



October 5, 2010

Elizabeth Denham  
Information and Privacy Commissioner  
of British Columbia  
PO Box 9038, Stn. Prov. Govt.  
Victoria, BC V8W 9A4

Dear Commissioner,

**RE: BC Ferries targeting FOI requesters**

I am writing to ask you to conduct an investigation under s.42 of the *Freedom of Information and Protection of Privacy Act* ("the *Act*") into the conduct of a public body, the BC Ferries Corporation. The conduct in question is the corporation's stated policy of putting information and records produced in response to FOI requests up on their website either before or at the same time as the requester receives them. This policy appears to violate the *Act* in that it fails to meet the prescribed standard for the duty of public bodies to assist FOI requesters.

FIPA considers this policy to be a preemption of the rights of requesters and highly destructive to the purposes and proper functioning of the *Act*. If it is allowed to continue, it is easily foreseeable that many public bodies will bring in similar systems. If this is allowed to happen, many media and other requests for general information will lose their rationale, resulting in fewer requests, less scrutiny of public bodies, less information reaching the public, and ultimately, less accountable public bodies.

**The Facts:**

We base this material on a reply we received from BC Ferries' legal counsel to written questions about the policy, and on public statements by BC Ferries' VP Public Affairs in response to media inquiries, published in the Vancouver Sun on October 1, 2010.

Although there are some apparent contradictions on some details, the essential elements appear to be as follows:

- All requests for information (except personal requests) will be put up on the BC Ferries website.
- Requesters will be required to go through the normal processes for FOI requests.
- BC Ferries intends to charge fees to the requester, to the maximum permissible in every case.

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- Whatever records are finally released will be posted to the BC Ferries website. If requested electronically, the requester will receive them at the same time they are posted. If sent in hard copy, the records will be posted within 24 hours of the mailing of the records to the requester.
- Once records are posted, a news release will be sent detailing the nature of the request and letting news release recipients know what records were sent and where to find them.

The net effect of this policy is to undermine the individual requester's rights under the Act and to violate BC Ferries' legal duty to assist the requester.

#### Right of access is individual

The wording of s.4 of the Act makes it clear that the right of access is that of the individual requester.

4 (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body

We respectfully suggest that this right takes precedence over a general desire to put out information to the public. If that was the intention of the public body, s. 20 provides them with the discretion of not answering the request but making the requested records public within 60 days. No fees would be charged and the information would receive general release. That is not what BC Ferries intends to do. They will charge requesters fees, then post the records to their website either before or at the same time as the person who paid the fees. They have also stated that they intend to make maximum use of fees to defray the cost of providing access.

#### The duty of assist requesters

The duty to assist requesters is set out in s.6 of the Act.

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.

In Order 00-32, Commissioner Loukidelis had this to say about the standard expected of a public body in fulfilling their duty under s.6:

Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. (emphasis added)

Although this was in the context of the requirement to carry out an adequate search for documents, we respectfully suggest that the test "what a fair and rational person would expect to be done or consider acceptable" should be applied to all aspects of the duty to assist. We respectfully suggest that the declared policy of BC Ferries does not meet that test.

A fair and rational person would expect that the public body would act to ensure that the requester was the first to receive the documents. Not only is that not the case here; BC

Ferries states it will do the *opposite*, ensuring that records will be posted at the same time or even before the requester receives them.

A fair and rational person would not expect a public body to issue news releases drawing attention to every posting of records released under FIPPA. This is further evidence that the intention of BC Ferries is not to create transparency or openness, but to prejudice the position of the requester vis-a-vis the rest of the world.

A fair and rational person would not expect a public body to charge fees to a requester whose records will be publicized by the public body at the same time or even before the fee-paying requester receives those records.

For all these reasons, we suggest that this policy is a violation of the public body's duty under s.6 of the Act.

#### Is this transparency or routine release?

It most certainly is not either. Although posting responses to requests on a public body's website (preferably in searchable form) may be a laudable initiative, the aim of this action is clearly to frustrate media and other requesters.

Fees will be charged to requesters even though all materials will be posted. This will work against the general release of information because requesters will be less likely to pay fees for records to which everyone else will have immediate or even priority access. Consequentially, fewer requests will be pursued and more requests will be abandoned. This means the information will not be posted and will stay hidden from public scrutiny.

Although BC Ferries has had months to begin posting information to its website, it has chosen not to. Instead, the corporation has put up what amounts to a warning to potential requesters that it will frustrate them in having the full benefit and normal use of the requested records.

If BC Ferries were sincerely interested in transparency or routine release, they could in the past have put up information about the salaries and benefits of senior management, a matter which has been of public interest and which at least partly prompted the government to put BC Ferries back under FIPPA. Salary information has also been subject to orders of full release in a number of decisions by your office, most recently Order 10-05. To date none of this material has been posted, and given the apparent attitude of BC Ferries, it may never be.

This policy will have the effect of giving control over the timing of release of information to the public body. At present the information in the hands of requesters can be released by the requester at a time of their choosing. If the announced system is put in place, that balance shifts to the public body's decision to release (and post) the information. Negative news will be more likely to be released at the time most convenient to the public body.

#### Likely consequences for the FOI process in general

If the BC Ferries policy remains in place, especially if it continues with the blessing or indifference of the Commissioner, it can be reasonably expected that many other public bodies will adopt similar policies.

We have already seen incidents where journalists have been subjected to these practices. In particular, see the fallout from Order 08-20, where the Vancouver Police released requested information to the requester by mail, but placed the same information on their website and apparently also informed competitive media about the posting. We would be pleased to provide additional information on these cases if requested.

If this practice becomes widespread, media and likely other requests will drop, as will the stories based on those requests. The public would not be well served by this, nor would good governance and transparency. Therefore we urge you to review this matter as soon as possible in the interests of the health and integrity of the FOI process.

If you have any questions, or require any additional information, we would be pleased to assist.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Vincent Gogolek', written in a cursive style.

Vincent Gogolek  
Director, Policy and Communications  
FIPA

Encl. Letter from BC Ferries Legal Counsel