excused.

## 4.0 CONCLUSION

[69] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. I require the Ministry to perform its duty under s. 6(2) of the Act to create the requested records; and

2. I excuse the fee in this case.

May 13, 2003

**ORIGINAL SIGNED BY**

David Loukidelis
Information and Privacy Commissioner
for British Columbia