



OFFICE OF THE
INFORMATION & PRIVACY
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Order F11-18

VANCOUVER BOARD OF PARKS AND RECREATION

Celia Francis, Senior Adjudicator

June 17, 2011

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Summary: The applicant requested records related to the use of amplified sound in parks for 17 events. After a delay of several weeks, the Board responded by issuing a fee estimate of \$510 for searching for the records, plus photocopying and delivery charges. The applicant requested a fee waiver to which the Board did not respond. The Board failed to comply with its duty to respond on time to the request for records and the request for a fee waiver. The fee is excused and the Board is ordered to respond to the request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7(1), 53(3), 58(3)(c), 75(5.1).

Authorities Considered: **B.C.:** Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 00-31, [2000] B.C.I.P.C.D. No. 34; Order 04-30, [2004] B.C.I.P.C.D. No. 31; Order F05-21, [2005] B.C.I.P.C.D. No. 29; Order F06-16, [2006] B.C.I.P.C.D. No. 23; Order No. 245-1998, [1998] B.C.I.P.C.D. No. 39.

1.0 THE FACTS

[1] This case is about a public body's failure to comply with its duties under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant, who represents the North West Point Grey Homeowners Association ("Association"), has been trying for months to get records from the Vancouver Board of Parks and Recreation ("Board") on 17 "permitted events" in 2010 in a number of city parks.¹ His interest centres on the use of amplified

¹ Under paragraph (q) of the definition of "local public body" in Schedule 1 of FIPPA, the Board is a public body.

sound at the permitted events, including: what type of sound was permitted; why the organizer required it; why the amplified sound was permitted; whether the Board assessed the potential impact on the surrounding community; what if any restrictions the Board placed on the use of amplified sound; any notices sent to residents within a two-block radius of the event.

[2] After two informal attempts in November 2010 to get this information, the applicant made a formal request under FIPPA on December 20, 2010. He followed up with several telephone calls and then emailed the Board on February 8, 2011. He reminded the Board of its obligation to respond to FIPPA requests within 30 days and noted that he had not yet received a response to his request. He added:

... this is a simple matter, but one of concern to residents of Point Grey. We are trying to understand the actual process by which the Parks Board permits amplified sound at various events in our area, as this does not appear to be happening in conformance with the Parks Board's own guidelines and by laws. ...

[3] The Board did not respond to this email either. The applicant then wrote to the Office of the Information and Privacy Commissioner ("OIPC") on February 24, 2011 requesting our help. He said that he had complied with the Board's Freedom of Information request procedures on its website and had received an acknowledgment to his request. He had not however received a response, despite following up a number of times. The OIPC treated the Board's failure to respond on time as a decision to refuse access to the applicant's request.²

[4] The Board finally emailed the applicant, on March 30, 2011, apologizing for the delay in providing the requested information:

Due to a number of retirements and some restructuring of responsibilities between the Park Board and the City of Vancouver, there has been and continues to be confusion about who is responsible for responding to FOI requests on behalf of the Board.

[5] The email then stated the Board was charging a fee for providing the records. The Board estimated it would require 20 hours for search and retrieval of the information and that, after subtracting the first three free hours, the estimated search fee was \$510 (17 hours @ \$30/hour). Moreover, the Board would also charge photocopy fees of 25¢ per page and delivery charges, unless the applicant chose to pick up the records. The email said that, once the Board received confirmation from the applicant that he wanted to proceed, it would respond as quickly as possible, given the delay.

² Section 53(3) of FIPPA.

[6] On April 6, 2011, the Board followed up with an email asking the applicant if he wanted to proceed. The applicant responded the same day, asking for a waiver of the fee on a number of grounds:

- the Association has “no ability to pay such an amount”;
- the size of the fee is “absurd”, considering the “very small amount of documents, all from 2010”;
- the Board had already breached its own FOI guidelines and provincial legislation by not responding to his request; and
- the FOI request was “clearly made for a public purpose”.

[7] The applicant added that his request was prompted by the Board’s “failure” to follow its own guidelines on permitting amplified sound at events in Jericho Park. He suggested that Board staff did not even seem to be aware that events held in the Park had to comply with the City of Vancouver noise bylaw. Since his Association had made its requests, he said that, “thankfully”, the Board appeared to have adjusted its permit procedure “to at least attempt to be consistent with the City’s noise bylaw”. The applicant said that he would agree to drop his request if the Board agreed to notify the Association in advance of any events for which the Board permitted amplified sound at any of the parks. He asked that this notification include the time, place and name of the event, any restrictions placed on the use of amplified sound and why the Board had permitted amplified sound for the event.

[8] The Board still had not responded to the fee waiver request when the OIPC issued a notice of inquiry on May 25, 2011. At this point, the applicant once again told the Board he would drop his request if the Board provided advance notice of events involving amplified sound. The notice directed the Board to make its initial submission on June 6, 2011, the applicant to respond on June 8, 2011 and the Board to reply on June 10, 2011.

[9] The Board did not make a submission. As there was nothing for the applicant to respond to, the Registrar closed the inquiry and told the parties the matter would go before an adjudicator for a decision.

2.0 ISSUES

[10] The notice said that issues before me are whether the Board has met its responsibilities under ss. 6(1) and 75(5.1). Section 57 of FIPPA, which sets out the burden of proof in an inquiry, is silent respecting s. 6(1) and s. 75(5.1). Thus, it is incumbent on the parties to submit argument and evidence in support of their positions.

3.0 DISCUSSION

[11] **3.1 FIPPA Provisions in Issue**—The relevant sections of FIPPA are these:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Time limit for responding

7(1) Subject to this section and sections 23 and 24 (1), the head of a public body must respond not later than 30 days after receiving a request described in section 5 (1).

How to ask for a review

53(3) The failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record, but the time limit in subsection (2) (a) for delivering a request for review does not apply.

Commissioner's orders

58(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:

...

(c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;

Fees

75(5.1) The head of a public body must respond under subsection (5) in writing and within 20 days after receiving the request.

[12] **3.2 Did the Board Comply With Section 6(1)?**—I have had to rely on the request and correspondence, outlined above, to arrive at my findings on this issue because the parties made no submissions.

[13] Public bodies must respond to requests under FIPPA within 30 business days, unless they take an extension under s. 10.³ The failure of the head of a public body to respond in time to a request for a record is to be treated as a decision to refuse access.⁴

³ Section 7(1) of FIPPA.

⁴ Section 53(3) of FIPPA.

[14] The applicant submitted his request on December 20, 2010. The Board's response was thus due no later than February 3, 2011. The applicant had not received a response when he wrote to the OIPC on February 24, 2011, 15 business days after the due date. The Board finally responded to the request by issuing a fee estimate on March 30, 2011, a full 39 business days past the legislated due date. There is no indication that the Board took or sought an extension under s. 10 of FIPPA during this time. Nor do I see any evidence that the Board responded to the applicant's offer of an alternative to his request.

[15] Past orders have found that a public body's failure to respond within the time limits set out in s. 7(1) means that it has also failed to fulfil its duties under s. 6(1). Former Commissioner Loukidelis had this to say about a similar case:

[22] Both public bodies breached the Act's requirement to respond to the applicant's request in the time required under s. 7(1) (subject to either s. 10(1) or ss. 23 and 24). It is simply not tenable to say that a public body that is in breach of the Act by having responded late can still be found to have fulfilled its statutory duty to respond to an applicant "without delay". As I indicated in Order 01-47, [2001] B.C.I.P.C.D. No. 49, at para. 28, the s. 6(1) duty to respond without delay requires a public body to make every reasonable effort to respond before the time required under s. 7(1). A public body in breach of the latter duty cannot be found to have fulfilled the former.

[23] I do not question the diligence or good faith of those who processed the applicant's request, but their inability to respond as required by law cannot – whether or not it was due to an excess of demand over the resources available to respond – wipe away the fact that the responses were late. I therefore find that both public bodies have failed to discharge their duty under s. 6(1) to respond to the applicant without delay. Since they have responded, however, I can do no more in this case (there is no fee that I could have ordered to be waived or refunded under s. 58(3)(c)). Any issue arising from the deemed decisions to refuse access, under s. 53(3), also falls away in light of the eventual responses. In both instances, I can only say that these public bodies, and all others, should ensure that adequate resources are available so that their access to information staff can process requests in compliance with the law.⁵

[16] In light of the events as I have outlined them above and having regard for previous orders on this issue, I find that the Board failed to meet its legislated obligations under s. 7(1) to respond to the applicant's request on time. It follows that I also find that the Board failed to comply with its duty under s. 6(1) to make every reasonable effort to assist the applicant.

⁵ Order 02-38, [2002] B.C.I.P.C.D. No. 38.

[17] Staff retirements and subsequent restructuring of responsibilities might cause service disruptions. Without further explanation, however, I am not satisfied these facts alone justify the lengthy delays and failure to comply with legal obligations that have occurred here.

[18] **3.3 Did the Board Comply With Section 75(5.1)?**—Under s. 75(5.1) of FIPPA, a public body must respond in writing to a request for a fee waiver within 20 business days of receiving the request, by April 29, 2011 in this case. The Board did not do so. In fact, it had not responded by the time the OIPC issued the notice for this inquiry on May 25, 2011. I therefore readily conclude that the Board failed to comply with its duty under s. 75(5.1).

[19] **3.4 What is the Remedy?**—Normally, where a public body has not responded to a request for records within legislated time limits, the remedy would be to order it to respond to the request under s. 58(3)(a).⁶ In this case, the Board has technically responded to the applicant's request by issuing a fee estimate.

[20] While it is open to me to order the Board to respond to the applicant's request for a fee waiver, the applicant has already waited for six months to receive a response to his request for records. Based on events to date, an order to respond to the fee waiver request might simply lead to further delays, while the parties sorted out the fee waiver issues and the Board produced the record. The OIPC might well have further involvement as well. Such delays would not serve the applicant's interests, needlessly consume scarce resources and bring FIPPA into disrepute.

[21] The Board has demonstrated disrespect for its legal obligations, the public and the OIPC. The only other similar case I am aware of is Order 00-31.⁷ In that Order, the British Columbia Institute of Technology was, for the second time in two years, the subject of a Commissioner's criticism for its failure to comply with its legal obligations under FIPPA.⁸

[22] For all the reasons I discuss above and having regard for previous orders which excused fees where public bodies had not met their timelines,⁹ I conclude that, in the circumstances, it is appropriate under s. 58(3)(c) for me to excuse the fees in this case and to order the Board under s. 58(3)(a) to respond to the request.

⁶ See Order 04-30, [2004] B.C.I.P.C.D. No. 31, for example.

⁷ [2000] B.C.I.P.C.D. No. 34.

⁸ The earlier case was Order No. 245-1998, [1998] B.C.I.P.C.D. No. 39.

⁹ See for example, Order 02-38, Order F05-21, [2005] B.C.I.P.C.D. No. 29 and Order F06-16, [2006] B.C.I.P.C.D. No. 23.

4.0 CONCLUSION

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

1. I excuse the fees for the search and retrieval, photocopying and delivery of the responsive records.
2. I order the Board to respond completely to the applicant within 10 days of the date of this order, as FIPPA defines “day”, that is, on or before July 4, 2011 and, concurrently, to copy me on its cover letter to the applicant.

June 17, 2011

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

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