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**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 146-1997  
January 28, 1997**

**INQUIRY RE: A request for a review of a decision by the Ministry of Municipal Affairs and Housing to refuse a waiver for fees levied in connection with an access request for employment equity records**

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**1. Description of the review**

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on December 16, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for a review of a decision by the Ministry of Municipal Affairs and Housing (the Ministry) to refuse to waive fees levied in connection with an access request for employment equity records.

**2. Documentation of the inquiry process**

On June 19, 1996 the applicant requested a variety of records regarding employment equity in the Ministry of Municipal Affairs. On June 28, 1996 the Ministry notified the applicant that it had established a fee estimate of \$135.00 for locating and retrieving the requested documents. The Ministry also advised the applicant that photocopies of any of the documents would be charged at \$0.25 per page, plus \$30.00 hour for preparing the record for disclosure, if the number of copies exceeded 100 pages. In the same letter, the Ministry requested the applicant to “send a deposit of one-half the estimate, \$67.50 in the form of a cheque.”

On August 26, 1996 the applicant wrote to the Ministry requesting it to waive the fee. On September 5, 1996 the Ministry denied this request, stating that the fee was “extremely reasonable in relation to the search time expended” and that the applicant “[did] not provide adequate, detailed reasons to show you are unable to pay or that these documents are critical to your complaint...” On September 16, 1996 the applicant requested a review of the decision by the Ministry to deny his request for a fee waiver. The mediation period ended on December 16, 1996.

### 3. Issue under review at the inquiry

The issue in this case is whether the applicant should be excused from paying all or part of the fees requested by the Ministry under section 75(5) of the Act. The relevant parts of section 75 are:

#### *Fees*

- 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
- ...
- (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 service.
- (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.

### 4. The records in dispute

The records in dispute are “all memos, documents and correspondence containing directions, suggestions and instructions regarding employment equity in the Ministry of Municipal Affairs dating back to October 1990.”

## **5. The burden of proof**

The Act provides no specific guidance on the burden of proof in a request for a waiver of fees. However, as I stated in Order No. 102-1995, May 17, 1996, “[t]o be excused from paying a fee under the Act is to receive a discretionary financial benefit; conversely, the province foregoes revenue to which it would otherwise be entitled under the Act. Thus it appears logical that the party seeking the benefit should prove its entitlement on the basis of the criteria specified in the Act. This places the burden of proof on the applicant in this inquiry.” (See also Order No. 90-1996, March 8, 1996, p. 3)

## **6. The applicant’s case**

For some time, the applicant has been concerned that the Ministry has discriminated against him on the basis of his gender. He filed a Human Rights complaint in 1994. He claims to be aware that there is some pressure on public bodies, from the government, to increase the number of female employees through quota hiring as part of their employment equity program: “For this reason, the Applicant asked to examine the Public Body’s employment equity program guidelines and material to determine if similar instructions to the Public Body existed.” He states that he now needs this material to compile a petition to the B.C. Supreme Court and that the Ministry has been unreasonable in not granting him a fee waiver.

The applicant cites sections 25, 70, and 75 of the Act in support of his request for a fee waiver. I discuss them in greater detail below.

## **7. The Ministry of Municipal Affairs and Housing’s case**

On the basis of its argument on specific sections of the Act, which are also discussed below, the Ministry is seeking an order that it has acted in compliance with section 75(4) of the Act and section 7 of the Regulation with respect to the fee estimate and confirming that it acted in compliance with section 75(5) with respect to its decision to deny the applicant’s request for a fee waiver.

## **8. Discussion**

The applicant is primarily concerned not to have to pay to examine the material he has requested; he is prepared to pay copying charges if he subsequently requests copies of records.

*Section 25: Information must be disclosed if in the public interest*

The applicant submits that his allegations of sex discrimination against the Ministry affect not only him but also other public servants and thus should be disclosed under this section of the Act.

As I have noted in other orders, the decision to use section 25 is essentially at the discretion of a public body, and I am not in a position to instruct it to so act. (See Order No. 142-1997, January 15, 1997, p. 12)

The Ministry's response is simply that the applicant's request is not *clearly* in the public interest but rather in his private interest for the purposes of his dispute with the Ministry. (Submission of the Ministry, paragraphs. 5.09-5.14) I agree with the Ministry on its application of this section in this inquiry.

***Section 70: Policy manuals available without request***

This section states that:

- 70(1) The head of a public body must make available to the public, without a request for access under this Act,
- (a) manuals, instructions or guidelines issued to the officers or employees of the public body, or
  - (b) substantive rules or policy statements adopted by the public body, for the purpose of interpreting an enactment or of administering a program or activity that affects the public or a specific group of the public.

The applicant submits that the employment equity material he is requesting falls under this section of the Act. The Ministry's response is that the applicant's request goes well beyond the confines of what would have been available to him about the topic of employment equity from the Human Resources Branch of the Ministry. The Ministry had to search much more widely and systematically in an effort to respond to his very broad request. Although the Ministry did recover some records that arguably fall under section 70, the applicant is not being charged for search or processing time for them. (Submission of the Ministry, paragraphs 5.02-5.08)

I agree with the Ministry that section 70 does not assist the applicant in meeting his burden of proof.

***Section 75(5): Fee waivers***

The applicant submits that his response to his discriminatory treatment by the Ministry was to take a leave of absence for one and a half years. This created financial hardship for him, which makes it fair to excuse payment of the fee imposed in this case.

As noted above, he also thinks that the public interest in the subject of sexual discrimination justifies the waiver as well.

I have set out, in previous Orders, my expectations with respect to the application of this section by public bodies. (See Order No. 55-1995, September 20, 1995, pp. 7-9; Order No. 90-1996, March 8, 1996, pp. 11-12)

The Ministry submits that the applicant has not submitted any evidence of his inability to pay the fee and notes that he is the owner and operator of a business in the Municipality of Oak Bay. Moreover, the applicant took a voluntary leave of absence, from which he returned on December 2, 1996. (The applicant later informed me that his position has been declared redundant.) The Ministry submitted further evidence that the B.C. Council of Human Rights investigated the applicant's complaints against the Ministry and concluded that "there is no reasonable basis in the evidence to warrant referring the matter to a hearing." (Submission of the Ministry, paragraph 5.18 and appendices)

The Ministry emphasizes that the capacity to waive fees is discretionary and not mandatory so long as the public body acts in good faith. (See Order No. 79-1996, January 19, 1996, p. 4; Order No. 55-1995, p. 8) I agree with the Ministry that its "estimated fee is extremely reasonable in relation to the search time expended." (Submission of the Ministry, paragraph 5.23; Affidavit of Ellie Jansen, paragraphs 8-11)

I find that the applicant has not met his burden of proof in this inquiry.

## **9. Order**

I find that the head of the Ministry of Municipal Affairs and Housing has acted in compliance with section 75(4) of the Act and section 7 of B.C. Reg. 323/93 with respect to the fee estimate to the applicant and further confirm that it acted in compliance with section 75(5) with respect to its decision to deny the applicant's request for a fee waiver. Under section 58(3)(c), I confirm the fee requested by the Ministry.

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David H. Flaherty  
Commissioner

January 28, 1997