

IN THE MATTER OF THE INQUIRY

BETWEEN

SHAWNIGAN LAKE WATERSHED WATCH ASSOCIATION

AND

LAND AND WATER B.C. INC.

(PUBLIC BODY)

**REPLY SUBMISSIONS OF
SHAWNIGAN LAKE WATERSHED WATCH
ASSOCIATION**

(Re: Written Inquiry into the April 13, 2004 decision by Trip Kennedy, Manager of Information, Privacy and Records of the Corporate Services Division Supporting the Ministries of Sustainable Resource Management, Water, Land and Air Protection and associated entities (“the Manager”), to deny a fee waiver to Shawnigan Lake Watershed Watch for the production of certain information requested under the *Freedom of Information and Protection of Privacy Act*.)

1. In reply to the Public Body's Description of the Inquiry (para. 1.02), the SLWWA clearly requested a review of the decisions of the public body in its May 26, 2004 letter.
2. In reply to paragraph 1.11 of the Public Body's Submissions, it is striking that the public body erred so massively in estimating the number of pages of records and the number of search hours required. The effect of this error was that the bill demanded by the public body was quadruple the amount that they now acknowledge is justifiable (\$810 v. the figure of \$220 that has been put forward after SLWWA launched this review).
3. The effect of the initial inflated estimate was that even the deposit demanded before records would be released was double the amount now acknowledged as appropriate for the entire bill. (A \$405 deposit was required in the March 16, 2004 letter, compared to the \$220 now acknowledged as the appropriate total bill.)
4. Thus, the deposit demanded was almost four times the amount that should have been required as a deposit. [\$405 v. the \$110 (50% of \$220) that should have been required for deposit.]

5. In considering the unreasonableness of this deposit demand, it is important to remember that the organization's request was not for government to automatically provide copies of all the records requested. The request was simply to be allowed to "view" all the records – and then take copies of relevant documents. (See the SLWWA letters of February 23 and March 18, 2004.)

6. Yet the Public Body, in its letter of March 16, 2005 produced the unreasonably high estimate of the number of records and demanded \$405 up front. It went on to state that if the money was not forthcoming that it would not proceed further -- and would shortly consider the request for records abandoned. Thus, the Public Body demanded quadruple the appropriate deposit – and then refused to allow the documents to even be viewed before this unjustifiable amount was paid.

7. One would hope this is not common practice in government, because the spirit of the Freedom of Information Act would be violated if that were so.

8. In reply to para. 1.12 of the Public Body's submissions, the Public Body appears to assume that the reduction in the fee payable was adequate, and that the reduction was reasonable enough that the SLWWA should have abandoned the review of the Public Body's decision simply because of the reduction. The SLWWA takes the position that the reduction was not a

compromise at all, but simply a lowering of a previously inflated fee. Since SLWWA has met the test for both s. 75(5) (a) and (b) fee waivers, it should receive a waiver of fees, not an illusory “reduction”.

9. In reply to para. 1.13 of the Public Body’s submissions, there was a substantive reason why the applicant didn’t respond to the November 8 letter. After nine months of dealing with LWBC, including extensive correspondence and other efforts, after filing a review and going through good faith mediation and a personal meeting with staff, SLWWA had run out of viable options in resolving the matter with the Public Body. Ms. Desmond felt that she must proceed with the Inquiry to bring some resolution to the issue of her fee waiver request – that otherwise the agency would keep her on an endless treadmill of fruitless activity, requiring her to make further applications and requests that they would simply turn down.

She felt that she had acted in good faith to exhaust all avenues with the Public Body and that the Public Body’s constant and changing demands for payment (See the history of letters from the Public Body) demonstrated that they would not ultimately grant a fee waiver, regardless of whether or not SLWWA actually met the s. 75 (5) test.

10. In reply to para. 3.02, it is agreed that the Act is silent with respect to the burden of proof concerning a request for a fee waiver. The proper approach to

this issue is outlined in the OIPC's publication, "Information About Written Inquiries under the Freedom of Information and Protection of Privacy Act":

Other Issues: For many issues, the Act does not stipulate a burden of proof and each party has an obligation to bring forward information and arguments that justify their position on the issue...

If the issue is a fee waiver denial under s. 75 of the Act, the applicant provides information and explanations about why they should be excused from paying the fee, such as: why the records relate to a matter of public interest, why the applicant cannot afford to pay the fee, or any other reason why it is fair to excuse payment. The public body provides information and explanations about why the applicant should not be excused from paying the fee. (s. 5.1 Burden of Proof).

11. In reply to para. 4.15, Bullet 2, the Public Body does not address the records that presumably document the necessary government communications and decisions that must have preceded the consultants' reports. Obviously the Public Body did work and produced records that led up to the creation of the reports.

12. Also, the "public meetings" referred to as "foster[ing] government accountability" refers to the only public meeting held, the one with 500 people. A representative from the Public Body appeared at the meeting, but did not volunteer much information. It is highly ironic that the Public Body cites the meeting organized by the SLWWA as an important means of keeping the public informed about the issue. The meeting was not organized by the Public Body, but by SLWWA and others. The SLWWA could have enhanced

government accountability at that meeting much better, if they had not been denied relevant government documents.

13. In reply to para. 4.15, Bullett 3, the Public Body again seems to affirm the validity of Mr. Kennedy's most egregious error – his following statement.

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 that 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.

It is odd that the Public Body continues to take this position, which as previously pointed out, is directly contrary to the previous Commissioner's Order 01-35.

14. In reply to para. 4.15, Bullet 4, the Public Body states that Trip Kennedy "indicated to the Applicant that any records relating to water quality would meet the public interest requirement and they would be produced without a fee and she declined that opportunity." To the best of Mary Desmond's knowledge, such an offer was never made.
15. Ms. Desmond never spoke to Mr. Kennedy by phone, and did not receive any emails directly from him. Her communication with Mr. Kennedy was by

correspondence. Yet, this alleged offer is not contained in any correspondence from him that is in the possession of SLWWA. SLWWA requests that the Public Body be asked to substantiate the existence or non-existence of such an offer, since the only evidence of such an offer is a hearsay statement made in paragraph 15 of Mr. Edwards' affidavit.

16. In reply to para. 4.15, Bullett 9, the CVRD did not have all the records that the Public Body did on this issue.
17. In reply to para. 4.15, last Bullett and para. 4.33, SLWWA vehemently disagrees with the allegation that it “unreasonably failed to work with the Public Body to reduce the costs” of government’s response. From the beginning, the SLWWA offered to narrow down the number of documents by coming in and viewing the documents before copying was done. SLWWA subsequently offered to narrow the range of the search to concentrate on marketing and development only. SLWWA also participated in a face-to-face meeting with Mr. Hallem to try to resolve the issues.
18. In reply to para. 4.19, the Public Body errs in their interpretation of the test for s. 75 (5). Order 01-24 does not stand for the proposition stated. It is simply not the law that applicants must pay unless there are “compelling public interest reasons that dictate otherwise. The law does not require that “compelling reasons dictate” a fee waiver.

19. In reply to para. 4.20, there are significant differences between Order 01-24 and this case. As will be discussed, numerous of the records here clearly relate to environmental impacts of the government's course of action in selling land for development (For example, draft environmental assessment reports). Many of the other records relate to how the Ministry is allocating Crown resources, and should qualify for that reason alone as releasable in the "public interest".¹ In addition, many records related to the sale and development of these lands will be related to the public interest in the environment – because sale and development will have unavoidable impacts on the environment and drinking water quality.

20. In reply to para. 4.22, the SLWWA did not request or need copies of irrelevant "administrative records." It is important to remember that the organization's request was to first "view" all the records. It then intended to only take copies of records that were relevant to the public policy issues surrounding environmental impact and the wisdom of government's decision to sell and develop Crown forest lands. (SLWWA letters of February 23 and March 18, 2004.)

¹ See paragraph 32, subparagraph (d) of Order 332-1999.

21. In reply to para. 4.23:

- Bullet 3. It is very likely that portions of the correspondence are relevant. Documents considered “administrative” by the Public Body may also relate to sale of Crown lands and to the relevant environmental issues.

- Bullet 4. The Requests for Proposals sent out to consultants for the purpose of commissioning environmental and other Reports is highly relevant, since such RFPs set out the criteria that the Public Body used in its requests for proposals for environmental and other reports. Such RFPs would indicate, amongst other things, whether government has taken into account all relevant environmental, social and economic factors, in initiating reports.

- Bullet 5. The proposals regarding the qualifications of consultants may be similarly relevant, since the qualifications of consultants doing environmental and other reports is relevant to the weight and credibility to be accorded such reports.

- Bullet 7. Electronic mail likely includes relevant records of communication, including that with environmental and other consultants. The review of these documents could potentially highlight an area of concern, which may not be fully addressed in the final report of the consultant. The inclusion of such

documents would allow for a more contextual understanding of the consultant's approach to the issue, thereby providing further insight into issues of concern to the public.

- Bullet 14. The revenue initiative documents are highly relevant, since the Public Body describes these as “summary documents concerning the desirability of proceeding with certain projects. They identified the issues that would need to be addressed before proceeding such initiatives, including environmental issues.”

Clearly these documents are relevant to not only the environmental public interest issues – but would also “[contribute] to public understanding of, or debate on, an important policy, law, program or service”, and would “disclose how the Ministry is allocating financial or other resources.” [ie, sale of Crown land.]

These documents that discuss the “desirability” of the proposed development will presumably balance the factors for and against the proposed development, including environmental factors. Dissemination of that information would facilitate informed public discussion about the important public policy questions surrounding land use in the Shawnigan Lake area. It would also help the public understand what government is doing when it sells off its lands.

- Bullet 15. The Agendas may be relevant since the topics discussed can give an indication as to the priorities and issues of concern that LWBC considered in considering the upcoming sale of the Crown lands. It is in the public interest for the public to know how Crown resources are being allocated, and the factors being considered.
 - Bullet 16. The Drafts or interim consultant reports are highly relevant since they provide information about the foundation that underlay the consultants' environmental and other reports. Consideration of the process undertaken by the consultant may be identified in these reports and it is likely that they would provide additional context as to how the consultant arrived at the conclusions that they did in their final report.
22. In reply to para.4.24, the SLWWA challenges the Public Body's position that drafts and interim Environmental Assessment and other reports "do not add in any meaningful way to the final reports already disclosed..." Surely the Public Body is not saying that the drafts and interim reports are identical to the final reports? If not identical, the information in them are likely to be of great public interest. The draft and interim reports may show information that did not make it into the final reports. They may omit information that was only added to the final report later. Also, the changes made between the interim and final report may have profound significance.

23. The Public Body does not state the basis for its bald assertion that these additional environmental and other reports “do not add in any meaningful way” to the previously released reports. That is precisely what SLWWA would like to determine. The question is why from the very start the Public Body refused SLWWA’s request to even view the documents until an inflated fee deposit (nearly quadruple the proper price) was paid.

24. In reply to para. 4.25, the Public Body states “There is no evidence that dissemination or use of the information in the records...could reasonably be expected to yield a public benefit.” This is a classic Catch-22, worthy of Joseph Heller. First the Public Body refuses to provide proper access to evidence -- then argues that the group has not provided evidence. The evidence is in the files that the SLWWA has not been allowed to even view, let alone obtain copies of.

25. In reply to para. 4.27, the Revenue Initiative documents described on p. 19 of the Public Body’s Submission would clearly “contribute to public understanding of, or debate on, an important policy...program or service.” Since they discuss the desirability of proceeding with projects and identify issues that need to be addressed before proceeding, including environmental issues, they would clearly contribute to public understand of the government’s program of selling Crown land and developing it. Such documents would

also “disclose how the Ministry is allocating financial or other resources.” [ie, sale of Crown land.]

26. In reply to para. 4.39, the certificate of incorporation of the Shawnigan Lake Watershed Watch Association as a non-profit Society in British Columbia is attached to the second affidavit of Mary Desmond, enclosed. The Public Body first requested this proof on November 8, 2004 -- long after SLWWA filed a request for review, and after the non-profit volunteer group had spent a great deal of time on the mediation. For example, in the Public Body’s April 13 letter, the Public Body raised no issue around the Association’s status as a legally incorporated non-profit body.

27. By the time the Public Body asked for proof of incorporation as a nonprofit society, SLWWA had decided that it had to proceed with this review to get proper resolution of the issues. By that time the group had already spent almost nine months being given the runaround and being given a variety of reasons for governmental non-cooperation. SLWWA decided that the only way to resolve this matter was to proceed with the review it had requested in

May.

Respectfully submitted,

Karla Point

February 17, 2005