OFFICE OF THE
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COMMISSIONER
— for —
British Columbia

Order 02-31

BOWEN ISLAND MUNICIPALITY

David Loukidelis, Information and Privacy Commissioner
June 28, 2002

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Summary: The applicant company has been involved in litigation with the Hood Point Improvement District, for which Bowen Island is acting as Receiver. The applicant requested records relating to a specific construction tender process, which was the subject of the litigation against HPID. The HPID estimated a fee of $3,500 and required the applicant to pay the entire estimate before responding, on the basis that the applicant is a "commercial applicant". The applicant is a commercial applicant. Bowen Island can only charge the actual costs of the services listed in the FOI Regulation.

Key Words: fees – commercial applicant – actual costs.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 75(1), (2) and (6); Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93, ss. 1 and 7, Schedule 1.

Authorities Considered: B.C.: Order No. 30-1995, [1995] B.C.I.P.C.D. No. 1; Order No. 90-1996, [1996] B.C.I.P.C.D. No. 16.

1.0 INTRODUCTION

[1] On September 19, 2000, Sound Contracting Ltd. ("Sound") made an access request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Bowen Island Municipality ("Bowen Island") for records relating to the tendering by the Hood Point Improvement District ("HPID") of a particular construction project. For some reason, eight months passed before the applicant received a reply. The reply came

on the HPID's letterhead. Rather than disclosing responsive records, the HPID's response, dated May 17, 2001, included the following passage:

> Pursuant to Section 75 of the Act we require you to pay the Hood Point Improvement District for the services you request which include locating, retrieving and producing records as well a [*sic*] preparing records for disclosure.
>
> Our estimate for providing this service taking into account S 75 (2) is $3500.
>
> If you want us to proceed with your request we require you to advance the estimated costs to the Improvement District prior to our commencing the services you requested. [original emphasis]

[2] The response did not say that the fee estimate was an estimate of actual costs that HPID proposed to charge Sound because HPID considered Sound to be a "commercial applicant". Nor were any details given about how the fee estimate was arrived at, an aspect of this matter to which I return later.

[3] This response prompted Sound to request a review under Part 5 of the Act. Because the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[4] The Portfolio Officer's Fact Report says that the public body determined, when arriving at the fee estimate, that Sound met the definition of "commercial applicant" under s. 1 of the FOI Regulation. In its initial and reply submissions, Bowen Island confirms that it believes the fee estimate is proper on the basis that Sound is a commercial applicant. Sound focuses its arguments on the reasonableness of the fee estimate. It says, in passing, that it may be a commercial applicant, but questions whether the estimated fee represents the actual costs of responding to the request.

[5] The Notice of Written Inquiry says the issue is whether the public body was correct in its interpretation of the definition of the term "commercial applicant" in s. 1 of the Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 323/93 ("FOI Regulation"). This decision is limited to this issue. I make some passing comments below about the amount of the fee estimated by HPID.

[6] Although s. 57 of the Act is silent regarding the burden of proof in this inquiry, previous decisions have established that the public body bears the burden of proving that a fee estimate is reasonable. I also consider that the public body should bear the burden of establishing that an applicant is a "commercial applicant".

3.0 DISCUSSION

[7] **3.1 Identity of the Public Body** – As I have indicated, Sound directed its request to Bowen Island, but the HPID responded. This may be because Sound copied its request to the HPID. I am satisfied that, although HPID responded to the applicant's request, Bowen Island, a municipality incorporated under the *Local Government Act*, is the proper party in this inquiry. According to Bowen Island's initial submission, it was appointed receiver of the HPID in September 2001, apparently upon HPID's dissolution. In addition, Bowen Island confirmed, on December 4, 2001, that it agreed with the HPID's original decision and the applicant at that time confirmed that he wished the matter to proceed to inquiry.

[8] **3.2 Applicable Provisions** – Section 75 of the Act permits a public body to charge certain fees for responding to access requests. It is worth reproducing all of s. 75 in this case:

> 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 fees for the following services:
>
> (a) locating, retrieving and producing the record;
>
> (b) preparing the record for disclosure;
>
> (c) shipping and handling the record;
>
> (d) providing a copy of the record.
>
> (2) An applicant must not be required under subsection (1) to pay a fee for
>
> (a) the first 3 hours spent locating and retrieving a record, or
>
> (b) time spent severing information from a record.
>
> (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), the public body must give the applicant an estimate of the total fee before providing the services.
>
> (5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>
> (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or
>
> (b) the record relates to a matter of public interest, including the environment or public health or safety.
>
> (6) The fees that prescribed categories of applicants are required to pay for services under subsection (1) may differ from the fees other applicants are required to pay for them, but may not be greater than the actual costs of the services.

[9] Section 77(c) of the Act authorizes a local public body to "set any fees the local public body requires to be paid" under s. 75. Section 77 says this must be done by "bylaw or other legal instrument by which the local public body acts". A local public body could, if it chooses, adopt the FOI Regulation's Schedule of Maximum Fees. Bowen Island's submissions focus on whether Sound is a commercial applicant, an issue that is relevant to whether the actual costs of responding can be charged under s. 7 of the FOI Regulation. In the absence of any proof that other fees have been set under s. 77, I consider that the FOI Regulation applies to the fee issue before me.

[10] Section 75(6) allows discrimination, in effect, between different classes of applicants. The relevant distinction in this matter is between a "commercial applicant", as defined in s. 1 of the FOI Regulation, and any other applicant. The definition of "commercial applicant" reads as follows:

> "commercial applicant" means a person who makes a request for access to a record to obtain information for use in connection with a trade, business, profession or other venture for profit; … .

[11] Section 7 of the FOI Regulation reads as follows:

> The maximum fees for services provided to different categories of applicants are set out in the Schedule to this regulation.

[12] Item 1 of the FOI Regulation's Schedule of Maximum Fees stipulates the maximum amounts a public body can charge to "applicants other than commercial applicants" for services described in item 1. Item 2 of the Schedule of Maximum Fees provides that a public body can charge a commercial applicant, "for each service listed in item 1", "the actual cost of providing" the service.

[13] **3.3 Is Sound A "Commercial Applicant"?** – In its initial submission, Bowen Island contends "it is abundantly clear" that the applicant is Sound, not the individual who is the principal of Sound. It says "Sound is a commercial enterprise", which is engaged in a "commercial venture for profit of bidding for and installing water systems and road systems" (p. 3, initial submission). Sound is a "commercial applicant", Bowen Island says, because the admitted purpose of its access request is to review records in order to see if it has a cause of action against the HPID. Bowen Island says this is a use in connection with a business or other venture for profit.

[14] Bowen Island notes that Sound is a contracting company that carries on the business of bidding for and installing water and road systems. Sound's own materials support this position. As Bowen Island argues, and Sound acknowledges, Sound wishes to review the requested records to determine if it has any legal rights about the HPID arising out of a construction contract put to tender by HPID.

[15] Sound concedes, in its initial submission, that it may be a commercial applicant, but questions whether the fee estimate for the services is accurate. It also says its principal or a family member could have made the request, thus presumably attempting to

evade being treated as a commercial applicant. In its reply submission, Sound says the following:

> We agree that "we should pay for the actual costs for access", as Bowen Island Municipality so aptly states in its final sentence, but only the actual costs.

[16] Sound goes on to argue that the actual costs should not include "the costs of a solicitor, to review each document one by one, before they are released to us and at our expense." It appears Sound believes that the $3,500 estimate is so high that it must have included costs for a solicitor to undertake the activities just described. There may be another basis for Sound's concerns about a lawyer's time, but there is no evidence before me on this point.

What does "commercial applicant" mean?

[17] Although my predecessor commented on the term "commercial applicant", in passing, its meaning has not, as far as I am aware, been directly in issue before. There is no comparable term under Ontario's *Freedom of Information and Protection of Privacy Act* and the Alberta *Freedom of Information and Protection of Privacy Act* is similarly silent. For the reasons given below, I have decided that Sound is a "commercial applicant" within the meaning of s. 1 of the FOI Regulation.

[18] In Order No. 30-1995, [1995] B.C.I.P.C.D. No. 1, a question arose during the oral inquiry as to whether the Radio and Television News Directors Association of Canada ("RTNDA") was a "commercial applicant". The evidence established that the RTNDA is a non-profit society, consisting of radio and television news directors, "formed to maintain and advance the quality of news in Canada." The evidence also established that the RTNDA had "no commercial income" and that it is "a professional organization that promotes a code of ethics for journalists and lobbies on matters of specific interest to its members, such as the Act." In this light, Commissioner Flaherty concluded, at p. 9 (Q.L.), that the RTNDA was not a commercial applicant. He did not think it was relevant that the RTNDA could disseminate records it received through its access request for use by commercial media outlets.

[19] By contrast, in Order No. 90-1996, [1996] B.C.I.P.C.D. No. 16, my predecessor decided that an applicant who was a "specialist in research and negotiation in the field of land claims" was a commercial applicant (p. 10, Q.L.). He did not give any reasons for arriving at this conclusion, which was not, in any case, in issue in that public interest fee waiver case. He did note, however, that a commercial applicant that makes an access request as agent of a non-commercial applicant should expressly state that it is acting as agent for such an applicant. If it does not, it must expect to be charged fees as a commercial applicant.

[20] The *Policy and Procedures Manual* published on-line by the Corporate Privacy and Information Access Branch of the Ministry of Management Services does not offer a

definition of the term "commercial applicant". It offers the following example in relation to s. 75(6):

> A business and an individual make the same request for access to specific records. The business may be charged more for copying than the individual, if the business applicant is designated as a separate category under the Regulation.

[21] This still leaves the question of whether a "business applicant" is in fact "designated as a separate category" under the FOI Regulation.

[22] The earlier print version of the *Policy and Procedures Manual* does offer (at p. 6 of Appendix 6.2.7) the following criteria for determining whether a request "has been made for a commercial enterprise":

> ***Criteria to Determine Commercial Purpose***
>
> Public bodies consider the following criteria when determining whether a request has been made for a commercial purpose:
>
> - is the applicant a business, or making the request on behalf of a business?
> - does the applicant intend to sell the information, either in its present form or in some reformatted version?
> - is the applicant acting as an agent (e.g., a lawyer) for another individual?
> - has the applicant requested commercial information?
> - will the applicant be reimbursed for his or her services relating to the request?

[23] The first two of these criteria are most likely to assist a public body. The last three criteria either overlap with the first two or add little to them.

[24] At p. 7 of Appendix 6.2.7, the following passage appears:

> Public bodies attempt to determine whether a request is made for a commercial purpose, although it may be difficult to do so. In many cases, the purpose of the request will be apparent. Repeated requests may indicate that a business motive underlies the request. In these cases, the public body may become aware of the commercial purpose only at the time of the subsequent requests.

[25] At the end of the day, of course, one must interpret the language used in the FOI Regulation's definition of "commercial applicant" in determining if someone is a commercial applicant. The plain meaning of the language used is quite broad, notably in referring to use of information "in connection with" a venture for profit. In this case, there is no doubt that Sound is a "venture for profit", as it is a company engaged in the business of construction contracting. By its own admission, Sound is seeking

"information for use in connection with" its venture for profit, *i.e.*, for use in assessment of its claim or possible claim against HPID. The words "in connection with" on their face cover Sound's use of the records in considering its legal position against HPID or Bowen Island as HPID's receiver. Sound is a commercial applicant as defined in s. 1 of the FOI Regulation and Bowen Island is permitted to charge fees accordingly.

[26] In interpreting the term "commercial applicant", I have considered whether it should be read as applying only where an applicant intends to use the requested information as, in effect, a commodity, *i.e.*, where an applicant will somehow exploit the requested information itself for profit. This narrower interpretation has some attraction, but I have decided that the plain language of the definition is broader than this and cannot be ignored. This is not to say that all commercial applicants should have to pay the actual costs of providing prescribed services. A public body may decide not to charge actual costs under item 1 of the Schedule of Maximum Fees, *e.g.*, if a commercial applicant is not seeking information that it will exploit directly, as a commodity, for profit. Also, s. 7 of the FOI Regulation confirms that the fees in the Schedule of Maximum Fees are just that – maximum fees. Section 75 also says that a public body "may" charge fees. It can therefore decide not to charge fees. Last, an applicant's status as a commercial applicant is by no means determinative of any fee waiver that it might request under s. 75(5).

[27] **3.4 What Fees Can Bowen Island Charge?** – As one would expect, given that it is not an issue in this inquiry, Bowen Island has not attempted to justify HPID's fee estimate, which Bowen Island has adopted. I will nonetheless make some passing observations about the amount of the fee that Bowen Island is able to charge Sound under the Act and FOI Regulation. Since the propriety of the fee estimate's amount is not before me, the following comments should not be read as expressing any conclusions or findings on the amount or appropriateness of whatever fee is ultimately payable. In the event that the appropriateness of the fee comes before me, I retain an open mind on that question.

[28] First, the FOI Regulation makes it clear that Bowen Island can only charge Sound the "actual cost" of services actually provided to Sound in responding to the request. Second, the only services for which a public body can charge are those listed in item 1 of the FOI Regulation's Schedule of Maximum Fees. That schedule does not list a lawyer's services as a permitted service. It must also be remembered that s. 75(2) prohibits a public body from charging a fee, even to a commercial applicant, for the first three hours spent locating and retrieving a record or any time spent in severing a record.

[29] Third, if I were asked to determine, for the purposes of an inquiry under Part 5, what the "actual cost" of providing a service is, I would be inclined to think it is the cost to the public body of having its staff perform the service. Where a public body employee performs the service, which will ordinarily be the case, the cost to the public body of that employee's time, based on the employee's salary, would be the actual cost. Where a public body cannot perform a service and has to retain outside help, I am inclined to think that the ability to charge the "actual costs" is not unfettered. It would be surprising, for example, if a public body could hire a senior chartered accountant whose hourly rate is $400 to provide the services of "locating and retrieving a record" and "copying records"

and then expect to pass that cost on to an applicant. Some of the services listed in item 1 of the Schedule of Maximum Fees are administrative in nature and one would expect the actual costs of obtaining those services outside the public body to reflect this.

[30] Last, acknowledging that there is no evidence on the point (which is not before me), one might think that the $3,500 fee estimated by HPID is, on its face, high. It would be surprising if there were a large number of responsive records or if they were difficult for HPID (and now Bowen Island) to locate. Further, as I noted above, HPID's fee estimate ought not to have included, if it did, any amount for time that would be spent severing the records. I believe Bowen Island should, before providing such services as are needed to respond to Sound's request, review the fee estimate in light of this decision and Bowen Island's assessment of the situation. It should also, I think, consider providing Sound with a more detailed fee estimate. Among other things, this would enable Sound to narrow its access request, if it wishes, in order to reduce fees.

4.0 CONCLUSION

[31] For the reasons given above, under s. 58(3)(a) of the Act, I confirm that Bowen Island has performed its duty in responding to Sound in estimating a fee on the basis that Sound is a "commercial applicant" within the meaning of s. 1 of the FOI Regulation.

June 28, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia