

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 259-1998
August 31, 1998**

INQUIRY RE: The Corporation of Delta's refusal to grant 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.oipcbc.org>**

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 May 27, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the Delta Optimist (the applicant) of the refusal to grant a fee waiver by the Corporation of Delta (Delta).

2. Documentation of the inquiry process

In October 1997 the applicant, a community newspaper, requested records related to the contract package, expenses, and training costs for Delta's Chief Administrative Officer for the years 1994 to 1997. It also requested records related to the expenses and training costs for Delta's Director of Corporate Services for the years 1995 to 1997.

In late October 1997, Delta issued a fee estimate of \$1,110 based on the following calculations: 37 hours search time (after allowing for the first three hours as free), @ \$30/hour for \$1,100, plus photocopying at 25 cents/page for the remaining \$10.00. In November 1997, the applicant requested a review by my Office of the fee estimate.

Mediation led to a decrease in the estimated search time to 25 to 30 hours and a corresponding decrease in the fee estimate to the range of \$660 to \$810. In early January 1998, the applicant agreed to close the first review file on the understanding that it would request a fee waiver.

In mid-January 1998, the applicant requested a fee waiver from Delta on the grounds that the request for access was in the public interest. Delta denied the request in

late January 1998. In late February 1998, the applicant asked my Office to review Delta's refusal to waive fees. The Office received this request for review on March 6, 1998 with the ninety days for the review due to expire on June 4, 1998.

Mediation on the second review file clarified that the applicant had actually dropped:

- one year from the time span for the records sought on the Chief Administrative Officer's expenses, leaving only the years 1995 to 1997;
- the part of the request related to records on the Chief Administrative Officer's training expenses and his contract package, including car allowance and other benefits; and
- the entire request for records concerning the Director of Corporate Services.

Mediation also led to a clarification of what the applicant meant by the term "itemized" expenses: that is, it was to include receipts, vouchers, and other supporting documents for expense claims. Delta in turn clarified that its revised fee estimate of \$660-\$810 (which was based on an estimated search time of 25-30 hours) had not included time for locating and retrieving supporting documents for the Chief Administrative Officer's expense claims. Delta stated that its fee estimate had not changed as a result of the applicant's clarification of the request, due to the addition of the request for supporting documents for the Chief Administrative Officer's expense claim records. Delta's decision concerning the denial of the fee waiver did not change.

On May 4, 1998 the applicant advised my Office that it wished the matter of the denial of the fee waiver to proceed to an inquiry. My Office issued a Notice of Written Inquiry to the applicant and Delta on May 5, 1998.

3. Issue under review and the burden of proof

The issue in this inquiry is Delta's decision under section 75(5) of the Act to refuse to waive the estimated fee for responding to the applicant's request for the Delta Chief Administrative Officer's itemized expense records for the three years 1995 to 1997. Section 75(5) reads as follows:

Fees

- 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 parties in an inquiry, is silent with respect to a request for review about a decision about a request for a fee waiver under section 75 of the Act. However, I decided in Order No. 90-1996, March 8, 1996, that the burden of proof is on the applicant.

4. The Delta Optimist's case

This community newspaper believes that Delta should not charge it for the information it has requested:

... we believe the amount the municipality set to process our Freedom of Information request has more to do with stifling the flow of information than it does with cost recovery. We have only used this legislation on two occasions and both times we were assessed exorbitant fees. We believe we present a strong case on both ethical and legal grounds for the fee to be waived.

The applicant states that this is its second attempt to use the Act and its first effort to bring a request for fee waivers to a formal review by me. It had previously asked for a list of consultants used by Delta during a year and their cost.

The applicant emphasizes that, as a community newspaper, it will share the results of its access requests with the public:

Delta is a community with an active, interested electorate. The public demands a high degree of accountability from government and insists it is involved in the governing process. We are part of that equation as residents look to their only community newspaper to facilitate the flow of information.... Residents here demand to know how local government is spending taxpayers' money and they rely on us to provide them with that information.

The Delta Optimist boasts of its very high readership rate among residents of Ladner and Tsawwassen as a twice-weekly, 17,000 circulation newspaper.

The applicant also states that it has limited personnel and budgetary resources:

We have two-and-a-half news reporters on staff and a relatively small operating budget.... To tell us we must pay a significant fee (\$1,110 is significant to us) for information is an easy way to put us off a story. We simply can't afford to shell out \$1,110 every time we want information from municipal hall....

We are not a hardship case; we turn a profit annually and have been in operation since 1922. However, we don't have the resources of a Vancouver Sun or a Globe and Mail. An \$1,110 fee (since reduced to \$800 because we've limited the scope of our request) is onerous to the point where we would not pursue the matter. It is distressing to think that Delta has the ability to stymie our efforts by assigning a dollar figure that we cannot meet.

The applicant further argues that it should not be burdened with the costs of searching for records because of Delta's "antiquated" computer systems.

The applicant concludes with the general argument that its application for a fee waiver is part and parcel of the residents of Delta's interest in being informed on how local government is spending its money.

5. The Corporation of Delta's case

Delta submits that it acted appropriately in declining to waive the applicable fee in this case. Its view is that its own management and external auditors have reviewed the expenditures: "... citizens should not have to pay a third time for a review by a self appointed auditor or watch dog with unknown qualifications." Further:

It is submitted that while the records sought may relate to a matter of the public interest and the applicant has the ability to disseminate information, no public benefit will flow from the waiver of the estimated fee in this case.

Delta also submits that my authority in this matter does not include substituting my opinion for that of the decision maker entrusted with the exercise of discretion under the Act by the Legislature.

6. Discussion

Section 75(5)(b) confers a discretion on the head of a public body to excuse an applicant from paying all or part of a fee if, in the head's opinion, the record relates to a matter of public interest, including the environment or public health or safety. In Orders No. 154-1997, March 18, 1997, and No. 155-1997, March 18, 1997, I established a two-step approach to the exercise of discretion under section 75(5)(b) of the Act. This includes deciding:

- a) whether the records requested relate to a matter of public interest;
- and

- b) if the records relate to a matter of public interest, then the head of the public body must decide whether the applicant should be excused from paying all or part of the estimated fees.

In Order No. 155-1997, I concluded that the focus of the second branch of the test should be on the applicant and the purpose for the request. Relevant factors would include: (a) whether the primary purpose is to disseminate information in a way that could reasonably be expected to benefit the public, or to serve a private interest; and (b) whether the applicant is able to disseminate the information to the public. If the primary purpose is to serve a private interest, the head of a public body may be justified in refusing to waive fees, even where he or she is of the opinion that the records do relate to a matter of public interest.

The first branch of the test is not seriously at issue in this case. Delta acknowledges that the records may relate to a matter of public interest. My review of the request and the submissions confirms that the records relate to a matter of public interest, insofar as they concern the expenditure of funds by local government. The evidence also establishes public interest in the subject of municipal spending.

However, Delta concluded on the second branch of the test that the applicant should not be excused from paying fees. In its response letter dated January 30, 1998, it provided the applicant with the following reason for its decision: "As you know, the overall expensed figures are readily available. However, the detail required by your request and the manner in which our accounting records are kept means that there is a cost attached to research and compilation of the information." Delta found that while "the applicant has the ability to disseminate information, no public benefit will flow from the waiver of the estimated fee in this case."

In an affidavit the Municipal Clerk states three reasons for declining to exercise her discretion to waive the fee:

- 1) the expenses for employees whose salary exceeds \$50,000 per year are published each year under the *Financial Information Act*;
- 2) Delta has internal financial controls and approval systems in place to monitor expensed claims;
- 3) each municipality is required by the *Municipal Act* to be fully audited each year.

In this case Delta decided that **no** public benefit would flow from the waiver of the fee. In my view the test of public benefit is part of the test which examines the applicant and his or her purpose in making the request. In establishing the issue of public benefit in Order No. 155-1997, I was using the test to determine whether the applicant's primary purpose was to serve a private interest. In this case there is no evidence that the

applicant intended to use the information for anything other than for the purpose of a newspaper story.

I did not take the test in Order No. 155-1997 to mean that a public body could assess whether there would be benefit to the public if the fee was waived. The test was to be used in the narrow sense to distinguish the private versus public purpose of the use of the information by the applicant. It was not to be used as a means to assess if there is any public benefit to waiving the fee.

Under section 58(3)(c) of the Act, I have remedial jurisdiction to “confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances.” To determine whether the circumstances of this case are appropriate for a fee waiver, it is necessary to examine Delta’s reasons for refusing the fee waiver, having regard to the evidence presented by the applicant.

Delta argues that in this case (where a record relates to a matter of public interest and it is not to be used primarily for private purposes, and the applicant has the means to disseminate the information to the public), that the fact that the total figures are available and that the public body has internal financial controls and external auditors, means there is no public benefit to waiving the fee. I cannot agree.

I turn to a detailed examination of the considerations underlying Delta’s decision not to grant a fee waiver. The Municipal Clerk declined to exercise her discretion to waive the fee in part because the Chief Administrative Officer’s expenses are published each year under the *Financial Information Act*. While the overall expenses for each employee whose salary exceeds \$50,000 per year are published annually under this legislation, there is no itemization of these expenses. As the applicant points out, the publication of global expenses provides an incomplete picture, since it does not provide details concerning the specific nature of each expenditure.

The Municipal Clerk also considered the existence of internal financial controls and approval systems to monitor expenses and the requirement for annual audits in declining to exercise her discretion to excuse the fee. However, the existence of these safeguards does not address the underlying issue raised by the applicant, namely the wisdom rather than the legality of each expenditure. As the applicant points out:

We have never suggested, nor do we believe, that the Corporation of Delta or Chief Administrative Officer, Tom Fletcher, has spent money contrary to the *Municipal Act*. We do not believe there is any wrongdoing of that kind. Our request centers on the judgment used in the spending of these tax dollars. An auditor makes a determination on whether this money was spent legally. However, it is the electorate that determines whether it was spent wisely; whether the public received good value. Unless the electorate is given a chance to review the expenditures (via a newspaper article), this determination cannot be made. Making a newspaper pay for

this information limits the electorate's ability to judge how its elected officials and staff are using public money.

The applicant emphasizes that Delta is a community with an active, interested electorate, and the public demands a high degree of accountability from its local government. According to the applicant, residents of Delta demand to know how local government is spending taxpayers' money and rely on the community newspaper to provide them with that information. In support of this submission, the applicant filed a number of letters to the editor, which demonstrate the specific concerns of Delta residents regarding the municipality's financial expenditures. The applicant also pointed to specific examples of how two of its recent stories have resulted in more careful handling of public funds by Delta. I accept that the applicant performs an important role in facilitating the flow of information concerning local government to the interested public.

While I am cognizant that the applicant, as a community newspaper, has a private economic interest in obtaining and disseminating the requested information, I accept in the particular circumstances of this case that the applicant's primary purpose is to disseminate the information in a way that could reasonably be expected to benefit the public. Thus I cannot accept Delta's submission that no public benefit would flow from the waiver of the fee.

On the basis of the material before me in this inquiry, I am satisfied that the applicant has discharged its burden of establishing that this is an appropriate case to excuse the fee for providing records relating to the Chief Administrative Officer.

I am persuaded by the submission of the Delta Optimist that its request for specific, targeted information concerning the expenditures for the benefit of the Chief Administrative Officer is in the public interest and that the Corporation of Delta should have granted it a fee waiver on the grounds set out in section 75(5)(b) of the Act.

The applicant notes that my own Office waived a proposed fee of \$500 for providing The Province newspaper with the records of my own travel expenses as Information and Privacy Commissioner:

By waiving the fee, the commissioner, we believe, set a precedent of open and accessible government, as well as accountability to the taxpayers. We hope the commissioner applies the same standard in regard to our request for a fee waiver.

While the decision of my Office to waive the fee in that case has no precedential effect, it provides some guidance to public bodies in dealing with applications for information concerning business and travel expenses from an inquiring media.

7. Order

I find that the head of the Corporation of Delta failed to exercise her discretion properly under section 75(5) of the Act. Under section 58(3)(c) of the Act, I excuse the fee charged by the Corporation of Delta.

David H. Flaherty
Commissioner

August 31, 1998