



June 20, 2005

Mr. David Loukidelis
Office of the Information and Privacy
Commissioner for British Columbia
PO Box 9038, Stn. Prov. Govt.
Victoria, B.C. V8W 9A4

Re: Request for an investigation under s.42 of the Freedom of Information and Privacy Act into FOI requests made by environmental organizations

Mr. Loukidelis:

As Commissioner of Information and Privacy for British Columbia I am sure that I need not describe to you the significant role Freedom of Information (FOI) requests have in British Columbia. Indeed, I am sure that it is obvious to you how crucial such requests are to ensuring the general public maintains its right to information and to ensuring government remains accountable.

FOI requests are even more important to public interest groups, and in particular environmental organizations, whose operations and mandate require government-held information on a regular basis. The very nature of environmental groups, as champions of the landscape common to all, requires them to have access to information that can only be acquired through the use of FOI requests. As Rachel Carson pointed out in *Silent Spring*:

The public must decide whether it wishes to continue on the present road [of environmental destruction]; and it can do so only when in full possession of the facts. In the words of Jean Rostand, 'The obligation to endure gives us the right to know.'

Yet environmental groups, who defend the public's interest in environmental protection, can only be as effective as the information that is available to them. For this reason it is particularly disturbing that the most important single source of information, the FOI process, is apparently being undermined by government.

In recent years government has made it more and more difficult for environmental groups to obtain public information. Groups have faced the numerous problems in pursuing FOI requests, notably:

- Delays – FOI requests from environmental groups are routinely delayed several months and even years.
- Exemption – Occasionally the information requested by environmental organizations is subject to exemption and censoring, beyond that allowed by the *Freedom of Information and Privacy Act* (the “Act”). Often this means that the information received is of little or no use.
- Excessive Fees – Quite regularly environmental organizations are asked for excessive and unreasonable fees, under the guise of such headings as search time and reproduction expenses. Although the legislation provides for fee waivers for requests that are in the public interest, requests for such waivers are frequently denied.

These three problems have been documented below, in order to illustrate the widespread nature of government’s behavior. When one considers the numerous situations described below, it appears likely that there is a system-wide pattern of acting to frustrate environmental groups that seek public information. In a number of cases, government appears to be acting contrary to the spirit and letter of Freedom of Information legislation.

This situation is worthy of an inquiry. For this reason, on behalf of my client, Sierra Legal Defence Fund, I urge you to exercise your authority under section 42 of the *Freedom of Information and Protection of Privacy Act* to investigate the inequitable treatment directed at environmental groups, and establish a public inquiry into the provincial government’s treatment of FOI requests which discriminate against environmental organizations.

We submit the following steps should be considered:

- Call for public submissions and input from public bodies related to these issues;
- A public hearing;
- A report; and
- If appropriate, Commissioner issues an Order to prevent reoccurrence of abuse of the FOI process

The cases described below were gathered in a short period of time, by contacting relatively few environmental organizations. Yet they clearly point to a larger, likely systematic, problem. Therefore, I ask the Commissioner to respond to the evidence that a systematic problem may well exist, by establishing an inquiry under s.42.

Evidence of Government's Contravention of the Act and the Spirit of the Act:

Delays

The following instances evidence the unreasonable and excessive delays that environmental groups have been subjected to while requesting government information:

- On April 10, 2000, Raincoast Conservation Society (Raincoast) requested information surrounding grizzly kill location data from the Ministry of Water, Land and Air Protection (referred to in this paragraph as "the Ministry"). On May 18, 2000, the Ministry responded by refusing the request. After unsuccessful mediation, Raincoast requested a review by the Commissioner of Information and Privacy (the Commissioner) on October 13, 2000. On December 3, 2001, the Commissioner made an order that the Ministry release the data in question to Raincoast, which the Ministry refused.

The Ministry then appealed to the Supreme Court of B.C. to review the Commissioner's ruling. The Ministry lost its appeal on November 10, 2002, and appealed again to the B.C. Court of Appeal, where government lost again on April 16, 2004, when that court again confirmed that government should make the information available. On August 6, 2004, the Ministry finally submitted the data requested, but it did so in a virtually unusable, hard copy print out format, and not in electric format.

Raincoast then filed a complaint to the Commissioner on August 16, 2004, and the Ministry refused to provide the data in electronic format in February, 2005. In April 2005 Raincoast requested an inquiry by the Commissioner into the Ministry's refusal to provide the data in electronic format. On April 27, 2005, *over five years after the original request*, the Ministry finally provided the data in electronic format.

- On January 16, 2004, Devon Page, on behalf of Sierra Legal Defence Fund, requested a data review and management plan (the "Keystone report"), along with

any public body records that referred to the Keystone report. Though the request was narrow in scope, the records were not provided until October 21, 2004, over six months after the date that the documents should have been provided under the Act (although three weeks of the delay can be attributed to the timing of the deposit payment, which was paid under protest). The information requested was generated in a government funded study conducted at the insistence of the forest industry, and it indicated the existence of just two Spotted Owls in the area surveyed. It is suspected that the material was delayed because the government was reluctant to let the public know about how it had paid the logging industry to conduct a survey to refute its own data, and/or because the government wanted to continue to resist calls to halt logging in Spotted Owl habitat and it knew that the information would weaken its position. (see Affidavit of Devon Page, paras 17 – 19)

- In August, 2004, Western Canada Wilderness Committee made two separate FOI requests to the Ministry of Water, Land, and Air Protection, for information regarding a road through Monck Provincial Park. The information in the first request was due on October 13, 2004, and had a fee assessed at \$180.00. The second request had a deadline of October 14, and a fee assessment of \$395.00. On November 4, 2004, Western Canada paid 50% of both requests under protest (Western Canada appealed both assessments).

Western Canada was told that the second request would be released in phases, the first of which was due on December 6, 2004, and the second which was due January 20, 2005. The first of these records were not in fact received by Western Canada until January 21, 2005, and the second phase records were not received until March 1, 2005.

The first request was also delayed significantly, with Western Canada not receiving the records until February 15, 2005. Western Canada was told in an email from Trip Kennedy that the delay was attributed to confusion in the offices of the Ministry of Water, Land, and Air Protection, as well as an outstanding fee appeal refusal complaint submitted by Western Canada to the Commissioner's Office on December 1, 2004. In addition to its subjection to the above delays, Western Canada has had to endure a long fee assessment appeal with the Commissioner's Office (which is still continuing).

- From April 19, 2005, to April 21, 2005, the West Kootenay EcoSociety requested documents from both the Ministry of Water, Land, and Air Protection (referred to

in this paragraph as “the Ministry”) regarding authorization of road construction into a “Class A” provincial park outside Nelson, B.C., home to hundreds of animal species including the Blue Listed Western painted Turtle. Despite much public protest and scientific concern, road construction approval from the Ministry was given in late March 2005, and construction was to begin May 1, 2005 and thus, time was of the essence for these requests. Unfortunately no such expediency was shown by the Ministry, as demonstrated by the fact that its FOI request is still outstanding (as of the time of writing). It is suspected that this delay is due to the fact that the Minister of Water, Land, and Air Protection, Bill Barisoff, reversed the decision of his regional staff to allow the new road, and that the requests may unearth his motivations for doing so.

In this instance, the BC Supreme Court, in a May 30, 2005 ruling, set aside the decision to build the road for lack of authority, in part because a civil servant, Mr. Gord McAdams, brought forth some of the necessary documents that showed that there would be ongoing harm to the turtle population and that the regional staff did not approve the move. Mr. Adam’s actions helped West Kootenay prove in court that the government acted in contravention of the *Park Act*. For his bravery, Mr. McAdams was fired. Though the public interest was served, this situation is a strong example of the necessity of FOI legislation. Had the legislation been complied with in a timely and forthright manner, a public employee would not have lost his job. In addition, the fact that the request simply could have been delayed until well after construction had begun shows just how serious contravention of the Act can be. In this instance, a road access would likely have been built with serious consequences to our natural environment, the species that live therein, and the integrity of the Park Act.

In addition to the above episodes that demonstrate the effect that government stall tactics have had, the following two facts demonstrate that the problem is more than a set of mere coincidences, but rather is a significant and systematic issue:

- In February 2004, Alasdair Roberts published findings in the *Freedom of Information Review* based on data he collected from FOI requests in BC. Mr. Roberts collected information on thousands of FOI requests whose files were closed in the three-year period between October 1, 2000, and September 30, 2003, and separated the requests into various categories based on such characteristics as the sensitivity of the information requested (as determined by both the particular ministry and the Corporate Privacy and Information Access Branch), the source of the request, and the processing time for requests. The results of the study indicate

that requests deemed “highly sensitive” by the ministries take substantially longer to process than do requests with a “low” sensitivity rating (an average of 81 days for “high sensitivity” requests compared to just 46 days for “low sensitivity” requests). The practical effect of this is that FOI requests from environmental groups take significantly longer to process than FOI requests from individuals or businesses, since environmental organizations’ FOI requests are more likely from the outset to be considered “highly sensitive” according to the study (which corresponds with the statements of Mr. Kennedy, below).

- On April 23, 2004, Mr. Kennedy confirmed with Mr. Page that the Ministry of Water, Land, and Air Protection, the Ministry of Sustainable Resource Management, as well as other government agencies, distinguish between FOI requests based on the likelihood of the subject matter sparking media interest. Those requests that are “likely” to spark media interest are characterized as Level 1 requests, which can be contrasted with basic, or Level 2, requests. The practical effect of this distinction is that interest groups, such as Sierra Legal Defence Fund, must have their requests approved by additional parties (including the Ministry communications staff and the Deputy Minister), which proves more time-consuming. This policy is blatantly prejudicial, as it affords less favorable treatment to environmental groups based solely on their designation as advocacy groups, and not based on the actual subject matter of the FOI request. (see Affidavit of Devon Page, para 16)

Excerption

Even if FOI requests are complied with by the appropriate government body, such requests are often subject to excessive excerption, which frequently results in added costs and delays for the requesting party, and can serve to defeat the purpose of the FOI request in the first place. Here are examples of such behavior:

- On October 24, 2002, Andrew Gage of West Coast Environmental Law submitted an FOI request to the Ministry of Forests, requesting documents arising from the “government/forest industry discussion process on forest issues”. Four months later, on February 27, 2003, the Ministry of Forests received a 90 day extension for this request (approved by Brenda Guiltner, Commission Intake Officer), with a final deadline of July 3, 2003, with the following conditions:
“The Ministry must respond to the applicant as soon as possible with the requested records. The Ministry should, if possible release reviewed records to the applicant in stages as the review progresses. The Ministry

should not delay releasing records merely to permit a 'bulk release' unless it is absolutely necessary for a global consideration of the disclosure package.”

Mr. Gage did not receive any information until July 10, 2003, when he received only partial records, with the following explanation: “Partial access is available to records relating to the Working Groups involved in the discussion process on forest issues. Records will be released on a phased basis, this being Phase 1.” There was no information on when the so-called “phase 2” information would be provided, nor was there any explanation for the delay or justification for withholding “phase 2” information.

The phase 2 information was subsequently submitted on August 7, 2003, and it did not include the entire balance of the information requested by Mr. Gage. In fact, some information requested was only divulged on December 9, 2003, after several months of mediation, and other information was never divulged

- In 2004, Mr. Page, on behalf of Sierra Legal Defence Fund, requested a map indicating the locations the logging activities of Cattermole Timber and the locations of the Spotted Owl. Sierra Legal was able to obtain the map through record requests and subsequent litigation, but when the map was received, the portion pertaining to the actual cut blocks was missing. Apparently, the cut block locations were severed on the basis that their disclosure would interfere with the conservation of an endangered species, pursuant to section 18(b) of the Act. Though the censored information was immediately divulged upon further request, the withholding was improper in the first place. Withholding information from an organization working to protect the species whose protection invoked the severance in the first place appears petty, absurd, and intended to frustrate. (see Affidavit of Devon Page, paras 12-14)
- On August 24, 2004, Western Canada Wilderness Committee made a request to the Ministry of Water, Land, and Air Protection (referred to in this paragraph and the next as “the Ministry”) pertaining to attendance, revenue (projected and final) and compliance from May 1, 2001 until September, 2004, regarding parking meters in Parks (the “first request”). The October 12, 2004 deadline passed without Western Canada receiving any records. Later that day Western Canada was informed by Gerry Edward (the FOI officer attached to the file) that two paragraphs of the records requested were confidential, per s.12 of the Act. On October 14, 2004, Mr. Kennedy, of the Ministry, told Western Canada that the amount of information censored had ballooned to twelve pages. Western Canada

was then denied a phased release, and it made a separate request for the section 12 records (the “second request”). Western Canada did not receive the information in the first request until November 22, 2004, when it was discovered that key information was missing, including projected revenues, final revenues, and compliance records. After correspondence between Western Canada and Brian Bawtinheimer (a manager with the Parks branch) the former was informed that several of the missing records would not be available until February or March, 2005. Western Canada responded by requesting the information, completed or not, and on January 12, 2005 it sent a complaint to the Commissioner.

On February 18, 2005, Western Canada submitted another FOI request to the ministry, requesting the exact same information as in the first request (the “third request”). On April 22, Western Canada received the information not yet received, minus projected revenues, final total revenues, and miscellaneous other records. Even more troubling is the fact that Western Canada was later given information from third parties which should have been captured in the original search. Western Canada is currently working with Ms. Edwards to determine why the missing information was not provided.

As for the second request, the information had an original deadline of November 25, 2004, which on October 21, 2004 was extended to January 11, 2005. The records were received on January 4, 2005, minus revenue forecasts and other information. Western Canada filed a complaint with the Commissioner’s Office on January 20, 2005, and it received only a portion of the missing information on March 22, 2005.

- In the fall of 2001, the Dogwood Initiative contacted the Ministry of Forests (referred to in this paragraph and the next as “the Ministry”) to acquire data related to historic logging within specific First Nations territories. Will Horter of the Dogwood Initiative was told by Bill Howard (Head of Revenue Branch) that the Ministry would provide all the data for records from 1989 onwards in digital form. When Mr. Horter was away on vacation an employee from the Ministry intervened and convinced Mr. Horter’s consultant to accept paper records instead. In early 2002 the Dogwood Initiative started an FOI request for the information in digital form, since the records were of no use in paper form. The Ministry then denied the existence of a database that contained relevant information, before divulging some of the data in digital format. Since discovering the database, the Dogwood Initiative has been engaged in a much-delayed series of FOI requests to access data it sought, and has been faced with demands of up to \$9000 to proceed.

In late 2003 the Dogwood Initiative made its latest attempts to access the data previously requested, as well as additional data relating to geo-referencing information. The data was finally provided, free of charge, due to the intervention of the Deputy Minister of the Ministry and political pressure from a number of sources. At the last minute, however, the Ministry withheld the geo-referencing data and directed the Dogwood Institute to another public body (Sustainable Resource Management) who requested a new FOI request, which the Dogwood Institute subsequently refused to proceed with. In addition, the information that was divulged by the Ministry included substantial gaps and inconsistencies (for which there was no adequate explanation). Due to the gaps and the discrepancies of the data, the information provided has been of limited utility to the Dogwood Initiative.

Fees

In addition to the aforementioned delays and excerpptions, environmental groups are frequently requested to provide fees for their FOI requests. Fees such as those illustrated in the following examples are quite obviously excessive:

- On February 13, 2004, the Shawnigan Lake Watershed Watch (SLWWA) group requested information from Lands and Water BC, related to Crown lands proposed to be sold for large private developments in the Shawnigan Lake area. The office of Mark Hallum quoted SLWWA a fee of \$810 for the records, and subsequently denied a fee waiver based on public interest and affordability grounds. The government agency justified its demand by estimating that it would take 13 hours of search time and 2000 photocopied pages to complete the request. It was only after the SLWWA filed a review and underwent mediation with government representatives that the fee was reduced nearly 75% - to \$220. This revised figure more accurately represented the actual cost of producing the documents, as demonstrated by the government's adjusted estimates of 3 hours of search time and 500 pages of photocopying.

In the same case, the government agency refused to allow a public interest fee waiver for documents related to development around, and possible degradation of, the domestic water supply for 8500 people. The government manager stated:

“The public associated with the “public interest” reason for waiving otherwise payable fees under the Act is the public of British Columbia generally or, at the least, a significant subset of the public. While I have

no doubt that the issue involved is of considerable interest to the members of the Shawnigan Lake community, that is a rather small community and not one which could, I think, be accurately characterized as the public of British Columbia generally or a significant subset of that public. I am drawn to the conclusion that the scope of this issue is too particular to qualify for a fee waiver on the “public interest” ground.”

This was government’s position, although a previous Commissioner’s decision stated that a water supply for only forty families was sufficient to constitute the “public” in such situations. It was only after the watershed group took the trouble to take this case to review before the Commissioner’s office that government modified this untenable position. This case continues on review before the Commissioner’s Office.

- On March 23, 2004, Randy Christensen, on behalf of the Sierra Legal Defence Fund, requested information from the Ministry of Water, Land and Air Protection that pertained to incidents of non-compliance under the *Waste Management Act*, in order to allow Sierra Legal to prepare a report for public distribution. Sierra Legal also made a request for a fee waiver pursuant to section 75(5) of the Act. The Corporate Services Division responded by denying the fee waiver, and provided a fee estimate of \$24 060 for search time and reproduction expenses. Sierra Legal is unable to pay this amount, clearly unreasonable for labour and photocopying expenses, and the matter remains unresolved. (see Affidavit of Randy Christenson, paras 9 – 11)
- On June 29, 2004 Mr. Page, on behalf of Sierra Legal Defence Fund, requested information regarding the most recent Chinook Forest Stewardship Plan or Forest Development Plan and amendments from the Ministry of Forests (referred to in this paragraph as “the Ministry”). Upon receipt of this request the Ministry provided Mr. Page with a fee estimate of \$4020, which included a required deposit of \$2010. Sierra Legal’s clients could not afford to pay the fee, nor could they afford to wait for a fee waiver; thus the matter was not pursued. This result is especially striking, considering that the principal components of the request were Forest Development Plans, traditionally characterized by the Ministry as “routinely releasable” and traditionally provided for the costs associated with photocopying. (see Affidavit of Devon Page, paras 5 – 10)
- On August 3, 2004, the T. Buck Suzuki Environmental Association submitted three FOI requests for data related to sea lice and disease incidence on salmon farms in the Broughton Archipelago. On September 24, 2004, the Information,

Privacy and Records Branch (the Branch) informed T. Buck Suzuki that its request would cost a total of \$19 470. The Branch then denied a formal request to waive the fees, claiming that the records did not relate to a matter of public interest. The Branch's acts are troubling. Characterizing the records as not relating to a matter of public interest is unreasonable, given that many scientists take the view that sea lice from farm salmon are a significant long-term threat to survival of wild salmon. Such an action could be construed as a deliberate attempt to deny the fee waiver so as to frustrate the FOI request.

The experiences described above, as well as the study performed by Mr. Roberts and the April 23, 2004, conversation between Mr. Kennedy and Mr. Page evidence the immediate need for the Commissioner's intervention. In addition, the recent publicity (in the Vancouver Sun, Times-Colonist, and Globe and Mail) about this province's poor FOI policies further substantiate the severity of the illustrated problems and the lack of isolation of the above events.

Therefore, it is requested that the Commissioner act quickly on this matter and establish a public inquiry, in order to prevent incidents such as those listed above from occurring. We trust that the Commissioner will act to rectify the situation. It would greatly benefit the public and British Columbia's environment if steps are taken to ensure that the public has access to government information about the state of our environment.

Sincerely,

Scott Giesbrecht, Student, Environmental Law Clinic

Sean Nixon, Staff Lawyer at Sierra Legal Defence Fund