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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 148-1997
January 30, 1997**

INQUIRY RE: A decision by the Ministry of Education, Skills and Training to deny a fee waiver

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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 18, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's request for review of a decision of the Ministry of Education, Skills and Training to deny the applicant's request for a fee waiver.

2. Documentation of the inquiry process

On August 20, 1996 the applicant requested the Ministry of Education, Skills and Training to waive fees on his request for records, based on his inability to pay and the public interest in the matter. On August 29, 1996 the Ministry responded to the applicant denying his request for a fee waiver.

On September 12, 1996 the applicant wrote to the Office of the Information and Privacy Commissioner to request a review of the decision by the Ministry of Education, Skills and Training to deny his request for a fee waiver. The ninety-day period for resolving the issue began on September 19, 1996 and expired on December 18, 1996. The Notice of Written Inquiry was distributed to the applicant and the Ministry on November 27, 1996.

On December 9, 1996 the applicant requested an adjournment of the inquiry which the Ministry opposed. I reviewed all matters relevant to the request for adjournment and on December 12, 1996 notified both parties of my decision to deny the applicant's request for adjournment.

3. Issue under review at the inquiry and burden of proof

The issue to be reviewed in this inquiry is whether the Ministry's decision not to grant a fee waiver complies with section 75(5) of the Act, which provides that:

- 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.

Section 57 of the Act, which establishes the burden of proof on the parties in an inquiry about a decision to refuse access, is silent with respect to a review of a decision about a request for a fee waiver. I decided in Order No. 90-1996, March 8, 1996 and Order No. 98-1996, April 19, 1996 that the burden of proof is on the applicant in situations such as this one.

4. Discussion

The fee waiver

I have been presented in this particular inquiry with the standard binder, which effectively lacks substantive contents. The essential problem appears to be that the applicant has refused to make submissions in this case except on procedural matters. He has objected to the fact that I have placed the burden of proof on him rather than the Ministry with respect to whether a fee waiver for the records that he is seeking is in the public interest. He is also unhappy about the fact that I denied him an adjournment.

My Office has established Policies and Procedures to implement provisions of the Act fairly and effectively for applicants, public bodies, and third parties. The procedures have been developed and revised carefully, taking into consideration the requirements of procedural fairness and the interests of all parties.

An applicant who seeks a review of a public body's decision is required to make submissions to me in an inquiry. When an applicant bears the burden of proof, a failure to file an initial submission inevitably results in a failure to prove his or her case.

I have determined in previous Orders (Nos. 90-1996 and 98-1996) that an applicant has the burden of proving entitlement to a fee waiver under section 75(5). The reasons for this are:

To be excused from paying a fee under the Act is to receive a discretionary benefit; conversely, the province forgoes 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. (Order No. 90-1996, p. 3)

This applicant is highly experienced in the use of the Act. His refusal to make a submission on his entitlement to a fee waiver has effectively required me to confirm the Ministry's decision to deny a waiver.

Request for an adjournment

In the present case, I find the Ministry's objections to the request for an adjournment to be persuasive. It pointed out that the applicant has already paid a fee deposit and only needs to be the remaining sum, that is the entire fee, to obtain the records that he has apparently requested. It also denied the applicant a fee waiver, which was supposed to be the focus of this inquiry.

I also think that the Ministry was on solid grounds in pointing out to me that the applicant waited until the eleventh hour to request an adjournment: "A party with the burden of proof cannot unilaterally force an adjournment of an inquiry by simply faxing a letter to a portfolio officer just hours before their submission is due."

5. Order

I find that the applicant has not met his burden of proof in this inquiry, and that the Ministry of Education, Skills and Training was in compliance with section 75(5) of the Act in denying a fee waiver to the applicant. Under section 58(3)(c), I confirm the fee charged by the Ministry.

David H. Flaherty
Commissioner

January 30, 1997