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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 147-1997
January 29, 1997**

INQUIRY RE: A decision by the Insurance Corporation of British Columbia to deny a request for a fee waiver

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.cafe.net/gvc/foi>**

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 19, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Insurance Corporation of British Columbia (ICBC) not to waive fees for the production of records under section 75 of the Act.

2. Documentation of the inquiry process

In a series of correspondence dated August 2, 6, and 11, 1996, the applicant requested records from the public body relating to the provision of services over a nine-year period to ICBC by Modern Management Services Ltd. and/or the principal of the company. It is a consulting firm that ICBC uses under contract to provide assessments of income loss suffered by persons involved in insured motor vehicle accidents in British Columbia.

ICBC responded to the applicant's request on August 23, 1996 with a fee estimate of \$12,255.00 to review and process the approximately 800 files relating to the applicant's request. ICBC also notified the applicant of the estimate and advised that he could ask for a fee waiver.

On September 1, 1996 the applicant wrote to ICBC to ask for a fee waiver because he could not afford the fee of \$12,255.00, and because the requested records relate to a matter of public interest. ICBC replied on September 10, 1996 by denying the

applicant's request. On September 12, 1996 the applicant requested me to review the public body's decision not to waive fees. The ninety-day review period ran from September 20, 1996 to December 19, 1996.

3. Issue under review at the inquiry

The specific issue to be examined in this inquiry is ICBC's decision not to waive fees under sections 75(5)(a) and 75(5)(b) of the Act. Section 75 provides:

- 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.
- 75(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.
- 75(3) Subsection (1) does not apply to a request for the applicant's own personal information.
- 75(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 services.
- 75(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. Burden of proof

Section 57 of the Act establishes the burden of proof in an inquiry about a decision to refuse access. Section 57 is silent with respect to the burden of proof for the matter under review in this inquiry. However, in Orders No. 90-1996, March 8, 1996, page 3; No. 98-1996, April 19, 1996, page 2; and No. 102-1996, May 17, 1996, page 2, I established that where an applicant requests a review of a public body's decision not to waive fees in the public interest, the burden of proof rests on the applicant.

5. The records in dispute

The applicant requested records relating to the provision of services by Modern Management Services Ltd. to ICBC. According to ICBC, approximately 800 files contain records that respond to the applicant's request.

6. The applicant's case

The applicant states that he directs a small occupational safety and health consulting business. After he was injured in a motor vehicle accident in April 1996, he learned that ICBC uses outside consultants to determine the value of lost income for self-employed individuals:

ICBC promotes these individuals as being 'independent experts' yet there is compelling evidence to suggest the outside consultants are not, in fact, truly independent of ICBC.

The applicant seeks to illustrate his point with the example of Modern Management Services Ltd., which has earned almost \$1 million from ICBC during the eight years from 1987 to 1995:

Any small business which earns almost one million dollars in an eight year period is not likely to be truly independent of the client - particularly when the client is a major insurer and the role of the outside consultant is to establish the amount of income loss to be paid to the insured.

The applicant made a series of requests to ICBC under the Act for detailed information about the outside consultant.

I will discuss below the applicant's specific arguments as to why his request for a fee waiver should be granted.

7. The Insurance Corporation of British Columbia's case

ICBC decided not to waive the disputed fee in this inquiry because of the broad scope of the applicant's request, "covering a nine year period and involving

approximately 800 claim files. The requested information was not directly related to the Applicant's own claim with ICBC" (Submission of ICBC, paragraph 13) ICBC also decided that the subject matter of the application was not a matter of public interest, because "the number of claims referred to Modern Management Services Ltd. as a percentage of the overall number of claims handled by ICBC was at best insignificant, given the small number of claims involving Modern Management Services Ltd. in any given year." (Submission of ICBC, paragraph 14)

ICBC submits "that it made a conscious and good faith decision to assess a fee estimate in this case, and to deny the Applicant's request for a fee waiver. ICBC submits that it has exercised its discretion in a reasoned manner, and has determined in good faith that the waiving of the fee is not in the public interest or otherwise justified in this case." (Submission of ICBC, paragraph 20)

8. Discussion

Section 75(1): Calculation of the fee waiver

Although the \$12,255.00 fee estimate stands out as being very high, I accept that ICBC appropriately calculated the fee to be charged to the applicant in this case. (Submission of ICBC, paragraphs 21-25) It further submits that its actual cost in staff time "of providing the requested records in relation to the fee estimate is likely to be considerably more than the fee estimates, given the conservative time estimates for reviewing claim files, which are likely to be voluminous." (Submission of ICBC, paragraphs 37, 38; Affidavit of Steve Heather, paragraph 6) The information requested by the applicant will require ICBC to retrieve 800 individual claim files that involved Modern Management Services Ltd. over a period of eight years in order to review each file individually and the information and reports contained therein. Most of the fee involves the amount of time (thirty minutes) that it will take to review each of these files. (Submission of ICBC, Exhibit K)

I also accept that ICBC's refusal to waive the fee was "made in good faith without discrimination or regard to irrelevant considerations." (Submission of ICBC, paragraph 26) ICBC argues on the basis of my previous Orders that "in the absence of bad faith or extraneous considerations, the discretionary decision of the head is not reviewable." (Submission of ICBC, paragraph 35) With respect, as I discuss further below, the decision on whether the public interest is indeed at stake is reviewable under any of these circumstances.

Section 75(5): Grounds for a fee waiver

I will discuss, separately, each of the applicant's arguments for a fee waiver.

1. The applicant states that the amount of the fee is approximately one-third of his gross income. I agree with the applicant that under such circumstances the fee cannot be

“considered affordable.” Therefore, I do not accept the position of ICBC that “the Applicant did not submit any supporting facts or argument for a waiver on this ground.” (Submission of ICBC, paragraph 30)

2. The applicant makes a variety of arguments in favour of waiving the fee imposed on him because “the record relates to a matter of public interest.” In his view, disclosure of various forms of information about Modern Management Services Ltd. may show any of the following:

- a bias in favour of ICBC on the part of Modern Management Services, which ICBC promotes as an independent concern;
- that the principal of Modern Management Services cannot be considered independent of ICBC because of the large amount of business (in terms of numbers of files and hours worked) that he conducts annually with ICBC;
- that it may be poor public policy to move to a system of no fault insurance in this province, since lawyers can be perceived as “a necessary hedge” against abuse of claimants by ICBC and its consultants.

ICBC emphasizes that the specific role of Modern Management Services Ltd. is to provide ICBC with “assessments of income loss suffered by persons involved in insured motor vehicle accidents in British Columbia Modern Management Services Ltd. is not in any way responsible for final adjudication of the amount of damages suffered by an injured person. Any work done by Modern Management Services Ltd. in relation to a given claim is open to dispute by the injured person, who is entitled to retain his or her own expert to rebut or supplement work done by Modern Management Services Ltd. under contract to ICBC as ICBC’s expert.” (Submission of ICBC, paragraph 17; see also paragraph 32) With respect, I find this submission disingenuous, because most individual claimants will not be in a position, under normal circumstances, to retain their own consultants.

ICBC also made the following statement about the basis for its denial of a fee waiver, which I find compelling:

Given the small number of claims referred to Modern Management Services Ltd. and the tenuous connection between the recommendations of Modern Management Services Ltd. in those cases and the independence of Modern Management Services Ltd., Mr. Heather [delegated head of ICBC] concluded that any statistical data which is compiled from the requested records would be insignificant and statistically irrelevant. Mr. Heather considered that the Applicant’s interest in this information arises out of his personal dispute with ICBC about the report completed by Modern Management Services Ltd. and that the public interest component, if any, was negligible. (Submission of ICBC, paragraph 33)

I am further impressed with the statement of ICBC to the applicant that “it would not be in ICBC’s interest, nor consistent with our claims philosophy, to use the services of an independent expert whose conclusions would be anything less than independent and unbiased.” (Submission of ICBC, Exhibit M) ICBC only retains such experts in the more complex cases. (Affidavit of Steve Heather, paragraph 10) The delegated head of ICBC in this inquiry further concluded that in his opinion “there was, at best, a tenuous connection between any recommendations of Modern Management Services Ltd. in a given case and the work it has done for ICBC over the years.” (Affidavit of Steve Heather, paragraph 15)

At the end of the day, I find the issue of determining the public interest in this inquiry problematic. The self-interest of the applicant is certainly at stake and he has argued, vigorously, for this rising to a matter of public interest for the reasons I have reviewed above.

Ultimately, it is the chronology of this inquiry that persuades me that the emphasis is that the applicant is not truly dealing with a matter of broad public interest but rather pursuing his self-interest. ICBC submitted to me the applicant’s lengthy letter of August 2, 1996 to a claims representative of ICBC contesting, in considerable detail, Modern Management Services Ltd.’s report about the claim involving the applicant. (Affidavit of Mark Francis, Exhibit A) The applicant’s stream of access requests under the Act followed shortly thereafter during the month of August. (Affidavit of Mark Francis, Exhibit B, C, D, I)

I make this decision in accordance with Order No. 98-1996, April 19, 1996, pp. 5-6. I find that the applicant has not met his burden of proof in this inquiry.

Type of inquiry

The applicant objects to the fact that I decided on a written inquiry in this case and against the use of intervenors. I based this decision on the following factors:

1. many of the issues arising from fee waivers have been dealt with by my Office, and the issues raised in this case were not complex;
2. material facts were not in dispute;
3. credibility was not in issue; and
4. in my view, the inquiry did not raise significant policy issues.

For the same reason, I did not consider it appropriate to give notice to possible intervenors in this case.

9. Order

Under section 58(3)(c) of the Act, I find that ICBC was in compliance with sections 75(5) (a) and (b) of the Act in denying a fee waiver in this case. Under section 58(3)(c), I confirm the fees charged by ICBC.

David H. Flaherty
Commissioner

January 29, 1997