

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 55-1995
September 20, 1995**

INQUIRY RE: The City of Vancouver's denial of the New Democrat Government Caucus's request for 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 in Victoria on July 6, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). The applicant in this case is the New Democrat Government Caucus. This inquiry arose out of the applicant's original request for review of a decision to deny a fee waiver, of a decision to categorize the applicant as a commercial entity, of the actual fees charged, and of whether the City of Vancouver had met the requirement in section 75 of the Act of providing the applicant with a fee estimate before providing the services.

On November 29, 1994 the applicant requested access to a variety of records related to the awarding of contracts and planning processes on an area known as Fraserlands by the City of Vancouver to Moodie Consultants Ltd. for the period 1984 to the present, in addition to the awarding of any other contracts to Moodie Consultants Ltd. for the same period. On December 23, 1994 the City issued a fee estimate of \$23,000 for processing the request.

The applicant and public body clarified the request in early January 1995. The applicant requested that the City waive all fees in the public interest. The City responded that the request for a fee waiver would be referred to the Standing Committee of Council on City Services and Budgets.

The applicant reiterated its request for a fee waiver on February 14, 1995. The next day the City released the first set of records to the applicant and issued an invoice of \$233.45 for them, together with a revised fee estimate of \$1,000 for the remaining records. The City also informed the applicant that the request for a fee waiver would be presented to the Standing Committee later that month.

On March 9, 1995 the Standing Committee declined to waive the actual fees. From late February to late March, the City continued to release records and issue invoices for copying and search costs. By the end of March 1995, the City had released approximately 2,400 pages of records and had issued invoices totaling \$1,715.

On April 7, 1995 the applicant requested this Office to conduct a review of the public body's decision to deny the fee waiver and to review the other three issues mentioned above. The ninety-day period for resolving the issues began on that date and expired on July 6, 1995. During this mediation period the City agreed that the applicant was not a commercial entity and that the revised fee should be approximately \$1,020, based solely on per page copying costs of 25 cents and 14 hours of search and retrieval time at \$30 per hour.

The Notice of Written Inquiry was distributed to the applicant and the public body on June 15, 1995. Initial submissions were due at the Office by noon on June 28, 1995 for exchange between the parties. Reply submissions were due on July 6, 1995.

2. Documentation of the inquiry process

The two parties received a Notice of Inquiry outlining the issues in this case and a two-page Portfolio Officer's fact report. It was accepted by the parties as accurate for the purposes of conducting the inquiry.

Mary E. O'Donoghue, Research Director of the New Democrat Government Caucus (NDP), represented the applicant. Catherine M. Kinahan, Barrister and Solicitor for the City of Vancouver Law Department, represented the public body. Both the applicant and the public body made submissions and rebuttals to the Office.

3. Issue under review at the inquiry

This inquiry deals solely with the issue of the City's refusal to waive the fee under section 75(5)(b) and whether it met the requirements of section 75(4) of the Act. Section 75 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 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 services.

(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.

(6) the fees that prescribed categories of applicants are required to pay for services under subsection (1) may differ from the fees other applicants are required to pay for them, but may not exceed the actual costs of the services.

....

4. The New Democrat Government Caucus' case

The City of Vancouver's initial estimate of its fees for staff time and photocopying charges was \$23,000: "The fee estimate was significantly higher than any other fee estimate offered by any other public body for any request under the Act." (Submission of the Applicant, p. 1) See also my Order No. 30-1994, November 30, 1994, p. 10. The NDP's research director stated that "[t]he source of my funds to pursue public records is fundamentally the taxpayer through Vote 1 of the Legislature. A fee of that magnitude made it effectively impossible for me to obtain the requested information." She requested a fee waiver and explained why the request was in the public interest. (Submission of the Applicant, p. 1) The request was not acted upon for three months and finally refused because the records were "not related to issues like the environment, public health or safety, which are identified in the Act as relating to the public interest."

The applicant states that the City provided it with three separate fee estimates for diminishing amounts. The issue is whether any of them "can be considered an estimate in any sense acceptable to the purpose of Section 75(4)." The purpose has to be to allow the applicant to determine its costs and whether they are realistic and affordable. (Submission of the Applicant, p. 3) The applicant claims that the initial high estimate occurred because the City overestimated the amount of documentation being sought. What the research director was finally charged was not, in her view, fee estimates but "guestimates." (Submission of the Applicant, p. 4)

With respect to the issue of the waiver of fees under section 75(5) of the Act, the applicant quotes the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual*, C.5, p. 6 to the effect that whether the proposed release "will benefit the public at large" is one suggested application of the otherwise undefined term "the public interest." (Submission of the Applicant, p. 5) The research director did provide the City with reasons for waiving fees in the public interest in a letter of January 6, 1995:

Given that Mr. [Gordon] Campbell is Leader of the Official Opposition and aspires to be Premier of British Columbia, there can be no question that the dealings between Mr. Campbell and Mr. [Jim] Moodie are of public interest Jim Moodie is a well known supporter of Gordon Campbell's political career. Mr. Moodie was Mr. Campbell's co-campaign chair in the Liberal leadership race Mr. Campbell voted in favour of contract awards to Mr. Moodie on a number of occasions over the course of his term as Mayor. (Submission of the Applicant, attachment 3)

The research director added in her submission to me that the matter of Campbell's relationship with Moodie "had already been raised in the public media and Mr. Campbell had himself admitted in the public media that his involvement in the approval of city contracts to Mr. Moodie was inappropriate." (Submission of the Applicant, p. 5; see also *The Vancouver Sun*, December 12, 1994 quoted in attachment 3; and the press stories reproduced in attachment 10)

I discuss the remainder of the applicant's arguments on fee waivers below.

5. The City of Vancouver's case

With respect to the controversy over the timing of the fee estimate, the City's position is that "[a]ll services and documents provided pursuant to the applicant's *Freedom of Information and Protection of Privacy Act* application of November 29th, 1994, were provided subsequent to the February 15th, 1995 fee estimate being sent to the applicant (paragraph 13, Affidavit of Steve Kautz). Significantly, the final invoice sent to the applicant was in the amount of \$1,022.75, \$210.70 less than the estimate sent to the applicant on February 15th, 1995 (paragraph 17, Affidavit of Steve Kautz)." The City argues that it has clearly complied with the requirement of section 75(4) of the Act. (Submission of the City, p. 1)

The City also argues that it acted appropriately in determining the issue of whether to grant a fee waiver in the public interest. I discuss its views in greater detail below.

6. Discussion

It is worth noting at the outset that this is a request for access to information, on a delicate matter of considerable political sensitivity, where the Act ultimately worked. The NDP Caucus received its records from the City of Vancouver, and two of four outstanding issues were resolved during a process of mediation with my Office.

Section 75(4): Fee estimates

Providing fee estimates to an applicant, where the head decides to charge a fee, is a mandatory activity under the Act in advance of providing the services. In the present inquiry, I place less emphasis on the latter words, because the City was making a major effort to clarify what the applicant wanted, estimate its costs more realistically, and deliver actual records as expeditiously as possible. All three activities were in effect taking place simultaneously in the interests of effective administration. I commend the City's efforts to comply with an act that had literally just been applied to it.

I am inclined to be tolerant of the City's varying fee estimates, not least because the amounts declined so considerably over time. Given the costs that it inevitably incurred in terms of overhead and staff time on this expansive request, it is my view that the actual costs ultimately charged to the applicant are quite modest. While it took some time to settle the estimates, and indeed process this request by locating appropriate records, the Act was new with respect to its application to municipalities and, contrary to its practice with respect to ministries and Crown corporations, the government did not make funds directly available to municipalities to help them to prepare for implementation. The costs of implementing this Act are thus paid directly by the taxpayers of the City under legislation enacted by the province.

I take a tolerant view of a certain amount of uncertainty by the City in its processing of this major request in the early days of implementation of the Act. (See the diary and correspondence of the NDP's research director in Affidavit of Mary O'Donoghue, Exhibit B; and Reply Submission for the Applicant, item 4) In my view, the City's staff went about processing the request in a reasonably systematic manner. (See, for example, the documentation included in the Submission of the Applicant, attachments 5, 8, 9) I would be naive not to also acknowledge that the City correctly perceived that this was not an "ordinary" request in terms of the heated state of provincial politics on this issue. Just as government asserts the right to coordinate responses to access requests on sensitive issues made by opposition political parties, so other public bodies, including the City of Vancouver, may attempt to coordinate and shape their responses to requests that they perceive as politically-motivated.

The research director did not appreciate the format in which she received the City's estimates, because it was almost impossible to assess their appropriateness. Her suggestion is that in the absence of "a fee estimate meeting the purpose of the Act, the public body should not be able to subsequently charge fees." (Submission of the Applicant, pp. 3-4) I sympathize with her frustration over the process but suggest that there was predictable give and take on both sides, as the documentation submitted to me by both sides indicates. The research director narrowed her request once she found out what was available and how the City's records were organized (or disorganized). This seems to be inevitable in the early stages of new legislation with the scope and application of this particular Act. Provincial ministries' responses have been to charge very small amounts and then only rarely. A municipality is free to make a different choice within its own jurisdictional domain, so long as it has rational grounds for doing so. (See section 76(1)(c))

For the moment, I will not prescribe a format and fixed contents for fee estimates, since I have no experience with the matter in terms of requests for review. This issue is much better left to the Information and Privacy Branch of the Ministry of Government Services and/or to user groups of municipal freedom of information and protection of privacy officials, whom I encourage to settle

matters of common concern among themselves in the first instance. My interest remains in seeing that implementation of the Act in difficult economic times occurs in as cost-effective and pragmatic a fashion as possible.

I find that the City acted appropriately in providing the fee estimates that it did to the applicant in the circumstances of this particular case.

Section 75(5): Fee waivers

The head of a public body has the discretion to waive a fee under this section. As I stated in Order No. 30-1995, p. 12, an applicant must ask for a waiver in order to obtain it and also provide the public body with reasons why it should be granted, such as how a waiver or reduction of a fee will serve the public interest. The public body must then exercise its discretion and inform the applicant of the reasons for its decision. Applicants unhappy with the results of this process may request a review by my Office.

In legislative debates over this section, then Attorney General Colin Gabelmann stated:

The reason for having fees ... has more to do with the need to ensure that the opportunities provided by this legislation are not abused There has to be some kind of deterrent, and that's the balance If it's not your own but government information, but it's government information that is of wide public interest, it too will be free. (Quoted in Submission of the Applicant, p. 5; and B.C. Debates, June 22, 1992, p. 2871.)

I take this statement as an indication of government's own intent, not the stated intent of Tier 2 public bodies, which are free to make their own determinations of such sections of the Act, as the City of Vancouver did in the present matter.

For the City of Vancouver, the head of the public body for purposes of discretionary fee waivers is the Standing Committee of Council on City Services and Budgets, which comprises all Council members. (See Submission of the Applicant, attachment 9) I do accept the critique of the applicant that the City was dilatory about processing her request for a fee waiver, contrary to the intention and stipulated time periods in sections 6(1) and 7 of the Act. (Submission of the Applicant, p. 6 and attachments 3, 5, 6, 9, 11, and 12) However, I find that such delays were understandable in the context of this particular request and the novelty of the Act.

The Standing Committee's decision on fee waivers in this case was based on a report prepared by the City Clerk, which contained a brief paragraph of the City manager's comments and recommendations. The applicant emphasizes that the report did not refer to its several submissions with respect to the public interest in this matter, which were prepared by the research director and the then chair of the NDP Government Caucus (and now Attorney General), Ujjal Dosanjh. (Submission of the Applicant, pp. 6-8 and attachments 3, 13) The latter wrote to City Council on March 8, 1995 as follows:

I can understand that unimpeded disclosure of this affair [the Campbell-Moodie relationship] could be unpleasant for all involved. I also believe that should be an irrelevant consideration

under our Freedom of Information legislation. The point of that legislation is to ensure that government information is widely available, so as to improve the public accountability of our institutions. To that end obstacles, including fees, should be minimized and, in the case of an issue of public interest such as this, waived. (Submission of the Applicant, attachment 13)

The City claims that it took this particular MLA's communication into account in reaching its decision on a fee waiver. (Reply for the City, July 4, 1995, p. 2)

The applicant contends that the City Manager's rationale for denying a fee waiver and the Standing Committee's subsequent decision are based on serious misreadings of the Act. His effort to limit the application of "public interest" to the specific topics listed in section 75(5)(b) was inappropriate. In addition, there was no consideration of section 25 of the Act. (Submission of the Applicant, p. 7) The applicant also argues that the City Manager misread the Act in recommending that it "would be unreasonable for taxpayers in Vancouver to subsidize an FOI request which is basically to support political debate at the provincial level." The research director states in her argument:

The political debate the City Manager refers to is, of course, the debate over conflict of interest in the awarding of City contracts worth over \$2 million to then Mayor Campbell's campaign manager [T]his debate surfaced in the media prior to and gave rise to my FOI request

The City Manager's reference to this "political debate" appears to be an admission that it is indeed a public debate. His second line of reasoning against a fee waiver is that it is not the intention of the Act to serve to support this debate at the provincial level.

I believe it is difficult to imagine a reading of the Act more at odds with its intention. As I understand it, a fundamental purpose of the Act is to further public debate, especially regarding matters of public expenditure and accountability. (Submission of the Applicant, pp. 7-8)

The research director quoted my Order No. 24-1994, September 27, 1994, p. 1 with respect to the Act's broad goals of promoting scrutiny of expenditures from the public purse and ensuring accountability to taxpayers. I find this argument problematic in the present inquiry because a debate in the media led a provincial political party to make an access request to a municipal government and then wanted it to waive fees in the public interest. I would be more persuaded on this point if the request for a fee waiver came from a member of the media, or a Vancouver taxpayer, or a public interest group concerned about the spending of municipal tax dollars. Even though City of Vancouver taxpayers are also likely to be provincial taxpayers, I find it unwise to impose the cost burden of a fee waiver on the former, after the head of the public body has made a conscious, reflective decision and the actual fees finally imposed are relatively modest compared to the likely actual costs of processing this particular request.

I find that the City of Vancouver has the authority to determine what is in the public interest under section 75(5)(b), subject to my oversight of any alleged failure to act in a reasoned manner on the issue. The Mayor's motion not to waive fees for political parties was passed with only one Councillor opposed. (Submission of the City, Affidavit of Steve Kautz, Exhibit B). I acknowledge the formulation set out by the City in its submission:

The Act appears to give the head of a public body wide discretion to determine what constitutes a matter of public interest. It is respectfully submitted that, provided that determination is made in good faith, without regard to extraneous considerations and without discrimination, the Commissioner ought not to overrule that determination. (Submission of the City, p. 2)

In a further submission, the City added that "in the absence of bad faith or extraneous considerations, such a discretionary decision is not reviewable. It is important that the Commissioner draw a distinction between a decision which he/she may or may not agree with and a decision which is reviewable in law. There is no evidence in this case of any bad faith on the part of the head of the public body." (Reply for the City, July 4, 1995, pp. 2, 3)

In this case, the City had before it a five-page report on the matter from the City Clerk, including brief comments from the City Manager, which were summarized above. I also note that the Standing Committee treated both the NDP and Liberal caucuses similarly, and in a non-discriminatory fashion, with respect to this issue of denying fee waivers for identical requests. (Submission of the Applicant, attachment 4) In point of fact, the Liberal Caucus withdrew its request for a fee waiver two days before the Council meeting. (Submission of the City, Affidavit of Steve Kautz, Exhibit B) The amount of cost recovery allowed for the City under the Act in this case is so modest as to make the actual fees finally charged quite minimal. As the Standing Committee's report back to Council indicated, the "most significant costs involved with the Freedom of Information requests are non-recoverable and involve the bulk of staff time spent on research."

However, I want to emphasize that I do not accept the following statement by the City:

... for a matter to be 'in the public interest' within the meaning of Section 75(5)(b) of the Act, that matter ought to be of universal concern to all British Columbians and also be part of the class of subjects enumerated in Section 75(5)(b). (Submission of the City, p. 2)

I am of the opinion that matters not specifically enumerated in this section can clearly be "in the public interest." And matters can be of concern "in the public interest" without meeting some quantitative criteria of the extent of concern. Thus one determined resident of this province might well stimulate a public interest request and accompanying fee waiver.

I am somewhat more sympathetic with the City's effort to distinguish between "political infighting" or "speculative attempts to discredit political rivals" and "the public interest." (Submission of the City, pp. 2-3) The problem with this attempted formulation, however, is that the records at issue in this case might also shed light on how the City spent its taxpayers' money and thus a fee waiver might indeed be in the public interest.

The City also argued that fees should be imposed on political parties seeking information from government files in order to discourage "fishing expeditions" at little or no expense. (Submission of the City, p. 3) I do not accept such a blanket statement about requests from political parties never meeting the public interest standard for fee waivers under section 75(5)(b). What I do accept is the responsibility of the head of the public body, preferably in accordance with

reasoned policy, to make the initial decision on such an issue, after considering a request for a fee waiver from a political party or any other applicant.

I also do not accept the City Council's decision to charge political parties as being perpetually binding. Such decisions normally need to be made on a case-by-case basis.

In its reply submission, the applicant claims that City Council acted to deny it a fee waiver for the "extraneous" reason of "politics." The applicant further submits that there is nothing in the Act to prevent or restrict use of the Act by political parties, political caucuses, politicians, or others engaged in political debate. I agree fully with the second statement. Similarly, there is nothing to stop the head of a public body from deciding that waiving the costs of a particular request is not in the public interest under section 75(5)(b). In my opinion, I have the authority to monitor suspected abuses of this section, not least under sections 42(1)(a) and 42(2)(a) and (c) of the Act. (Reply Submission for the Applicant, p. 2)

Some of the confusion in the present case is that City Council may have acted under its own perceptions of what was motivating the requester. The applicant denies that it argued that seeking information about a political rival was in the public interest:

Rather, I [the research director] argued that the disclosure of information relating to the activities of a public official in expending over \$2 million of taxpayer's money in circumstances where he and others had noted a conflict of interest was in the public interest. (Reply Submission of the Applicant, p. 2)

Based on the extensive documentary record submitted to me by both parties to this inquiry, it is my determination that the applicant's motives and reasons for a fee waiver were not spelled out clearly enough in its request, leaving it for others (including Councillors, the media, and the public) to attribute different motives to it. I have cited above the applicant's formal request for a fee waiver in a letter of January 6, 1995. (Submission of the Applicant, tab 3) This request is phrased much more in the language of partisan politics rather than the rehearsal of what the argument really was in the portion just quoted from the reply submission of the applicant. Applicants wanting a public interest waiver must make a reasoned argument. See Order No. 30-1995, p. 12.

I find that the City acted appropriately in denying a fee waiver to the applicant in this particular case.

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 a fee estimate and deciding on a fee waiver. Under section 58(3)(c), I confirm the fees charged by the City of Vancouver,

September 20, 1995

David H. Flaherty
Commissioner