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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 157-1997
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INQUIRY RE: Decisions of the Ministry of Attorney General to deny a request for a reduction of a fee estimate and a 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 (the Office) on January 29, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's two-part request for review of decisions of the Ministry of Attorney General, the first dealing with the Ministry's refusal to reduce a fee estimate for providing the applicant with records relating to a Residential Tenancy Branch arbitrator, and the second dealing with the Ministry's denial of the applicant's request for a fee waiver.

2. Documentation of the inquiry process

On September 8, 1996 the applicant requested correspondence, expense vouchers, case files, and decisions of an arbitrator for the Residential Tenancy Branch. On September 18, 1996 the Ministry sent the applicant a fee estimate of $16,432.50.

On September 23, 1996 the applicant sent the Ministry a revised request in which he asked for only five of the arbitrator's files. On October 3, 1996 the Ministry responded to the applicant with a revised fee estimate of $112.50. The Ministry's estimate included: "Time spent photocopying the records requested..." and showed a charge for 2.5 hours at $30 per hour, totaling $75, plus a charge for: "Approx. 150 pages at $0.25/page..." totaling $37.50. On October 11, 1996 the applicant objected to the Ministry's estimate. On October 16, 1996 the Ministry responded that it regarded the applicant's letter as a request for a fee waiver and that the fee estimate would stand.

On October 19, 1996 the applicant requested a review of the method the Ministry used to calculate the fee estimate and, on October 22, 1996, the applicant clarified his request to include a review of both the Ministry's refusal to reduce the fee estimate and its refusal to waive fees.

3. Issues under review at the inquiry

The first issue to be examined in this inquiry is whether or not the Ministry correctly applied section 75 of the Act and section 7 of the Regulation when calculating the fee estimate, and whether or not the applicant's request for a reduction of the fee estimate is justified.

The second issue is whether or not the Ministry correctly applied section 75 of the Act to the applicant's request for a fee waiver.

Section 75 of the Act reads in part 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.

....

(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.

....

4. Burden of proof

Section 57 of the Act establishes the burden of proof on the parties in an inquiry and is silent with respect to a request for review about a decision concerning a request to alter a fee estimate determined under section 75 of the Act. I decided in Order No. 137-1996, December 17, 1996, that the burden of proof in these circumstances is on the public body, in this case the Ministry.

Section 57 is also silent with respect to a request for review about a decision concerning a request for a fee waiver under section 75 of the Act. I decided in Order No. 90-1996, March 8, 1996, that the burden of proof in these circumstances is on the applicant.

5. The applicant's case

The applicant is seeking various records of an arbitrator retained by the Residential Tenancy Branch of the Ministry, including expense vouchers and the general contract under which he or she was hired. He is apparently seeking to calculate the average cost of an arbitration hearing. Although he has narrowed his request with the assistance of the Ministry, he submits that there has not been an adequate search for the records he is seeking. He objects as well to the fact that he is being charged a flat hourly rate for the time spent photocopying rather than at a page rate for what is actually copied. In this case, he calculates that his fee is actually less than $50.00 and thus should be waived.

The applicant believes that it is in the public interest for the arbitration decisions of the Residential Tenancy Branch to be disclosed and relies in this connection on my Order No. 142-1977, January 15, 1997. He also invokes section 25 of the Act. He submits that it is contrary to the public interest for the decisions of such arbitrators not to be published: "How then are landlords and tenants able to manage their affairs, if they have no access to these arbitration decisions? It ... makes for many a needless dispute between landlords and tenants." The applicant claims that the director of the Residential Tenancy Branch has decided not to publish such decisions.

It is the applicant's view that if the Ministry shares the decisions of its arbitrators with him free of charge, "the number of arbitration hearings will fall rather than increase and the government will save money. Rather than assessing a fee for these records, the government should in fact be paying me a fee."

6. The Ministry's case

The Ministry's position is that it provided the applicant with a fee estimate and instructions as to how to apply for a fee waiver, which he did not expressly do. (Submission of the Ministry, paragraphs 3.03-3.07) The Ministry submits that the two issues in this inquiry are 1) its calculation of the fee estimate and 2) the appropriateness

of its exercise of discretion not to waive or reduce the fees charged. (Submission of the Ministry, 4.03) It submits that its calculation of its fee estimate was fully in accordance with section 75 of the Act and section 7 of the Regulation. (Submission, 5.13)

With respect to the first issue, the Ministry has analyzed the words "preparing the record for disclosure" as used in section 75(1)(b) of the Act and "providing a copy of the record" as used in section 75(1)(d). In its view, photocopying a record is part of preparing it for disclosure and therefore fees for this service are chargeable. (Submission, 5.03-5.06) It then views providing a copy of the record as a separate service from preparing the record for disclosure.

The Ministry then analyzed the schedule to section 7 of the Regulation which lists the maximum fees chargeable for each of the services set out in section 75(1) of the Act. It argues that these must be read as corresponding to the services referred to in the Act: locating, retrieving, preparing, and producing a record as separate activities. (Submission, 5.08-5.09) With respect to the issue of copying and providing copies of records, the Ministry argues:

> Where an applicant wants to keep a copy of a record, it makes sense to charge on a per page basis if what is being charged for in providing this service is really the paper and ink that is being handed over to an applicant. If a copy of a record is not being given to an applicant to keep, but rather is being kept by the public body after the applicant views it, there is nothing being given to the applicant to keep, to support charging fees on a per page basis. But regardless of whether an applicant receives a copy of a record that s/he can keep, or whether a public body keeps that copy after an applicant has viewed it, there is reason to charge for time spent on photocopying the record, as part of 'preparing the record for disclosure.' The public body submits that that is separate from, and in addition to, any per page charge that applies because of the method of access preferred by an applicant. (Submission, 5.10)

I have discussed this specific matter further below.

The Ministry's reply submission addressed the second issue identified above, that is, whether it properly exercised its discretion in not granting a fee waiver to the applicant. The Ministry submits that I have only limited authority to oversee its decision on this matter, relying on Order No. 55-1995, September 20, 1996, p. 8. I have discussed below its more specific submissions on the issue of the fee waiver.

7. Discussion

As part of his submission in this inquiry, the applicant included eleven pages of his correspondence with the Ministry. This had the benefit of allowing me to see how

inappropriately he treats public servants from whom he wishes to obtain services under the Act.

Charging for photocopying

The Ministry's position is clear: "Disclosure is disclosure, whether it is effected by giving an applicant a photocopy of a record which the applicant may keep, or whether it is effected by allowing an applicant to view a copy of a record which s/he is not permitted to keep." (Submission, 5.11) I agree that in both instances photocopying will have to occur, especially if severing has to happen; a public body will indeed have to make a copy of the record, with the information severed, in order to prepare a record for disclosure; this process has become relatively easy with the latest photocopiers. (Submission, 5.11)

The Ministry also offers the practical argument that photocopying, stapling, sorting, and assembling records often now happens at the photocopier itself. Thus there appears to have been a merger of the activity of copying with collating, stapling, and assembling records for disclosure, for which the Act stipulates separate charges: "it simply would not make sense, or be financially responsible, to require a public body to sort and staple separately from photocopying, in order to keep track of what it may charge for and what it may not charge for." (Submission, 5.12)

The applicant has gone on at great length about the inappropriateness of some of the specific charges in the Fee Schedule for photocopying and the like. Since there is nothing peculiar or unauthorized about the Ministry's fee practices in this inquiry, I have decided not to challenge the fees assessed. I note that public bodies may charge for "producing the record" (section 75(1)(a)), "preparing the record for disclosure" (section 75(1)(b)) and "providing a copy of the record" (section 75(1)(d)). This permits public bodies to charge for the time spent making copies of original records prior to severing the copies, as well as the usual per-page charge for the photocopies of the final severed records. Public bodies cannot charge for the time spent severing records (section 75(2)(b)).

The Government of British Columbia's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, Chapter C.7, page 5 (September 1994 edition) provides helpful guidance on the issue of fee calculations:

> Where an applicant asks to examine a record rather than receive a copy of the record and it is not possible to provide access to the original record, the public body may charge a fee for the time spent copying a record in preparation for the applicant to examine the record. The public body may not, however, charge copying fees (e.g., 25 cents a page) for a record prepared for examination. Copying fees apply only for copies given to the applicant.

Example

> An applicant requests an opportunity to view a report that contains personal information of a third party. The third party's personal information must be severed from the report. The public body copies the original record to produce a working copy. The public body severs the working copy and then makes a final copy to show to the applicant. The applicant may only be charged a fee for the time it takes to photocopy the final copy of the report.

Of course, if, after examining a report, the applicant wishes to take a copy of the records, the public body may charge the usual per-page fee for photocopying, since this charge is not for time spent photocopying but rather for the cost of paper itself.

Grounds for a fee waiver

I have discussed, extensively, in two recent Orders (Order No. 154-1997, March 18, 1997 and Order No. 155-1997, March 18, 1997) my jurisdiction to oversee the exercise of discretion by a public body over the granting of fee waivers. In this case, however, I defer to the Ministry in its decision not to grant a fee waiver to the applicant.

The Ministry submits that none of the records requested by the applicant relate to a matter of public interest. He asked for access to an arbitrator's case files, not just the decisions, or reasons for decisions, that the arbitrator reached in those cases. In either case, the Ministry submits that these are not matters of public interest:

> Given that written reasons are not always produced with a decision of an arbitrator, and that an arbitrator is required to make his or her decision on the merits of the particular matter before him or her and is not bound by legal precedent, the written reasons may be of limited value to tenants or landlords. The Public Body submits that the fact that written reasons for arbitrators' decisions are not generally required under the *Residential Tenancy Act* is evidence that the Legislature did not deem them to relate to a matter of public interest. (Reply Submission, paragraph 4.03)

In a subsequent submission, the Ministry acknowledged that the amended *Residential Tenancy Act* does require arbitrators to give written reasons for their decisions to the parties to an arbitration, but there is still no requirement that such written reasons be made available to the public.

I agree with the Ministry that the applicant did not provide it with sufficient information to support a request for a fee waiver. (See Order No. 55-1995, p. 6) More importantly, I agree with the Ministry that the applicant has not met his burden of proving "that the head acted in an unreasonable manner in coming to the opinion that the records do not relate to a matter of public interest. The Applicant has not even presented any

argument or evidence to support such a finding." (Reply Submission, 4.05) I also agree with the Ministry that section 25 of the Act has no application to the records in dispute in this inquiry. (Reply Submission, paragraph 5.02)

I do not agree with the applicant's submission in a letter to me of January 29, 1997 that "all requests whose purpose is to make public bodies more accountable and be held up for public scrutiny are in fact requests which are in the public interest." That is a misreading of the Act. If there are special reasons why he has been selected to subject the Residential Tenancy Branch to scrutiny, he has not adequately explained them to me.

Objections of the applicant

The applicant made a series of objections during the inquiry process. He objected to:

1. The denial of his request to include in this inquiry a complaint under section 6 of the Act that the Ministry did not make every reasonable effort to assist him. This request was denied by my Office as being premature, since the issues in this inquiry relate only to fee estimates of records yet to be produced.
2. The contents of paragraph 1(d) of the Portfolio Officer's fact report. This report was subsequently amended to reflect the applicant's concern.
3. Paragraph 1(a) of the Portfolio Officer's fact report, which states that the applicant requested "all the case files and decisions of an arbitrator for the Residential Tenancy Branch." This paragraph was not amended, since the information was taken directly from the applicant's original request to the Ministry.
4. My Office's procedures for accepting evidence *in camera*.
5. My Office's procedures for not accepting as part of his submissions, records produced during the mediation process, unless the public body consents.
6. My prior determinations that the burden of proof in an inquiry about a request for a fee waiver is on the applicant.

I do not consider paragraph 1(a) of the Portfolio Officer's amended fact report to be inaccurate. It is qualified by paragraph 3, which states that the applicant subsequently narrowed his request. These facts are not in issue between the parties and are not central to the issues under review in this inquiry.

My Office's procedures for accepting *in camera* evidence and submissions follow the direction provided in section 56(4) of the Act. My procedures for not accepting, in an inquiry, records produced in the mediation process are necessary to preserve the integrity of that process. The mediation process is separate, and all information exchanged between the parties and my Office is treated in confidence, unless otherwise agreed to by the parties.

With respect to the burden of proof, I rely on my previous rulings to establish that the applicant must bear the burden of proving that the Ministry erred in its exercise of discretion under section 75(5) of the Act.

The applicant also submitted that he should be permitted to make a reply submission to all of the Ministry's submissions, not just its initial submission on the calculation of the fee estimate. He has refused to submit a reply submission, as required by our procedures, unless he can respond to both of the Ministry's submissions. The procedures of my Office do not permit a reply to a reply submission, although I have occasionally deviated from that practice upon specific application where new points are raised that require a response. I do not find such a need in the present inquiry, despite the protestations of the applicant to the contrary. I so informed the applicant in a letter dated January 31, 1997. However, I did agree to accept a late submission of eight pages from the applicant in order to attempt to finalize these particular matters. It is worth noting that this late submission is in fact highly repetitive of arguments previously made to me in this inquiry.

Section 70(1)(b)

Section 70(1)(b) of the Act requires public bodies to make substantive rules and policy statements available to the public without a request under the Act. Despite his unwillingness to make the submissions required by my Office's procedures, the applicant did ask me to order the Residential Tenancy Branch to publish all of its arbitration decisions. Section 70(1)(b) states:

> 70(1) The head of a public body must make available to the public, without a request for access under this Act,
>
> ...
>
> (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.

My view is that the applicant has misread the meaning of this section of the Act, which is intended to encourage public bodies to prepare and make available policy manuals to the public as well as "substantive rules or policy statements." I do not see how this can be construed as my having authority to order publication of arbitration decisions. If the Residential Tenancy Branch in fact has a compilation of "substantive rules" for landlord-tenant relationships that have resulted from decisions of arbitrators, this should be made available to the interested public, in some accessible form, but that is quite a different issue than somehow requiring it to publish all of these decisions.

8. Order

I find that the head of the Ministry of Attorney General complied with section 75(1) of the Act and section 7 of the Regulation with respect to the calculation of the fee estimate in this case. I also find that the head of the Ministry of Attorney General properly exercised her discretion under section 75(5) not to excuse or reduce the fees to the applicant. Under section 58(3)(c), I confirm the decisions of the Ministry on the estimated fees to be charged in this case.

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David H. Flaherty
Commissioner

March 20, 1997