

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 240-1998
June 17, 1998**

INQUIRY RE: The appropriateness of a fee levied by the BC Assessment Authority

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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 April 15, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by a property tax agent (the applicant) for a review of the appropriateness of a fee issued by the British Columbia Assessment Authority (the Assessment Authority) under section 75 of the Act for granting access to records pertaining to three commercial properties. The applicant also requested a review by the Commissioner as to whether the Assessment Authority had met its duty to assist him under section 6 of the Act in the processing of his access request.

2. Documentation of the inquiry process

The applicant is the agent for the owner(s) of three commercial properties in the appeal of their property assessments. On September 23, 1997 the applicant requested all records in the custody and control of the Assessment Authority pertaining to these properties. It responded on September 29, 1997 by providing a fee estimate of \$1,201. The Assessment Authority required a fifty percent deposit prior to processing the request. The applicant paid the deposit, and the records were disclosed. On October 10, 1997 he requested a review of the appropriateness of the fee, because he felt it was inflated. He was also dissatisfied with the response of the Assessment Authority, stating it did not meet its duty to assist him as required by section 6 of the Act.

During mediation, the Assessment Authority issued a “revised invoice” to the applicant, which reduced the fee to \$653. On February 5, 1997 it further reduced the fee to \$635. In that same letter, it indicated that it would “forgive the portion of the fee that exceeds the deposit,” which was \$35.

The applicant believes the revised fee estimate was also inflated. He opted to proceed to a formal inquiry. The ninety-day deadline for this review was January 8, 1998 but, with the consent of both parties, the inquiry date was extended to April 15, 1998.

3. Issue under review and the burden of proof

There are two issues under review:

1. Did the Assessment Authority levy the fee in accordance with section 75 of the Act?
2. Did the Assessment Authority meet its duty under section 6 of the Act to assist the applicant in the processing of his access request?

The relevant portions of the Act read as follows:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

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 be greater than the actual costs of the services.

Section 57 of the Act, which establishes the burden of proof on the parties in an inquiry, is silent with respect to a request for review about the duty to assist under section 6 of the Act. As I decided in Order No. 110-1996, June 5, 1996, the burden of proof in these circumstances is on the public body, in this case the Assessment Authority.

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

4. The records in dispute

The records in dispute are 177 pages of property records related to three commercial properties.

5. The applicant's case

The applicant requested records from the Assessment Authority and received what he regards as an inflated fee estimate for providing those records. He argues that the Assessment Authority was not appropriately helpful in explaining the costs, especially when it asked him to clarify his access request. He states that several Assessment Authority personnel were similarly unhelpful.

The Assessment Authority also appears to have changed the basic list of charges for the applicant quite substantially in the course of processing the request, including an initial failure to give three hours of free search time, charging a \$65 per hour hourly rate (reduced to \$35), and charging almost \$500 for an electronic "computer dump" of records in the second fee. Even if the latter charge is supported by the Schedule to the *Freedom*

of Information and Protection of Privacy Regulation (B.C. Reg. 323/93) it came as a surprise to the applicant.

The applicant seeks a refund of the fee that he has paid, because the assessors “have not provided an estimate as required and as such have forfeited their rights to collect any amount.”

The applicant’s reply submission focuses primarily on minor points (e.g., whether there were one or two phone calls) that in my view do little to resolve the merits of what he is seeking in this inquiry, as does his characterization of an affidavit from the principal involved in handling the Act for the Assessment Authority as “misleading, lacks veracity, and is prevaricating.”

6. The BC Assessment Authority’s case

In its submission, the Assessment Authority has slightly restated its understanding of the two issues in this inquiry, but not in a way that makes any real difference to the decisions that I have to make. (Submission of the BC Assessment Authority, paragraphs 4.03 and 4.04)

The Assessment Authority emphasizes that its second fee estimate was more accurate than the first, which was the result of “inexperience and inadvertence” but “without malice or bad faith...” (Submission of the BC Assessment Authority, paragraphs 3.14 and 5.04) It also asserts that the applicant did not request a fee waiver, which I have acknowledged as an essential step in obtaining one. (See Order No. 55-1995, September 20, 1995, p. 6; Order No. 90-1996, March 8, 1996, p. 11; and Order No. 217-1998, March 6, 1998, p. 12)

I have discussed below the specifics of the Assessment Authority’s submission.

7. Procedural Objections

Both parties submitted a reply to each other’s reply submission as well as correspondence about whether I should consider either or both second replies. As all correspondence on the topic was exchanged, both parties also submitted a response to each other’s second reply. I reviewed all submissions and correspondence in the course of reaching my decision.

8. Discussion

Section 6: The duty to assist applicants

A public body is required to make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately, and completely. The applicant contends that the Assessment Authority was not sufficiently helpful in explaining the costs of his access request. In its submission, the Assessment Authority essentially admits to making some errors in its initial fee estimates. (Submission of the BC Assessment Authority, paragraphs 3.05, 3.06, 3.14) It points out that the applicant's initial contact was acrimonious and accusatory. (Submission of the BC Assessment Authority, paragraphs 3.07 and 3.08; 6.05) The applicant makes similar allegations.

The Assessment Authority also questions whether the applicant truly sought an explanation of the first fee estimate in his original telephone call. (Submission of the BC Assessment Authority, paragraphs 6.05 and 6.06) Whatever the merits of the respective positions on this point, the applicant eventually asked for an explanation of the fee estimate and is still not satisfied with the explanations that he has received. At least initially, the Assessment Authority did not make "reasonable" efforts to assist the applicant. It is my view that an applicant must ask for explanations if not satisfied with a fee estimate. (See Reply Submission of the BC Assessment Authority, paragraph 4.05)

Based on my review of the evidence, I am satisfied that the Assessment Authority discharged its duty to assist the applicant in this case. The applicant's concerns regarding the nature of assistance provided in relation to the fee estimate are more properly considered under section 75 of the Act.

Section 75: The fee estimate

If an applicant is required to pay fees for services under section 75(1), a public body must provide the applicant with an estimate of the total fee before providing the services.

The Assessment Authority believes that it ultimately provided the applicant with a reliable fee estimate. The applicant contends that he continued to get surprising and inadequate explanations for the various components of the estimate. The applicant states that he is not asking for a fee waiver; rather he is arguing that the fee "should be deemed uncollectable as the estimate provided did not meet the requirements for every reasonable effort and for an open, accurate and complete response." (Reply Submission of the Applicant, paragraph 2) I reject that argument.

I cannot deem a fee to be "uncollectable" because a public body made errors in the preparation of the fee estimate. Nor do I consider this to be an appropriate case to exercise my discretion to excuse the fee or order a complete refund. The Assessment Authority ultimately provided a revised estimate.

Given the history of the processing of this request by the Assessment Authority, I agree with the submission of the applicant that, in future, it "should provide every cooperation in assisting the applicant with an explanation of the estimate, a reasonable

breakdown of the categories of costs involving, [*sic*] provide more accurate and complete estimates, and other details and information that would assist an applicant in reducing the time and expense of any requests.”

The Assessment Authority now agrees that:

Reasonable efforts would certainly include providing clarification as to the components of a fee estimate, and to the extent possible, such detail as will permit the applicant to make rational decisions about the ambit of the requested search. (Submission of the BC Assessment Authority, paragraph 6.08)

Every public body should provide applicants who question fee estimates with sufficient background information to justify the charges. What this applicant asked for is not excessive in this regard.

As the Assessment Authority ultimately provided a revised estimate, it deserves the benefit of the doubt in what it says was its first experience with fee estimates; I accept that it acted in good faith in the present case. (Submission of the BC Assessment Authority, paragraph 6.02) On the basis of its experience in this inquiry, the Assessment Authority should undertake to do a more careful job of preparing and explaining fee estimates to future applicants.

Charging for mainframe computer time

I remain concerned with the late introduction of the cost of mainframe computer time, as well as the amount estimated for such computer time.

The Assessment Authority submits that the charge for 30 minutes of central mainframe processor time devoted to printing 32 CAPAS screens was charged at \$16.50 per minute in accordance with section 1(c) of the Schedule of Maximum Fees set out in B.C. Regulation 323/93. The applicant argues that a central mainframe processor capable of handling 10 to 20 queries per second would only take a few seconds to access 32 pages. He submits that the Assessment Authority is effectively charging for time spent “for ‘seated at the remote terminal time’ at a rate of \$990.00 per hour plus labor.” (Applicant’s Response to Reply Submission of the BC Assessment Authority, paragraph 5) The Assessment Authority agrees that “the time, per screen, would be in the order of seconds” but argues that since section 1(c) of the Schedule of Maximum Fees allows, as the maximum fee for producing a record from a machine readable record, “\$16.50 per minute for cost of use of central mainframe processor and all locally attached devices,” the charge for 30 minutes charged at \$16.50 per minute “includes the time that the mainframe, personal computer, keyboard or printer were in use to produce the records in question ...” (BC Assessment Authority’s Response to Reply Submission of the Applicant, paragraph 3.03)

I have difficulty with this expansive interpretation of the applicable Regulation, especially since section 1(c) of the Schedule goes on to provide for a charge of “\$7.50 per 1/4 hour for developing a computer program to produce the record,” thus recognizing different rates for different functions. The essence of the dispute, in my view, is whether “all locally attached devices” can be interpreted as including such devices as a keyboard or printer. In my view, the term “locally attached device” refers to those devices that do not attach to the mainframe over a network. Those devices would normally be limited to storage devices such as disk drives or tape drives, communications devices to access the network, an operator console, and printer(s). The purpose of this equipment is to support the operation of the computer - they would not normally be used to access application data that was stored / processed by the computer and storage devices. When persons not employed as computer operators decide to print a report or view a screen, they do so through the use of a “remotely attached device” normally in an office and normally over a network.

I find that the head of the British Columbia Assessment Authority did not calculate the fees in accordance with section 7 of the Regulation. In particular, I find that the portion of the fee estimated for mainframe computer time is excessive in the circumstances and should be calculated on the basis of actual mainframe time used.

Charging for search time

The applicant contends that he made a request for three separate sets of records and that he should have had three full hours of free search time for each request. Section 75(2) provides that an applicant must not be required under subsection (1) to pay a fee for the first three hours spent locating and retrieving a record. In my view, the burden is on an applicant to establish how much free time he or she can expect per request. If the request for records of three properties is contained in one formal request, then it is appropriate for a public body to treat them as one request, thus providing only three free hours of search time. Since the applicant was not charged for locating and retrieving records in his final invoice, the Assessment Authority submits that this argument is irrelevant. (Reply Submission of the BC Assessment Authority, paragraph 3.15) I agree in the circumstances of this inquiry.

9. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the British Columbia Assessment Authority made every reasonable effort to assist the applicant under section 6(1) of the Act.

Under section 58(3)(a) of the Act, I require the British Columbia Assessment Authority to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the Assessment Authority met its

obligations under section 6, I find that the Assessment Authority has complied with this Order and discharged its duty under section 6(1) of the Act.

Under section 58(3)(c) of the Act, I order the British Columbia Assessment Authority to calculate the actual mainframe time used and to refund any difference to the applicant within 30 days of the date of this Order.

David H. Flaherty
Commissioner

June 17, 1998