



Order F24-74

CITY OF VERNON

Jay Fedorak
Adjudicator

August 15, 2024

CanLII Cite: 2024 BCIPC 84
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 84

Summary: An applicant requested from the City of Vernon (City) copies of maintenance records, reports and repair costs relating to recreation centres and other facilities. The City responded that the records were available for purchase by the public and therefore were outside the scope of the *Freedom of Information and Protection of Privacy Act* in accordance with s. 3(5)(a). The City also issued a fee estimate under s. 75. The adjudicator found that the records were not available for purchase by the public and s. 3(5)(a) did not apply. The adjudicator also found that the fee estimate was not appropriate under s. 75 and excused the applicant from paying the fee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 3(5)(a), 75.

INTRODUCTION

[1] An applicant requested copies of maintenance records, reports and repair costs relating to recreation centres and other facilities from the City of Vernon (City) under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The City responded that the requested records were “routine release” and were not subject to FIPPA. The City gave the applicant an estimate of the fees that would be applicable for disclosing the records under “routine release” at \$2223.38 and indicated that it would require a deposit of 50%. The applicant was dissatisfied with this response and requested a review from the Office of the Information and Privacy Commissioner (OIPC).

[2] The OIPC identified the issue as whether the City had charged a fee in accordance with s. 75 of FIPPA. The City responded that it had not treated the applicant’s request as an access request under s. 5 of FIPPA. The OIPC investigator then changed the issue under investigation to whether the records

were outside the scope of FIPPA in accordance with s. 3(5)(a) of FIPPA, on the grounds that they were available for purchase by the public.

[3] Mediation failed to resolve the matter, and the applicant requested that it proceed to an inquiry.

[4] Following this, the City provided a fee estimate of \$1923.38 under s. 75(1)(b) as a fall back position in the event that the OIPC determined that s. 3(5)(a) did not apply. Both s. 3(5)(a) and s. 75 were issues listed on the Notice of Inquiry.

ISSUE

[5] The issues to be decided in this inquiry are:

1. Whether the records requested by the applicant are available for purchase by the public and, therefore, are not subject to the access provisions in Part 2 of FIPPA in accordance with s. 3(5)(a) of FIPPA;
2. If not, whether the \$1,923.38 fee estimate is in accordance with s. 75(1)(b) of FIPPA;
3. If not, what is the appropriate remedy?

[6] Section 57 is silent regarding the burden of proof in cases involving scope issues, such as the application of s. 3(5)(a). Nevertheless, previous orders have established that the public body bears the burden of proving that the records are excluded from the scope of FIPPA under s. 3.¹ I adopt that approach here.

[7] Section 57 is also silent respecting fee matters. Previous orders have held that the burden is on the public body, as it is in the best position to establish how the fee estimate complies with the Schedule of Maximum Fee in the Freedom of Information and Privacy Regulation.² I adopt that approach here.

DISCUSSION

[8] **Parties' submissions** – The parties did not provide any further information describing the background to this request. In fact, the parties provided little of substance in terms of submissions. The City submitted only copies of a 40-page policy manual, its correspondence with the applicant and internal correspondence, under a cover letter of one page. The cover letter

¹ Order F23-100, 2023 BCIPC 116 (CanLII), para. 112; Order F16-15, 2016 BCIPC 17 (CanLII); Order F17-30, 2017 BCIPC 32 (CanLII); Order F23-70, 2023 BCIPC 83 (CanLII).

² Order F24-04, 2024 BCIPC 5 (CanLII), paras. 18-19; Order F22-41, 2022 BCIPC 46 (CanLII); Order F10-41, 2010 BCIPC 61 (CanLII); Order F18-02, 2018 BCIPC 2.

merely identified the exhibits and stated perfunctorily that they demonstrated that it treated the applicant's request in a timely manner and properly categorized the requested records as "routine release". The applicant's response submission was a letter to the City describing his request in more detail. The City declined to provide a reply submission.

[9] I found these submissions to be insufficient to determine whether the requested records were available for purchase by the public in accordance with s. 3(5)(a) or whether, in the alternative, the fee the City assessed complied with s. 75. Therefore, I identified this problem for the parties and invited them to make further submissions.

[10] The City declined to make further submissions regarding the application of s. 3(5)(a). Regarding the application of s. 75, it merely stated that the fee estimate was based on 14 hours of search time and 2,555 pages of records.

[11] **Record at issue** – The records consist of an estimated 2,555 pages of reports, maintenance records and repair costs regarding recreational and other facilities.

Are the records available for purchase by the public in accordance with s. 3(5)(a)?

[12] The relevant provision of FIPPA reads as follows:

3 (1) Subject to subsections (3) to (5), this Act applies to all records in the custody or under the control of a public body, including court administration records.

...

(5) Part 2 does not apply to the following:

(a) a record that is available for purchase by the public;

[13] There are no previous orders that have established a test to determine whether records are considered to be available for purchase by the public for the purposes of s. 3(5)(a). Nevertheless, there are orders that have found that certain records were available for purchase and the reasons of the adjudicators in these cases are instructive.

[14] In Order F23-100, the adjudicator found that records available for purchase online from the Land Title and Survey Authority of BC's website. In that case, the Ministry had provided affidavit evidence that the public can purchase the records for a fee and obtain them directly from the website. In Order F22-30, the adjudicator found that certain standard reports, which were available for purchase from the Vancouver Police Department website for a set fee of \$55, were considered to be available for purchase by the public in accordance with s. 3(5)(a). In Order F21-05, the adjudicator found that customized reports that the

public could request on the BC Assessment Authority, website using an online request form and selecting particular data elements, were considered to be available for purchase by the public.³

[15] My observation is that the common characteristics of the findings in these orders is that there were established processes in place for the public to pay for and obtain these records online immediately without employees having to search for records, collate and produce them, as they would in responding to a request under FIPPA.

[16] In its submission, the City listed a series of three appendices (including a policy manual, correspondence and a fee bylaw) and stated the following:

In summary the attachments above demonstrate that the City:

- received the applicant's information request and responded in a timely manner;
- classified the documents as routinely released in conjunction with City policy (attached in Appendix A) and *Freedom of Information and Protection of Privacy Act* Section 3(5)(a);
- communicated regularly to the applicant and provided a fee estimate in a timely manner.

[17] The City referred to specific page numbers in the policy manual and highlighted the relevant passages.

[18] The applicant's submissions do not address the question as to whether the records he requested are available for purchase by the public.

Analysis

[19] It is not sufficient for the City merely to state that records are available for purchase by the public. It must demonstrate that the specific records requested by the applicant are available for purchase.

[20] The City has not satisfied me that any or all of the records in dispute are available for purchase by the public. It has merely stated that it categorized the records as "routine release" and issued an estimated fee. It has not explained how records designated as "routine release" constitute being available for purchase by the public in accordance with s. 3(5)(a).

³ F23-100, 2023 BCIPC 116 (CanLII); F22-30, 2022 BCIPC 33 (CanLII); F21-05, 2021 BCIPC 5 (CanLII).

[21] The best I can glean from its submissions is that it will provide the requested records, if the applicant pays the fees set out in the bylaw. This does not appear to be what “available for purchase” means. The applicant still has to request the records, wait for the City to search, collate and produce them and pay a charge per page. This is precisely what would occur in the processing of a request in accordance with FIPPA. The only difference is in the amount of fees assessed according to the schedule in the bylaw instead of the Schedule of Maximum fees in the regulation to FIPPA.

[22] This is not like the previous cases that I identified above where the public can select the records and retrieve those records themselves immediately using a website or catalogue.

[23] In applying the principles of statutory interpretation, I conclude that the intent of excluding from the access provisions of FIPPA of records “available for purchase by the public” was to prevent applicants from obtaining records under FIPPA that were already otherwise available for purchase. For example, it prevents applicants from avoiding the standard charge for obtaining a copy of their own birth certificate by trying to obtain it under FIPPA for free. It does not appear that the intent of this provision was to permit public bodies to establish an almost identical process to that under FIPPA but with different fees.

[24] Consequently, I have insufficient information before me to conclude that any or all of the requested records are “available for purchase by the public” within the meaning of s. 3(5)(a) of FIPPA. As noted above, I wrote to the parties to inform them of this and give them another opportunity to provide further submissions. The City declined. I conclude that it would serve no purpose to invite the parties to make further submissions a second time. The City has not met its burden of proof to demonstrate that the requested records are available for purchase by the public.

[25] Therefore, I find that the requested records are not available for purchase by the public and that s. 3(5)(a) does not apply.

Is the fee estimate appropriate?

[26] Section 58 of FIPPA requires me to dispose of the matter in this inquiry. The relevant passage reads as follows:

- 58 (1) On completing an inquiry under section 56, the commissioner must dispose of the issues by making an order under this section.
- ...
- (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;

[27] Section 75 permits public bodies to charge fees as follows:

- 75 (1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body the following:
- (a) a prescribed application fee;
 - (b) prescribed fees for the following services:
 - (i) locating and retrieving the record;
 - (ii) producing the record;
 - (iii) preparing the record for disclosure, except for time spent severing information from the record;
 - (iv) shipping and handling the record;
 - (v) providing a copy of the record.
- (2) Subsection (1) (b) (i) does not apply to the first 3 hours spent on a request.
- (3) Subsection (1) does not apply to a request for the applicant's own personal information.
- (4) If an applicant is required to pay fees for services under subsection (1) (b), the head of the public body
- (a) must give the applicant a written estimate of the total fees before providing the services, and
 - (b) may require the applicant to pay a deposit in an amount set by the head of the public body.

[28] The Schedule of Maximum fees in Schedule 1 of the Freedom of Information and Protection of Privacy Regulation sets out the highest amount that the public body can charge for activities related to locating, retrieving, preparing the record for disclosure, producing the record and shipping it. Under s. 58(3)(c), the Commissioner has the authority to confirm, excuse, reduce a fee or order a refund. During a review, such as this one, the Commissioner's role is to evaluate whether the public body has a reasonable basis for its estimates based on the evidence it provides.

[29] The public body must demonstrate that its estimate is reasonable and appropriate. It must provide argument and evidence to support the accuracy of its estimate. For example, in Order F22-28, the public body provided time sheets in support of its estimate of the number of hours required to locate the records.⁴

[30] At no point did the City explain how it calculated the fee estimate of \$1,923.38 or otherwise address the issue of whether this fee estimate was appropriate, other than to state the total search time and provide an approximate

⁴ Order F22-28, 2022 BCIPC 31 (CanLII), para. 13.

number of total pages. However, later, in the one-page submission in response to my invitation for further submissions, the City provided the following:

Should it be determined that the records are within the scope of FIPPA, the City suggests the fee estimate of \$1,923.38 is incorrect and offers the following estimate:

Locating and copy/scan 7 ½ years of maintenance records for the steam room, sauna and waterslide and locating and copy/scan 7 ½ years of repairs costs for the steam room, sauna and waterslide throughout the financial records is estimated to take 14 hours of staff time and result in 2,555 pages.

11 hours (1st 3 hours no charge) @ \$7.50 per ¼ /hr = \$330.00
Scan 2555 records @ \$ 0.10 = \$255.50
Photocopy 2555 records @ \$0.25 = \$638.75

The estimate for this request, should it be determined to fall under section 75, would be \$585.50 (if records are scanned) and \$968.75 (if the records are copied).

[31] The applicant does not make any submissions as to whether this fee estimate is appropriate.

Analysis

[32] In order for the City to establish that its fee estimate was reasonable and appropriate requires more than just restating the fee estimate.

[33] The City has provided nothing to support its estimation of 14 hours as the staff time required to locate and produce the record. It has provided no basis for its precise estimate of 2,555 pages of records. It has provided the estimates without any rationale or explanation as to the information upon which it based them. Without further information, I have no means to determine whether these estimates are reasonable or appropriate.

[34] The City has correctly identified the categories of activities for which s. 75 permits it to charge fees and applied the correct rates from the Schedule of Maximum Fees. Nevertheless, it has not demonstrated how it estimated the number of hours required to locate and produce the records and the number of pages involved.

[35] Consequently, it has not met its burden of proof to demonstrate that its fee estimate was reasonable and appropriate.

[36] Therefore, I am unable to find that the City's estimates are reasonable and appropriate.

What remedy is appropriate?

[37] In this case, the City has not demonstrated that its fee estimate is accurate or reasonable. Nor has it provided me with any information upon which I could devise an accurate or reasonable fee. As I mentioned above, I gave the City two opportunities to explain.

[38] Therefore, I find that the appropriate remedy in this case is to excuse the entire fee.

CONCLUSION

[39] For the reasons given above, I make the following order under s. 58(2) of FIPPA:

1. I find that the requested records are not available for purchase by the public in accordance with s. 3(5)(a).

[40] I make the following order under s. 58(3)(c):

2. I find that the fees of \$585.50 or \$968.75 are not authorized by s. 75.
3. I excuse the fees in their entirety.

[41] I make the following order under s. 58(3)(a):

4. I order the City to complete the processing of the complainant's request and to disclose the outstanding records to the complainant within 30 days of the date of this Order.

[42] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **September 27, 2024**.

August 15, 2024

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F24-95484