



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

Order F05-36

MINISTRY OF AGRICULTURE AND LANDS

Celia Francis, Adjudicator

December 14, 2005

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Summary: Applicant requested records related to Crown properties in the Shawnigan Lake area and asked for a fee waiver on public interest and financial grounds. Public body refused to waive the fee on both grounds. A complete fee waiver is appropriate on the grounds that the applicant cannot afford payment. A partial fee waiver is appropriate on public interest grounds.

Key Words: fee waiver—public interest—cannot afford—dissemination of information—use of information—partial fee waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 75(a) & (b).

Authorities Considered: B.C.: Order 01-35, [2001] B.C.I.P.C.D. No. 36; Order 01-51, [2001] B.C.I.P.C.D. No. 54; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 01-24, [2001] B.C.I.P.C.D. No. 25; Order No. 332-1999, [1999] B.C.I.P.C.D. No. 45; Order No. 299-1999, [1999] B.C.I.P.C.D. No. 12.

1.0 INTRODUCTION

[1] The Shawnigan Lake Watershed Watch Association (“SLWWA”), the applicant in this case, made a request on February 23, 2004 under the *Freedom of Information and Protection of Privacy Act* (“Act”) to Land and Water BC Inc. (“LWBC”) for records in LWBC’s marketing and development office in Victoria related to Crown lands in the Shawnigan Lake area.

[2] LWBC responded to SLWWA's request by issuing a fee estimate of \$810. SLWWA and LWBC then engaged in a series of exchanges about SLWWA's request for a fee waiver which LWBC refused to grant. SLWWA complained to this office about LWBC's refusal to waive the fee and mediation led to a reduction of the fee to \$220. Mediation was otherwise unsuccessful and the matter proceeded to inquiry under Part 5 of the Act.

[3] At the time of the request and inquiry, LWBC was a public body in its own right, with the Ministry of Water, Land and Air Protection responsible for handling its requests under the Act. I have therefore referred to LWBC as the public body in this decision. LWBC's programs have since been integrated with other public bodies and the Ministry of Agriculture and Lands ("MAL") is now responsible for the records in question. My order below is therefore against MAL as the present public body.

2.0 ISSUE

[4] The issue before me in this case is whether LWBC acted properly in denying the applicant a fee waiver under ss. 75(5)(a) and (b).

3.0 DISCUSSION

[5] **3.1 Chronology of the Request**—SLWWA's February 2004 request began as follows:

Under the *Freedom of Information and Protection of Privacy Act*, section 5, I hereby request the viewing [and copying] of the following documents:

Any and all information, be it written or recorded by all existing means, including facsimiles, memos, emails, notes of meetings, telephone conversations, correspondence, and documents pertaining to Crown land properties in the Shawnigan area [defined by current municipal boundaries as "Area B"] emanating from or received by the office of Mark Hallam, regional Vancouver Island manager, Lands and Water B.C. Inc., Marketing and Development, Victoria offices, for the period April 1, 2002, to the present time.

[6] SLWWA asked for a fee waiver on the grounds that the records relate to "a matter of public interest, including the environment", as described in s. 75(5)(b) of the Act. It added:

The subject of the records is a matter of increasing concern to citizens of the Shawnigan area who fear the sale of forestry lands for potential subdivision may affect the well-being of their community watershed.

[7] SLWWA also said that it is a non-profit organization with “very limited financial resources”, most of which it directs to gathering and disseminating information for local residents. It said it would therefore be grateful if the fees associated with the request could be waived.

[8] LWBC responded to this request with two letters, both dated March 16, 2004. The first letter told SLWWA that, under s. 20(1)(b), LWBC was withholding some relevant information related to marketing options and development proposals as it would be releasing a report on these matters within 60 days. It said it would provide SLWWA with a copy of the report upon its release. LWBC says it later disclosed this report.¹

[9] LWBC’s second letter dealt with the rest of the request and said that it was charging a fee for those records as follows:

2000 pages @ \$.25 per page =	\$500.00
13 (minus 1 st 3 hrs) to search, locate and prepare the records for disclosure @\$30 an hr =	\$300.00
Shipping =	<u>\$ 10.00</u>
Total =	\$810.00

[10] LWBC requested that the applicant pay a \$405 deposit before it would proceed with work on the request. LWBC also told the applicant that it could request a fee waiver if it could not afford the fee or if there were other reasons that would justify excusing the fee.²

[11] SLWWA replied in a letter of March 23, 2004 by once again asking that the fee be waived under s. 75(5)(b) on public interest grounds and said the issue had received considerable coverage in the local media. It also said the shipping fee need not be charged as it would view the records in person. It reiterated that it is a non-profit organization with little funds and said that its purpose in making the request was to increase awareness of land use decisions that might affect the welfare of local citizens.

[12] The next day, LWBC responded that SLWWA had not provided sufficient information for it to determine that a fee waiver was warranted and suggested that the applicant pay the deposit “under protest” so that processing of the request could continue. Once it had the records, LWBC continued, it would know exactly what costs it had incurred in gathering and preparing the records for release and how many pages were involved. It could then provide the applicant with an exact cost for providing the records. LWBC said that if the applicant abandoned its request at that time, LWBC would return

¹ para. 1.04, initial submission.

² SLWWA had, of course, already requested a fee waiver, a request that LWBC did not address in its letter.

the deposit. Alternatively, once it had reviewed the records, LWBC would be in a better position to assess the public interest grounds for a fee waiver. It then said:

I should point out in this regard, though, that much of what government does is of interest to at least some of the public; the records at issue will have to relate quite directly to a matter that has a fairly high public profile for me to find that a public interest fee waiver is warranted. I advise you of this not to prejudge a decision I may have to make in future but rather to make you aware that you will probably need a stronger argument than you have advanced thus far for me to be able to find in your favour.

[13] In a four-page letter of April 5, 2004, SLWWA set out its arguments on the public interest aspect of the fee waiver request, in accordance with past orders on this topic. It first said that the sale of Crown lands and possible development of those lands—and the resultant possible ecological effects on the environment and public health in the area—have been contentious topics of public debate and the subject of extensive local media coverage over the last few years.

[14] It then stated that protection of the local watershed was a concern and that “the integrity of the watershed has been eroded by other ill-conceived housing estates”. It expressed concern about the possible construction of a golf course and hundreds of housing units in the Shawnigan Lake area and concern about possible detrimental effects of such development on local water quality.

[15] SLWWA’s letter then discussed the benefits flowing from dissemination of information on these issues and said that it had been frustrated in its attempts to obtain information on LWBC’s intentions regarding the sale of Crown lands. It also expressed concern about the effects of local logging and said it would like the Ministry of Forests to designate a community forest in its area. It included comments about accountability and said that LWBC’s information was vital to its efforts in these areas.

[16] SLWWA reiterated that it is a non-profit organization and that it manages on a limited budget to disseminate information in a variety of ways. It said it was also designing a website and planning a public meeting. It said the \$810 fee would bankrupt it. While it recognized the government’s limited resources, SLWWA said it could not “decrease the scope of its request without compromising the chronological origin and historical accuracy of our quest regarding the extent of LWBC’s proposals for our region”. It said that the estimate of approximately 2,000 pages relevant to its request suggested that LWBC’s initiative was much broader and more developed than SLWWA had been led to believe.

[17] LWBC replied, in a letter of April 13, 2004, that it understood that there is “considerable public interest in the matter of the disposal of Crown lands, including forested lands, to support residential and other more intense usage development”. It went on to say that the public associated with the “public interest” reason for waiving fees is the public of British Columbia generally or at least a significant subset of that public. LWBC acknowledged that the issue in question was of considerable interest to members

of the Shawnigan Lake community but said that it was too small a community to be characterized as a significant subset of the public.

[18] LWBC also said that, while some of the records might relate to the issue of water quality, given the Cowichan Valley Regional District's ("CVRD") responsibility for that issue, it was not clear how LWBC's records would further "elucidate the issue". Only a small portion of LWBC's records might be relevant to this issue, it said. LWBC also acknowledged SLWWA's status as a volunteer organization with limited financial means.

[19] It then said:

Finally, on the matter of accountability, I understand that yours is a volunteer organization with limited financial resources. However, the release of records is what, it seems to me, addresses that purpose of the *Act*. The records you have requested will be released to you, that is not an issue in the present context. Rather, the issue is whether fees otherwise payable under the *Act* should be waived. I am unable to see a connection between the two matters in this instance.

[20] LWBC concluded by saying that, as it had indicated in its March 16, 2004 letter, with fewer records being requested or a better understanding of the contents of the records, it might be able to come to a different conclusion.³ LWBC said once again that SLWWA had not provided it with "a solid basis" for determining that the fee waiver was warranted and that it would have to make a stronger argument for LWBC to find in its favour. It suggested again that the applicant pay the deposit so the processing of the request could continue.

[21] During the processing of this request (apparently in May 2004), LWBC disclosed to the applicant four reports it had commissioned on the Shawnigan Lake, West Malahat area, on the following topics: the economic impact of a golf resort concept proposal; CVRD development options for Crown lands in the area; a preliminary environmental assessment on Crown lands in the Shawnigan Lake area; and an initial evaluation for on-site sewage systems and water wells for Crown land parcels in the Shawnigan Lake area.⁴

[22] In an 11-page letter of May 26, 2004, SLWWA complained to this Office about LWBC's denial of its fee waiver request. It argued that LWBC had erred in concluding that the Shawnigan Lake community is too small to constitute the "public", pointing to Order 01-35⁵ where the Commissioner had found that watershed issues respecting 40 households qualified for the public interest test. It said that LWBC had also erred in finding that the requested records do not relate to the environment and that dissemination

³ I could find no mention of either of these two possibilities in the two LWBC letters of March 16, 2004 provided to me for this inquiry. However, LWBC does mention the second possibility, *i.e.*, a "better understanding" of the records upon retrieval, in its letter of March 24, 2004, as noted above.

⁴ para. 1.09, LWBC's initial submission.

⁵ [2001] B.C.I.P.C.D. No. 36.

and use of the records could not benefit the public. It also said that the primary purpose of its application was a public, not a private, interest and that its intent was to disseminate the information to the public.

[23] SLWWA also said that it should qualify for a fee waiver as it could not afford the fee. It referred to the four reports it had received from LWBC and relevant orders on fee waivers, and set out detailed arguments on the two-step public interest fee waiver test, similar to those in its fee waiver request of April 5, 2004. It concluded by saying that it had an annual budget of approximately \$2,000, \$1,000 of which it spends annually on mail-outs to Shawnigan area residents and the rest of which it spends each year on paper, computer maintenance and photo development. It said that spending \$810 on the records was not a viable option for it.

[24] During mediation of the complaint, LWBC retrieved the responsive records and realized it had overestimated the number of pages and the amount of search time required to retrieve the records.⁶ In a letter of September 27, 2004, it said it had revised its fee estimate as follows:

500 pages @ \$. 25 per page =	\$125.00
3 (minus 1 st 3 hrs) to locate and retrieve records @ \$30.00 per [hr] =	\$000.00
3 hours to prepare the records for disclosure @ \$30.00 per [hr] =	\$ 90.00
Shipping =	<u>\$ 5.00</u>
Total =	\$220.00

[25] LWBC requested full payment of the revised fee.⁷ It also offered to assist the applicant with any concerns that the records might relate to water quality issues and suggested that the applicant speak with its manager of strategic initiatives.

[26] LWBC then said, in a letter of November 8, 2004, that its manager of strategic initiatives had determined that the responsive records were almost exclusively administrative in nature and did not relate to an environmental issue. It said it understood that the applicant had met with the manager to clarify certain things and that the applicant still had concerns. LWBC provided with this letter a list of the types of administrative records within the files and asked the applicant to state whether the list clarified issues and addressed the applicant's concerns.

[27] LWBC's list says the Shawnigan Lake file contains the following types of "administrative records": appraisals; maps; correspondence; requests for proposal; proposals; contract details; e-mails; land title office records; plans; budget forms; parcel descriptions; parcel encumbrance reports; water supply report (December 2002); revenue initiative documents; meeting agendas; draft environmental assessment report—Shawnigan; cultural heritage impact assessment—Bamberton; schedules/work plans; media reports.

⁶ para. 11, Edwards affidavit.

⁷ LWBC nowhere explains how it arrived at the estimate of 3 hours to prepare 500 pages of records for disclosure.

[28] Regarding the applicant's argument that it was unable to pay the fee, LWBC said in the same letter that it would consider this argument with appropriate documentation. It asked for proof that the SLWWA is a registered non-profit society and that the "modest revised fee" of \$220 would cause it financial hardship. LWBC said that suitable proof could be an annual report or statement of income, a 2003 tax statement from the Canada Revenue Agency, a bank statement for the last year or other similar proof.

[29] Further mediation was unfruitful. Early in 2005, this Office scheduled an inquiry to deal with both fee waiver issues.

[30] **3.2 LWBC's Mandate**—At the time of the request, LWBC managed the allocation of provincial Crown lands and water resources on behalf of the government of British Columbia. As a Crown corporation, it ensured "a responsible, timely and prosperous use of British Columbia's most valuable assets". LWBC acted on behalf of the province in land tenure administration and Crown land sales and to ensure compliance with the *Land Act*. It also had responsibilities for the administration and licensing of Crown water resources.⁸

[31] LWBC was at that time considering the potential development of two parcels in the Shawnigan Lake area and it held a public meeting on this issue. LWBC acknowledges that there were public concerns about water quality in the area and concern that additional development might erode water quality. It says the Ministry of Water, Land and Air Protection investigated water quality issues concerning the Shawnigan Lake area in July 2004 and found that water quality was acceptable at that time.⁹

[32] **3.3 Applicant's Status**—In its initial submission, LWBC questions SLWWA's status as a "person", saying SLWWA had not established that it is a society or some other legal entity with the right to make a request under s. 5 of the Act.¹⁰ LWBC says that, on its own initiative, it located SLWWA in the corporate registry and now recognizes that SLWWA is a "person" for the purposes of making a request under the Act. LWBC also says that SLWWA could have provided the information on its status as a society in the first instance.¹¹ SLWWA provides a copy of its certificate of incorporation with its reply and points out the LWBC did not raise any questions about its status as an applicant in its early correspondence.¹²

⁸ paras. 4.01-4.03, LWBC's initial submission.

⁹ paras. 7-11, first Hallam affidavit.

¹⁰ paras. 4.35-4.39, initial submission.

¹¹ para. 35, reply.

¹² para. 26, reply.

[33] There is no record of LWBC raising this as an issue until November 2004. LWBC's point about whether SLWWA is a "person" mentioned in s. 4(1) of the Act, and as to whether SLWWA should or could have established this in the first place, is not in my view relevant to the issues before me in this inquiry.

[34] **3.4 Is a Fee Waiver Merited on the Grounds of Inability to Pay?—**
Section 75(5)(a) reads as follows:

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

- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, ...

[35] Past orders on this issue have made it clear that applicants must do more than assert an inability to pay a fee. They must provide some kind of evidentiary support for their claims. Applicants have generally failed to show that they cannot afford payment, although this case is an exception.

[36] Moreover, even if an applicant provides evidence to support a claim of inability to pay, public bodies still have discretion not to waive the fee. See Order 01-51¹³ and Order 02-01¹⁴, for example. In Order 02-01, the applicant failed to establish that he could not afford the fee. The Law Society said that, in any case, the applicant's proposed use of the records was to serve a private, not a public, interest. The Commissioner confirmed that this was a relevant factor to consider and noted that the applicant had not established any reason as to why it was fair to waive the fee, on financial or other grounds.¹⁵ In concluding that the Law Society was entitled to charge the modest fee at issue, the Commissioner also took into account the fact that the public body had "treated the applicant with an abundance of fairness", including the expenditure of many hours' work on the applicant's previous requests for his personal information, apparently a consideration of whether the public body had complied with or exceeded its s. 6(1) duty to assist the applicant.

[37] The applicant in Order 01-51 also failed to show that he could not afford the fee. Moreover, he also wanted to use the records to serve a private purpose and did not co-operate by narrowing his broadly-worded request to reduce the fee, despite the public body's encouragement to do so. The Commissioner appears to have accepted this as a relevant factor to consider in deciding whether it was fair for other reasons to waive the fee. In any event, principally because the applicant had not shown the public body how

¹³ [2001] B.C.I.P.C.D. No. 54.

¹⁴ [2002] B.C.I.P.C.D. No. 1.

¹⁵ I do not think this means that a fee waiver would never be warranted in cases where the applicant has a private rather than a public purpose in requesting records. There may be cases where an applicant has a private purpose which does merit a fee waiver on financial grounds.

the fee would cause him financial hardship, the Commissioner declined to interfere with the public body's decision not to waive the fee.

Can the applicant afford the fee?

[38] SLWWA says that it cannot afford either the initial fee of \$810 or the reduced fee of \$220 and that LWBC did not adequately address this issue in its letter of April 13, 2004, when it suggested that SLWWA pay the deposit under protest. SLWWA says it has a modest budget, most of which comes from members' donations, which it spends on disseminating information, administration and maintenance. It says the financial statement it filed with the provincial government to maintain its non-profit status—a copy of which it provided with its initial submission in this inquiry—shows that, for the 2003/2004 fiscal year, it had \$487.07 in revenue and \$1,198.36 in expenses, leaving it with a deficit of \$711.29 and \$266.65 in its bank account. SLWWA also attached to its initial submission copies of its March 2004 bank statement (which shows it had \$266.65, plus \$5.00 in shares, for a total of \$271.65 in its bank account) and its most recent bank statement, from October 2004 (which shows it had \$203.22, plus \$5.00 in shares, for a total of \$208.22). It says the original fee estimate of \$810 was four times the amount of funds that it had, and even the reduced fee is more than it has currently.¹⁶

[39] LWBC says a mere assertion of the inability to pay should not suffice. It says that the applicant in this case provided no evidence that it is unable to pay the fee, despite the fact that LWBC asked for evidence in its letter of November 8, 2004, such as a statement of income, a tax statement or a bank statement. As such, it said, it had no basis on which to conclude that the applicant was unable to pay the fee. Accordingly, there is, LWBC argues, no reason to interfere with its decision not to waive the fee under this section of the Act.¹⁷

[40] Referring in its reply to SLWWA's financial statements, LWBC asks why SLWWA did not provide more recent information, including on its current and anticipated revenues for 2004/2005, which might show that SLWWA can afford the fee. LWBC says SLWWA's "latest bank statement" from March 2004 shows it has enough money in its account to cover the fee. LWBC thus still declines to waive the fee on the basis of inability to pay.^{18 19}

[41] I accept SLWWA's evidence, notably in the form of its bank statements, that it cannot afford even the revised \$220 fee. SLWWA's financial statements show that it had revenues of less than \$500 in the 2003/2004 fiscal year and that it ended that period with a deficit of over \$700. It is evident that the \$220 fee would more than eliminate the \$208 balance in SLWWA's bank account as of October 2004. Even if one considers the state of SLWWA's finances at the time of the request (spring 2004, when SLWWA had \$264

¹⁶ paras. 50-53, initial submission; Exhibit "A" to Desmond affidavit.

¹⁷ paras. 4.40-4.42, initial submission.

¹⁸ paras. 35-38, reply submission.

¹⁹ LWBC appears not to have noticed the October 2004 statement, which shows that SLWWA, with only \$208 in its bank account, had less than the revised fee of \$220.

in its account), it is clear that SLWWA could not afford the fee, which at \$810 was much higher at that time (approximately three times the amount SLWWA had in its bank account).

Exercise of Discretion

[42] Having found that SLWWA established its inability to afford the fee (both original and revised), I will now consider LWBC's exercise of discretion on this aspect of the matter. These factors are drawn from previous orders, for example, Order 02-01 and Order 01-51. There is some overlap with the factors in s. 75(5)(b) and s. 58(3)(c) cases.

[43] LWBC says that, even if an applicant cannot afford to pay a fee, a public body retains discretion to charge or waive the fee, referring to Order 02-01 on this point. It says that excusing the fee in this case would sanction the applicant's failure to provide evidence of its inability to pay in the first place and its failure to co-operate in narrowing the focus of the request. This is not an appropriate case in which to waive the fee, it argues.²⁰

[44] SLWWA responds that LWBC did not ask for evidence of inability to pay until November 2004, long after the review had begun and SLWWA had spent much effort on mediation. SLWWA also says it did not agree to LWBC's suggestion at that time to select records of interest to it as, by then, it did not believe that LWBC would ever grant a fee waiver, no matter what SLWWA did.²¹

[45] While the correctness of LWBC's first assertion is highly doubtful, for discussion purposes, I will assume LWBC is correct in contending that a public body can properly consider an applicant's delay in proving inability to pay in deciding whether to waive a fee on that basis. I reject LWBC's argument on this point for a number of reasons.

[46] First, SLWWA raised its limited financial resources right at the start, in its February 2004 request for records, asking, on this basis, that no fees be charged. It continued to raise its inability to pay fees as a basis for a fee waiver, first during its negotiations with LWBC on its fee waiver request and, later—as the material before me reveals—during mediation through this Office. However, according to the material before me, LWBC did not address this issue by requesting proof until November 2004, nine months after the request and well into mediation by this office. There is no record of any other requests by the public body for such proof before or after November 2004 and LWBC nowhere explains why it did not request proof of SLWWA's inability to pay until this late date. LWBC is, in my respectful view, being disingenuous in suggesting that it is entitled to refuse to waive the fee because of SLWWA's alleged delay in demonstrating that it could not afford the fee, when the evidence is that LWBC itself waited for months to ask for proof and longer still to suggest this would be a legitimate consideration in its decision to waive the fee or not.

²⁰ paras. 39-40, reply.

²¹ paras. 9 & 26, reply.

[47] I also reject LWBC's second assertion on the applicant's unwillingness to co-operate in narrowing the request, for reasons I set out below in my discussion of LWBC's exercise of discretion in its decision on the public interest fee waiver aspect of this matter. Furthermore, as I also discuss below, LWBC failed to take into account SLWWA's purpose in making the request and to make reasonable efforts to assist the applicant. For these reasons, I find that, under s. 75(5)(a), it is appropriate to excuse the entire fee.

[48] **3.5 Is a Fee Waiver Merited on Public Interest Grounds?**—Section 75(5)(b) reads as follows:

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

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

[49] A number of orders have considered whether fee waivers in the public interest are merited.²² I have applied here without repeating it the approach taken in those orders.

[50] Order 01-24 sets out the long-established two-step process for deciding public interest fee waivers under s.75(3)(b), as follows:

Applicable Principles

[32] For convenience, I reproduce here the two-step process I set out at p. 5 of Order No. 332-1999:

1. The head of the Ministry 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

²² See, for example, Order 01-24, [2001] B.C.I.P.C.D. No. 25.

- (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?
2. If the head of a Ministry, 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?

[33] It should be emphasized here that the references in para. 1, above, to the environment and public health or safety do not exhaust the scope of what may be a matter of public interest. This is made clear by para. 1(c)(iii).

[51] In Order 01-35, the Commissioner further commented on factors that arise in step two, respecting the exercise of discretion, as follows:

[45] There is no doubt in my mind that the discretion conferred on a head in s. 75(5)(b) is not limited to the two factors set out above in the second part of the test. In Order No. 332-1999, for example, I added to that list. I said that a head should also consider 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 interest.

[46] Although the list of factors will never be exhaustive, I consider that the following criteria may, in addition to those described or referred to above, be relevant to a head's exercise of discretion:

1. As expressly contemplated by s. 58(3)(c) of the Act, whether "a time limit is not met" by the public body in responding to the request;
2. The manner in which the public body attempted to respond to the request (including in light of the public body's duties under s. 6 of the Act);
3. Did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested during the processing of the access request, including by narrowing or clarifying the access request where it was reasonable to do so?;
4. Has the applicant unreasonably rejected a proposal by the public body that would reduce the costs of responding to the access request? It will almost certainly be reasonable for an applicant to reject such a proposal

if it would materially affect the completeness or quality of the public body's response;

5. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?

Do the records relate to a matter of public interest?

[52] With respect to the first step of the test, LWBC says²³ that the requested records fall into the following categories:

- Appraisal reports on the valuation of Crown land; LWBC says they do not deal with environmental issues
- Maps collected from other public sources
- Correspondence that does not deal with environmental issues; LWBC says it does not have staff with environmental expertise and relies on external experts for advice on these issues. This is why it commissioned the four reports previously mentioned. LWBC says the correspondence deals with administrative issues, including terms of reference of contracts and correspondence on scheduling meetings
- Requests for proposals sent out to consultants for the purpose of commissioning the reports
- Proposals which contain information concerning the qualifications of consultants who submitted proposals to the public body, what work they were willing to do and for how much. LWBC says these records do not deal with the substance of environmental issues raised by the applicant and would shed no light on environmental issues of interest to her. LWBC says that a significant amount of the requested records fall into this category
- Details of contracts between LWBC and the consultants who prepared the reports
- E-mails dealing with administrative matters related to the potential marketing of Crown properties; LWBC says these records do not deal with environmental issues but rather include, for example, communications on scheduling meetings, budgetary issues, cost estimates, notes forwarding meeting agendas, proposals and contract administration details. They do not deal with environmental issues concerning Shawnigan Lake, LWBC says, and would shed no light on the environmental issues of interest to the applicant
- Land title office records; LWBC says a significant number of the records fall into this category
- Legal surveys of Crown property

²³ at para. 4.23 of its initial submission.

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- Budget information
 - Parcel descriptions
 - Parcel encumbrance information; LWBC says a significant number of the requested records fall into this category.
 - Two reports, one a water supply report of December 2002 which LWBC has made publicly available (a copy of which it attached to its submission in case the applicant had not received one) and the other a specific report which the applicant has told LWBC it does not want
 - Revenue initiative documents which are summary documents concerning the desirability of proceeding with certain projects; LWBC says they identify the issues, including environmental issues, that need to be addressed before proceeding; they contain no substantive discussions about environmental issues, LWBC says, but simply refer to the fact that such issues, including water quality, will need to be addressed; LWBC says it has done this through commissioning reports and continues to do so
 - Agendas of internal meetings in which issues are identified, LWBC says, but with no discussions contained therein
 - Draft or interim consultants' reports which LWBC says would not add anything meaningful to the reports already disclosed to the applicant
 - Cultural Heritage Impact Assessment – Bamberton; LWBC says this record deals with First Nations' concerns regarding Crown lands adjacent to Shawnigan Lake and not with environmental issues around Shawnigan Lake
 - Schedules/work plans and
 - Media reports

[53] In a September 22, 2005 letter, LWBC also identified a study dated January 19, 2004 as likely responsive to the request, but said that it is subject to solicitor-client privilege and therefore falls under s. 14 of the Act. The applicability of s. 14 or any other exception is of course not in issue here.

[54] LWBC says that the Act allows it to charge fees and gives it discretion to waive fees. It says the fees it can charge cover only a fraction of the true costs of processing a request and further argues in its initial submission as follows:

- 4.07 The issue in fee waiver cases is whether it should be the taxpayers of British Columbia who should bear the entire burden of paying the costs of processing a request or whether an applicant should at least *[sic]* a small portion of those costs.

- 4.08 The Public Body submits that in this era of significant demands for government services and limited government resources, it is not surprising that the Legislature should provide a mechanism in the Act for public bodies to recover at least some of the costs of processing requests from applicants where the request involves a large volume of records or involves extensive search time.²⁴

[55] LWBC sets out the two-step process for considering whether a fee waiver is merited on public interest grounds. It then says²⁵ that it concluded that the requested records do not relate to a matter of public interest after considering the following factors:²⁶

- Disclosure would not reveal a health, safety or environmental concern nor foster accountability and transparency respecting the issue of concern to the applicant; rather, the four reports which LWBC had commissioned for its own purposes and then disclosed to the applicant and others accomplished this aim, as did a public meeting that LWBC held
- A large portion of the public would not be affected since the information was of specific interest to only a small segment of the public²⁷
- Despite LWBC's encouragement to clarify the records SLWWA was seeking, SLWWA had made no efforts to assist in this request²⁸
- The issue of water quality in the Shawnigan Lake area has been the subject of public discussion but the requested records are "administrative" in nature and do not deal with that environmental issue
- There was no reason to believe that disclosure of the records would contribute to the development of public understanding of or debate on an important public health or safety issue, nor a policy, law, program or service²⁹
- SLWWA had not provided evidence that it was unable to pay the fee; LWBC discusses this further in its reply³⁰

²⁴ It is not clear from this passage or other aspects of LWBC's submissions whether it contends that SLWWA's 2,000-page request involved a "large volume of records" or "extensive search time", bearing in mind that one quarter that number of records were retrieved and three hours were ultimately involved in retrieving the records.

²⁵ at paras. 4.04-4.15 & 4.24-4.28, initial submission.

²⁶ As my comments in the footnotes below indicate, some of these factors do not actually relate to the first step in the public interest fee waiver test.

²⁷ LWBC later acknowledges, at para. 1 of its reply, that the size of the Shawnigan Lake community did not preclude the s. 75 threshold from being met, so long as the records relate to a matter of public interest.

²⁸ This actually relates to the additional factors to consider in the exercise of discretion from Order 01-35, the second part of the test, which I discuss below.

²⁹ LWBC does not explain this further.

³⁰ This factor is not related to a public interest fee waiver test under s. 75(5)(b) but to a s. 75(5)(a) waiver on financial grounds.

- Water quality was of interest to the Cowichan Valley Regional District and SLWWA could have made, or could still make, a request to that public body³¹
- SLWWA was unwilling to work with LWBC to reduce the fee or focus on records of primary interest to it.³²

[56] LWBC points out that the test in s. 75(5)(b) is whether the records themselves relate to a matter of public interest. It is not enough that the applicant may use the records for a purpose that is in the public interest, it says, referring to Order 01-24. LWBC acknowledges that the issue of potential development in the Shawnigan Lake area has attracted local interest but says this does not mean that the records at issue relate to a matter of public interest. It points out that the applicant did not request records on water quality in relation to Shawnigan Lake but made what LWBC says was a broadly-worded request covering far more than records related to water quality, which, it says, is what SLWWA is interested in.³³

[57] In taking the above factors into account in concluding that the records do not relate to a matter of public interest, LWBC appears to have conflated to some degree the two steps in the public interest fee waiver test. Moreover, although SLWWA made extensive arguments on the public interest aspects of its fee waiver request—based on its misapprehension, as an outsider to government, that LWBC possessed certain kinds of records—LWBC’s submissions indicate that it rejected these arguments in April 2004 without having examined the requested records, a requirement of the first step in the test. In fact, LWBC does not appear to have reviewed the responsive records until November 2004, months after it issued its decision to deny a public interest fee waiver. I do not see how a public body can properly determine whether or not requested records relate to a matter of public interest if the public body’s decision-maker has not reviewed them or been given evidence, based on direct knowledge of the records’ contents, as to their nature and content. There is no evidence before me that LWBC had either kind of factual basis on which to conclude as it did.

[58] Returning to the parties’ submissions, SLWWA indicates that drinking water quality in the Shawnigan Lake area, its deterioration due to past land developments and its possible degradation from further development are of great interest and concern to it and area residents. These issues have been the subject of local media coverage and recent public debate in the area, it says, providing copies of media articles in support of this point. SLWWA also argues that the records it has requested relate to the safety of drinking water and thus directly to the environment, public health and safety.³⁴

[59] SLWWA believes that the requested records relate to the development of public lands in areas that could affect the Shawnigan reservoir and the impact of development on the safety of drinking water, and thus would disclose an environmental or public

³¹ This factor has no relevance to any part of the public interest fee waiver test.

³² Again, this pertains to the supplementary factors in the exercise of discretion, not the first part of the test.

³³ paras. 4.16-4.22, initial submission.

³⁴ paras. 16-20, initial submission.

health and safety concern. It believes that disseminating information on proposed developments in the Shawnigan area could have significant impacts and change the nature of the community, thus providing a public benefit. Disclosure of the information through its newsletters and website would, SLWWA argues, contribute to the development or public understanding of, and debate, on an important environment or public health or safety issue. It would also inform the local citizens of the government's plans for Crown forestry lands in the area and other public policy issues for land management in the Shawnigan area and, SLWWA says, reveal how LWBC is allocating public resources in the form of sale and transformation of public forest lands into "private, urbanized lands".³⁵

[60] SLWWA says it does not want administrative records and always intended only to take copies of records relevant to the environmental impact and "the wisdom of government's decision to sell and develop Crown forest lands", referring to its February and March 2004 letters to LWBC in this regard.³⁶

[61] LWBC responds that SLWWA has received all of its records on development proposals and that no detailed development plans exist, as matters have not yet progressed that far. Moreover, water quality is not a central concern of the requested records, LWBC asserts. Despite SLWWA's comments on the types of information it believes are in LWBC's records, LWBC says, disclosure of the records to which the fee applies would not add anything to what it has already disclosed and would shed no light on the environmental, water safety and development issues of interest to SLWWA. It says it has proactively disclosed information to the public and points again to its disclosure of the four reports mentioned earlier. It attaches a fifth report on water issues which came into existence after the request and says it has released updates to the public and the media and has participated in a public meeting.³⁷

[62] SLWWA also questions LWBC's determination that Shawnigan Lake is too small a segment of the public for the purposes of the "public interest" test. It says there are 8,500 residents in the area and points out that the Commissioner found in Order 01-35 that 40 households were sufficient for these purposes.³⁸

[63] I note that the previous Commissioner found, in Order No. 299-1999³⁹ that the communities around South Granville Street in Vancouver adequately established the public interest in that case. As noted above, LWBC acknowledged, belatedly, that the size of the Shawnigan Lake community is not an issue.⁴⁰

³⁵ paras. 21-31, initial submission.

³⁶ paras. 19-25, reply.

³⁷ paras. 3-16, reply; paras. 4-15 & 18-21, second Hallam affidavit.

³⁸ paras. 12 & 37-38, initial submission.

³⁹ [1999] B.C.I.P.C.D. No. 12.

⁴⁰ Given past orders on this issue, LWBC was remiss, in my view, in deciding initially that the Shawnigan Lake community was too small for the purposes of the public interest fee waiver test.

[64] LWBC states that it retrieved the records in dispute during mediation on the applicant's complaint.⁴¹ To assist me in my deliberations on the s. 75(5)(b) aspect of the fee waiver issues, therefore, I requested and reviewed copies of the records in dispute.

[65] LWBC has accurately described the types of records in the Shawnigan Lake file, as set out above. For the most part, it has also accurately characterized the records as predominantly administrative in nature. I do not, however, fully agree with LWBC respecting the nature of the e-mails and other correspondence. I would say perhaps 30-35 pages (consisting mainly of e-mails, letters and memos) concern environmental matters, including LWBC's internal discussions on water issues, the potential sale and development of the Crown lands in question and the impact of development on water quality. They would also shed light on LWBC's planning and execution of the Shawnigan Lake project, a matter of public interest, in my view.

[66] I also consider that the records would promote transparency and accountability of LWBC's activities. It follows that I do not agree with LWBC's contention that, along with the disclosure of the reports, its participation in a public meeting (according to SLWWA, a meeting it organized) sufficed in terms of accountability and transparency. Taken to its extreme, this comes very close to saying that records disclosure does not advance accountability or transparency, which are instead achieved by whatever government does in its sole discretion.

[67] LWBC appears to have accepted that water quality is an environmental issue but does not directly address whether land development issues equate to environmental issues. In this context, however, the issue is the potential effect of such development on water quality in the Shawnigan Lake area, and water quality is an environmental issue (and may be a public health issue). I also accept, on the evidence before me, that water quality and development of Crown lands in the Shawnigan Lake area have been matters of recent public debate and media coverage and that the issues relate to matters that could have a long-term effect on the SLWWA residents and the lands around Shawnigan Lake. I also consider that disseminating these records would add to the public's understanding of these matters. Thus, I find that the 30-35 pages just discussed meet the first part of the public interest fee waiver test.

Exercise of Discretion

[68] Because I have found that a small percentage of the records relate to a matter of public interest, I will now consider LWBC's exercise of discretion regarding those records. I include here the factors LWBC says it considered in the first step.

[69] LWBC argues that, even if the records do relate to a matter of public interest, the appropriate circumstances do not exist to excuse the fee.⁴² Despite LWBC's encouragement to clarify the records SLWWA was seeking, LWBC says SLWWA made

⁴¹ para. 1.11, initial submission; para. 11, Edwards affidavit.

⁴² paras 4.29-4.30, initial submission.

no efforts to assist in this way. It also says the applicant was unwilling to work with LWBC to reduce the fee (which it calls “minimal”) and, in the October meeting, refused to focus on records of primary interest to it.⁴³

[70] LWBC also says it had indicated that it would disclose free of charge any records related to water quality as they would meet the public interest test, but the applicant had declined this opportunity.⁴⁴ SLWWA says that, as far as it knows, no such offer was made.^{45 46} For its part, SLWWA says that it offered to reduce the scope of the request to marketing and development issues.^{47 48}

[71] LWBC then says that, in Order No. 332-1999⁴⁹, the Commissioner cited the public availability of information as a relevant factor to consider in s. 75 cases. It says a relevant factor here is that it has already provided the only responsive records that deal extensively with the environmental issues raised by the applicant (that is, the four reports) to SLWWA and other interested parties free of charge.⁵⁰ I do not consider this argument persuasive.

[72] SLWWA points out that it offered from the beginning to reduce costs by coming in to view documents before copying was done. It also says that, later, it chose not to select the records of interest to it from LWBC’s list and not to provide evidence that the fee would cause it financial hardship, as by then it had spent nine months on the request and review, including considerable correspondence and a meeting. By this point, it felt it had to proceed to an inquiry or LWBC “would keep [SLWWA] on an endless treadmill of fruitless activity, requiring [it] to make further applications and requests that they would simply turn down”.⁵¹

[73] SLWWA says its primary purpose in making the request is to create public awareness around potential issues, such as land development, that may affect Shawnigan Lake citizens who drink water from the lake. Any negative impacts on the drinking water supply are of “paramount public interest”, it says, and creating awareness of these concerns is crucial. SLWWA also says that it is able to disseminate the information to the public, despite its limited financial means, through the above-mentioned listserve, newsletters and media articles (although, apart from some media articles, it did not provide examples of these materials). It says it was at that time designing a website to

⁴³ para. 4.15, initial submission.

⁴⁴ para. 4.15, initial submission; para. 15, Edwards affidavit.

⁴⁵ paras. 14-15, reply.

⁴⁶ I could find no record of such an offer in the material before me. The only evidence on this point was from the analyst responsible for the request who stated that the decision-maker “advised her” he had made this offer. LWBC did not explain why it was unable to document the offer nor why it did not provide direct affidavit evidence on this and other aspects of the fee waiver decision from the decision-maker himself.

⁴⁷ para. 17, reply.

⁴⁸ I could find no record of this offer either.

⁴⁹ [1999] B.C.I.P.C.D. No. 45.

⁵⁰ para. 4.32, initial submission.

⁵¹ paras. 4-9 & 17, reply.

increase public access, was planning to hold a public meeting on the issue and works with other groups which publish SLWWA's material.^{52 53}

[74] LWBC and SLWWA agree that LWBC met the Act's timelines.⁵⁴ I also agree. This factor is therefore not relevant here.

[75] SLWWA casts doubt on LWBC's comment that its records would shed no light on the water quality issue. In SLWWA's view, the proposed sale and development of Crown lands managed by LWBC would likely have an adverse impact on the Shawnigan Lake watershed. It says it pointed this out in its letter of April 5, 2004.^{55 56}

[76] SLWWA is also suspicious of the fact that the original estimate of \$810 was almost four times the actual cost of \$220 and says that LWBC only reduced the fee after a great deal of work on SLWWA's part. It argues LWBC should have given more consideration in April 2004 to SLWWA's statement that it could not afford the fee. It acknowledges⁵⁷ that LWBC proposed that SLWWA narrow the request.⁵⁸ SLWWA says reducing the scope would have affected the completeness of the response and also argues that the fee would not shift an unreasonable burden onto LWBC.^{59 60}

[77] SLWWA also says that LWBC did not make every reasonable effort to assist it with its request. SLWWA points out that it was not until well into mediation that LWBC said the records were administrative in nature and did not relate to environmental issues. SLWWA nevertheless believes that some if not all of the records in LWBC's list respond to its request and relate to an environmental or public policy issue. It says that LWBC refused when SLWWA asked to see examples of the "administrative records".⁶¹

[78] LWBC responds to SLWWA's complaint about the handling of the request by saying that it met with SLWWA to address its concerns and that it gave SLWWA "every opportunity" to focus the request, which it declined to do. LWBC says the delay has been caused by SLWWA's unwillingness to pay the fee, a fee which the Act authorizes. LWBC says it would have processed the request long ago if SLWWA had simply paid the fee.⁶² LWBC also rejects SLWWA's suspicions regarding the reduction of the fee,

⁵² paras. 33-34, initial submission.

⁵³ LWBC appears to have paid little or no heed to the applicant's arguments on step two of the public interest fee waiver test from Order 01-24.

⁵⁴ para. 37, SLWWA's initial submission; para. 17, LWBC's reply.

⁵⁵ para. 39, initial submission.

⁵⁶ As noted elsewhere, while the applicant misunderstood the contents of the responsive records, this is because LWBC did not make any effort to enlighten the applicant on this point until many months after it had rejected the applicant's fee waiver request.

⁵⁷ at para. 42 of its initial submission.

⁵⁸ SLWWA says elsewhere, however, that it was not aware of LWBC making an offer to provide free access to records related to water quality.

⁵⁹ paras. 40-43, initial submission; paras. 2-4, reply.

⁶⁰ LWBC does not address this last factor.

⁶¹ paras. 38 & 45-49, initial submission.

⁶² para. 17, reply.

saying it is not required to locate all records when it issues a fee estimate. Otherwise there would be no need to issue an estimate. An estimate is an estimate, it says, and it was only after it had retrieved the responsive records—which it argues it was not obliged to do—that it was able to calculate a more accurate fee.⁶³

[79] LWBC suggests that SLWWA may not appreciate the nature and extent of the responsive records and may overestimate the extent to which its records deal with environmental issues and development proposals. Matters have not yet progressed to where LWBC is dealing with specific development proposals regarding Crown lands in the Shawnigan Lake area, it says. Rather, it has “certain development ‘concepts’”. Once it has detailed development proposals, it continues, it will be in a position to conduct detailed planning studies and to commission environmental reviews. It says it will release future studies and reviews as they are conducted.⁶⁴

[80] LWBC also says that it was not unco-operative in its meeting with SLWWA, when SLWWA’s representative asked to see sample “administrative records”. Rather, it could not provide access at that point as it had not yet reviewed the records and was concerned that allowing SLWWA to view the records might result in the disclosure of information subject to an exception. It says it was not in a position to provide a detailed description of the records at that point, although it did provide the list set out above with its letter of November 8, 2004. It also met with SLWWA in October 2004 to determine the records of interest to it, but says that SLWWA was not willing to provide clarification. If it had, LWBC says, LWBC could have told SLWWA whether it had such records.⁶⁵

[81] I agree with LWBC that SLWWA appears to have overestimated the extent of the records related to environmental issues in LWBC’s files. However, LWBC fails to acknowledge that the applicant’s misunderstanding on this point is largely due to the fact that LWBC did not describe the contents of its files to the applicant until October 2004, eight months after SLWWA made its request. Even then, for reasons I discuss above, LWBC did not have a good understanding of the contents of the relevant file. LWBC also did not provide a detailed description of the records and explain why it had so few records related to environmental issues until its initial submission. It is hardly surprising in the circumstances that the applicant was unwilling to narrow the scope of the request in the October meeting, when LWBC had not reviewed the records, could not describe them in any detail and declined to provide a sample for viewing.

[82] SLWWA is a non-profit group whose purpose includes developing and increasing understanding of watershed protection matters and land development, and disseminating information on these issues to its members, the public and the media. Its primary purpose in requesting the records is not a private purpose, but for use and dissemination in a way that could reasonably be expected to benefit the public’s understanding of development

⁶³ paras. 21-24, reply.

⁶⁴ paras. 25-28, reply; paras. 22-24 & 28-29, second Hallam affidavit.

⁶⁵ paras. 29-31, reply; paras. 25-27, second Hallam affidavit.

proposals and water quality issues. SLWWA has also shown that, despite its limited financial resources, it is in a position to disseminate that information. LWBC does not appear to have given any consideration to these factors, which relate to the second step of the test.⁶⁶

[83] I am also of the view that LWBC did not make reasonable efforts to assist SLWWA with its request. For example, there is no indication that LWBC contacted SLWWA after receiving the request to discuss what SLWWA wanted. SLWWA's later correspondence suggests that it was primarily interested in development and water quality issues, but, as already noted, LWBC does not appear to have told SLWWA early on whether it had such records and what types of records it had in its Shawnigan Lake file. It was not until eight or nine months after the request, well into the mediation process, that LWBC told the applicant that only a small amount of its records relate to water quality matters.

[84] As for SLWWA's complaint that LWBC's estimate of the number of responsive pages was considerably higher than the actual figure, I can understand that this estimate inflated SLWWA's expectations as to the number of responsive records in LWBC's files. I do not however share the applicant's suspicions on this point. Public bodies need not produce a precise count of the number of responsive records in preparing fee estimates. However, given these potential problems, public bodies may wish to consider other ways of preparing their fee estimates, for example, by requesting a deposit based on a percentage of the estimated amount of search and retrieval time and waiting to issue an estimate of the number of responsive records until they have retrieved the records. These and other adjustments may result in the issuance of more realistic fee estimates and perhaps fewer disputes over fees and fee waivers.

[85] Returning to LWBC's handling of the request, although SLWWA said from the start that it wanted to view the records and would save the shipping fee by visiting LWBC's offices, LWBC ignored these offers to reduce the fees and continued to issue fee estimates that included copying and shipping costs. In addition, even though SLWWA said in its request and throughout the request and review processes that it could not afford any fees,⁶⁷ LWBC took no notice of this. It was not until months into the mediation phase that LWBC dealt with this aspect of the matter by requesting documentary proof of SLWWA's status as a society and of its inability to pay.

[86] Because LWBC did not take these basic steps at the beginning of the process, but waited until well into mediation, SLWWA was left for many months without any knowledge of the contents of the Shawnigan Lake file and of the reasons behind LWBC's stance on the public interest matter. By this time SLWWA had understandably become frustrated, entrenched in its position and no longer interested in finding a solution.

⁶⁶ I note here, in passing, that LWBC instead appears to have concentrated solely on the supplementary factors in the exercise of discretion from Order 01-35.

⁶⁷ In my view, on the facts, clearly a request for a fee waiver under s. 75(5)(a) based on inability to pay.

[87] Nor has LWBC persuaded me that waiving the revised \$220 fee would shift an unreasonable burden to it from the applicant, an impecunious non-profit group.

[88] For the reasons discussed above, I find that the records that meet the first part of the test also meet the second part of the test for public interest fee waivers. In my view, under s. 75(5)(b) appropriate circumstances exist to excuse the fees regarding the 30-35 pages discussed above.

4.0 CONCLUSION

[89] For the reasons given above, under s. 58 of the Act, I order MAL to excuse the fee in this case.

December 14, 2005

ORIGINAL SIGNED BY

Celia Francis
Adjudicator

OIPC File No. F04-21455