

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 98-1996
April 19, 1996**

INQUIRY RE: A request for review of the City of Vancouver's denial of a request for a fee waiver

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on March 1, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by the applicant for a review of a decision by the City of Vancouver (the public body) to deny him a fee waiver. The applicant is the director of the Civic Association of Independent Reformers (CAIR).

On November 10, 1994 the applicant requested access to a series of records pertaining to the Human Resources Department of the City of Vancouver. The records relate to employment competitions dating back to 1984. The City issued four fee estimates for processing the various requests, totalling \$18,260.

On March 28, 1995 the applicant requested another set of records pertaining to an "experimental arrangement" within the Sanitation Department of the City. The City provided a fee estimate of \$200 for processing the request.

The applicant requested that the City waive all of the fees in the public interest. On September 22, 1996 the City denied all of the applicant's requests for fee waivers.

2. Issue

This inquiry deals with the issue of the City's refusal to waive fees under section 75(5)(a) and 75(5)(b) of the Act. The relevant section reads as follows:

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 three hours spent locating and retrieving a record, or
- (b) time spent severing information from a record.

...

(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.

3. The burden of proof

As I noted in Order No. 90-1996, March 8, 1996, the Act provides no specific guidance on the burden of proof to be applied in a request for a waiver of fees. However, I noted that fees may be assessed by a public body in accordance with the Act and its regulations. A fee estimate provided by a public body must be paid by way of a 50 percent deposit by the applicant before records are provided, unless I order otherwise under section 58(3)(c) of the Act. To 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.

4. The applicant's case

The applicant describes himself as a City of Vancouver employee, a director of the Vancouver Civic Party, and a member of the Freedom of Information and Privacy Association. He states that his first requests were motivated by concerns expressed by public and civil employees about the City's employment and recruitment practices, including allegations of discriminatory and nepotistic practices. His second requests concerned an allegedly controversial work program of the Engineering Department for many of its sanitation employees. (Submission of the Applicant, p. 2)

The applicant calls the \$18,000 fee "totally unrealistic." His estimate is that it should be less than \$2,000. (Submission of the Applicant, pp. 2, 3)

In seeking to support his argument that release of the requested records to him on the basis of a fee waiver would be in the public interest, the applicant claims that the "public release of the withheld records will reveal if there has been a concerted effort amongst the head of the City and City Council to shield from public scrutiny their employment practices." (Submission of the Applicant, p. 5) In his reply submission, he refers to the City's alleged efforts to exclude members of the general public from being considered in employment competitions. (Reply Submission, p. 9)

The applicant asserts that the city manager and city clerk, who participated in the fee waiver decision, are prejudiced against him, and, therefore, are not making the fee waiver decision in good faith.

5. The City of Vancouver's case

The City's basic position is that it will take "significant staff time" to respond to the applicant's requests and that its head has found "that it is not in the public interest to supply the requested records to the applicant without charge." In support of this position, the City relied on its submissions to me in Order No. 55-1995, September 20, 1995, p. 2.

The City has supplied the applicant with a number of records that he has requested. It notes generally with respect to this applicant that:

In total, these applications presented 92 separate points of enquiry, many with numerous subsections, which totalled over 200 separate record and information requests. City staff have responded to these applications to the best of their abilities and have also responded to the applicant's several requests to the Office of the Information and Privacy Commissioner for reviews of the City's work, responses and tardiness on these applications. It is unfortunate, but much of the delay in providing responses to the applicant lies in the time required to manage his continual stream of correspondence, which restate portions of previous applications and add or change parts of the applications. (Submission of the City, p. 2. The applicant contested these observations in his Reply Submission, pp. 5, 6)

The City has proposed to charge the applicant only for the specific items of his access requests "that would require detailed and time-intensive research."

In summary, "the Head considered the public interest in continuing this application and found, in good faith, without regard to extraneous considerations and without discrimination that there is no public interest or other benefit in waiving the fees for this application." (Submission of the City, p. 4)

6. Discussion

The applicant requested an opportunity to make oral submissions in the present inquiry. Under section 56 of the Act, I have the authority to determine in what format "representations" will be made to me during an inquiry. In the present matter, I am satisfied that the voluminous written submissions of the applicant gave him every opportunity to make his points.

In his submission, the applicant raised a number of issues, such as allegations of the City's delays in responding to his access requests. I note simply that these are not relevant to the merits of his request for a fee waiver, which is the matter before me in this inquiry. (See Submission of the Applicant, pp. 3, 4, 7) It is also of no consequence in this context that the applicant was accustomed to receiving city records and information at no cost prior to the Act coming into effect. The applicant's two submissions to this inquiry also entered into exhaustive chronological detail of his experiences with the City in connection with his several access requests. While I have reviewed these twenty-five pages of textual materials, I find that they too have little to do with the specific issue of the fee waiver. The applicant has obviously had a tangled relationship with the City of Vancouver over a number of years, but whether or not the City has always acted in "good faith" in its other relations with him is not a relevant issue in connection with his request for a fee waiver. (See especially the Reply Submission of the Applicant, pp. 16, 17)

I strongly encourage all applicants for access to information to strive to maintain good working relationships with the custodians of records in the interests of making the system of access to information under the Act work as efficiently as possible in terms of the expenditure of scarce taxpayer's money.

The applicant's request for Human Resources information

The applicant has requested specific information that the Human Resources staff of the City reports "would require manual search of approximately 600 employment competition files, at an estimated cost to the applicant of \$18,000, based on \$30.00 per hour file search fee and an estimate of one hour per file." (Submission of the City, p. 3) The City describes its debate with the applicant in this instance as "a series of arguments over the number of files to be researched." The positive aspect for the applicant is that he can only be charged for the time it actually takes to search such records. If the time needed is as low as he appears to suggest, his actual costs will be much lower than the fee estimate. The same consideration will apply if the applicant has in fact narrowed his request considerably. (See Reply Submission of the Applicant, p. 11)

With respect to the other large fee estimates, the City claims that it would cost \$4,200 "for the search and retrieval of any City records regarding complaints or enquiries on the City's employment practices," and \$3,000 "for search and retrieval of the employment files for all past members of the Vancouver Association of Civic Managerial and Professional Staff and the Vancouver Superintendents' Association." (Submission of the City, p. 3) Again, these estimates strike me as credible in the sense that large numbers of personnel records will have to be searched to locate material that may be responsive to the needs of the applicant. The Act does permit the charging of fees in such circumstances.

The City describes the applicant's major requests as "specific research projects of interest only to the applicant" and "quantitative research" that might better be served by the applicant's direct contact with the staff in the Human Resources Department, "who are well familiar with his issues and have dealt with the applicant for many years." (Submission of the City, pp. 3, 4) I have no comment on the applicant's response that he was forcibly ejected from his last meeting with the Director of Human Resources. (Reply Submission of the Applicant, p. 11)

Establishing the public interest in a fee waiver

One of the applicant's arguments for a fee waiver in the public interest concerns his questions about the recruitment and performance of the City's Personnel Director. The applicant indicates that he made "revelations" in written and oral presentations on these issues to City Council in March 1994. It evidently "refused to comment on these revelations." (Submission of the Applicant, p. 5) Since the applicant claims to have already received a relevant document on the matter from the City, I fail to see how waiving fees with respect to his current requests for records can change the situation he finds himself in with respect to Council's decision not to pursue his allegations, since it has overall responsibility for the administration of the City.

The applicant further claims that the City has implemented "a unique and unprecedented government operation" on a unilateral basis and without the public's awareness and input: "Consequently, it is in the public's best interest to review all the records that exclusively pertain to this operation." (Submission of the Applicant, pp. 5, 6) I find it impossible on the basis of claims such as this one to establish what the public interest is in learning about this matter. I need evidence to establish the legitimacy of the applicant's arguments that go beyond such a bald assertion.

The head of the public body has considered the request for a fee waiver and determined in each instance that granting the applicant's request is not in the public interest. (Submission of the City, pp. 3, 4) I defer to the expertise and knowledge of the City in this regard, since its Human Resources staff know the volume of sensitive records that need to be reviewed, and the head of the City, which is familiar with the applicant's long-term concerns in this domain, has determined that free disclosure of the records in dispute would not be in the public interest. (See also the Reply Submission of the City, pp. 4, 5) Order No. 55-1995, pp. 7-10, explores the criteria that I expect a public body to address in these regards.

The applicant alleges that the City did not act in good faith in processing his access requests and therefore should not be allowed to charge him the assessed fees. I find that the City has acted in good faith and in a reasoned manner in its decision not to waive fees for the applicant. Similarly, the applicant wants his fees waived to "punish" the City for delays, bad faith, and false estimates. It is not an appropriate use of my authority to eliminate statutory rights due to alleged misbehaviour of one of the parties.

The applicant made only a one-sentence reference to the fact that he is a director of the Civic Association of Independent Reformers, which he describes as the third largest municipal political party within the City of Vancouver. He indicates that his requests are of interest to "many" of his fellow civil employees, a "number" of whom are members of this party. (Reply Submission of

the Applicant, p. 11) Further development of the public interest represented by the applicant's political party might have helped the applicant's effort to establish a public interest for a fee waiver.

In summary, the City did consider the issue of whether a fee waiver for the applicant was in the public interest and decided that it was not. My role is to ensure that the City exercised this discretion in an appropriate manner.

Based on a consideration of the factors presented in this case, I find that the applicant did not meet his burden of proof under the Act.

7. Order

Under section 58(3)(c) of the Act, I find that the City of Vancouver was in compliance with sections 75(4) and 75(5)(b) of the Act with respect to the providing of a fee estimate and deciding on a fee waiver. Under section 58(3)(c), I confirm the fees charged by the City of Vancouver.

April 19, 1996

David H. Flaherty
Commissioner