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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 279-1998
December 2, 1998

INQUIRY RE: A fee estimate by the City of Kelowna

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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 August 27, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request from a representative of J. L. Forming Company of Ontario to review a fee estimate given by the City of Kelowna (the City).

2. Documentation of the inquiry process

The applicant wrote to the City on March 17, 1998 to request records related to a Sewage Treatment Plant, specifically, copies of concrete testing results for the first three pours of cast-in-place concrete on the expansion project. The City replied on April 6, 1998 to inform the applicant that the records would have to be retrieved from storage and that the consultants for the project estimated the cost of locating and providing the requested records at $1,070:

Estimated labour	$ 900.00
Disbursements (estimated)	100.00
Subtotal	$1,000.00
GST	70.00
Total	$1,070.00

The City asked for a deposit of $535 and indicated that it would not proceed further without the requested deposit. The applicant wrote to my Office on April 21, 1998 to ask for a review of the appropriateness of the requested fee.

The City subsequently provided some additional information about the basis of the fee estimate. The City's project consultants indicated that the related files, which contain hundreds of materials-testing certificates, are all in storage (locally) and that none of the project staff is in Kelowna.

The applicant indicated that he wished the matter to proceed to inquiry. As it was not possible to do so before the expiry of the ninety-day review period, both parties were asked to consent to an extension of the deadline from July 22 to August 31, 1998. The applicant indicated that he wanted the inquiry to be held no later than August 19, 1998. However, as that date was not feasible for my Office, and as the City had given consent, my Office issued a Notice of Written Inquiry to be held August 27, 1998.

3. Issue under review and the burden of proof

The issue to be reviewed is the City's application of section 75 of the Act to the records in dispute.

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 regarding the matter of a fee estimate under section 75 of the Act. However, I decided in Order No. 137-1996, December 17, 1996, that the burden of proof is on the public body, in this case the City.

The relevant section of the Act is as follows:

> 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;
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> (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.
>
> (3) Subsection (1) does not apply to a request for the applicant's own personal information.

(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.

4. The records in dispute

The applicant requested "copies of concrete testing concerning the first three pours of cast-in-place concrete" for the City's sewage treatment plant expansion project, and contends that this involves only six pages of records.

5. The applicant's case

The applicant states that he is prepared to pay $300 for the six pages that he has requested. He believes that the City's consultant is charging the City too much to retrieve the requested records. In his view, the Act "should protect the public from unreasonable fee requests of third parties for their services." Moreover, the City should bear "some financial responsibility for not keeping the requested records in its files."

6. The City of Kelowna's case

The City relies on its *Freedom of Information and Privacy Act* bylaw which it passed pursuant to section 77 of the Act, and which appears to mirror the provisions of the Schedule to B.C. Regulation 323/93. Under the Bylaw (Schedule "A"), the maximum fees for a commercial applicant are the "actual costs of providing that service."

The City maintains that the records in dispute are in storage under the control of the City's Engineering consultant and that the estimated cost of locating and providing the requested records was $1000 plus GST. The consultant offered to use a summer student to help locate the records in an effort to keep the fees to a minimum. The City's position is that the applicant should pay the actual costs billed to the City for locating and retrieving those records.

I note that the consultant points out in a letter to the City that "the other option is for the City to review their files for the information as it was copied to the City." The City does not dispute that this is the case. Nor has the City provided a fee estimate for the location and retrieval of the information to which the applicant seeks access from the files in its custody and control.

The City also submits:

> Although [the] applicant has requested a reduced fee, they have not provided the City with any evidence that they cannot afford the payment, that there is another reason that it is fair to excuse payment, or that the record relates to a matter of public interest, as outlined in section 75 of the Act. It is our understanding that the documents are required for business reasons with respect to the applicant company in Ontario.
>
> … As the records are of a business nature (as opposed to personal), and the applicant has not provided any evidence as to why the fees should be reduced, we find no justification to support a reduction in the fees that the consultant would otherwise be passing on to the City to locate these records. We note that the first three hours spent locating and retrieving the records will be at no cost to the applicant and believe the City's consultant has been more than reasonable by offering to use summer student help in order to reduce the costs to the applicant.

The applicant does not dispute that he is a commercial applicant for purposes of the bylaw.

7. Discussion

It was not helpful to me in this particular case that neither of the parties responded to the submission of the other.

The applicant has made a request for access to three records in the control of the City. Section 4(3) of the Act provides that the right of access to a record under the Act is subject to the payment of any fee required under section 75.

Under section 42(1) of the Act, I am given general powers, in addition to those powers and duties prescribed by Part 5 of the Act (section 52), for monitoring how the Act is administered by a public body. Relevant to this case is section 42(2)(c) of the Act, which provides that I may investigate and attempt to resolve complaints, such as the complaint of this applicant, that "a fee required under this Act is inappropriate." Section 58(3)(c) of the Act gives me the authority to "confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances."

The City has provided the applicant with an estimate of the total fee before providing the services. In determining whether a fee estimate is appropriate, I can consider the basis upon which the estimate is made and the adequacy of the public body's explanation for that estimate. I decided in Order No. 240, 1998, June 17, 1998, that every public body should provide applicants who question fee estimates with sufficient background information to justify the charges. In this case, there is a broad labour estimate of $900 and a disbursement estimate of $100, which seems surprising given that the applicant says the records he seeks should not exceed six pages.

The City says that it would take a week to locate and retrieve the records, but there is no adequate explanation why this is so. The consultant proposed to use summer students to keep costs to a minimum, and it further indicated to the City that it "would only charge the actual time taken which, if all goes well, should be a lot less than that estimated."

The consultant implied in a communication to the City that the latter had the option to review its own files for the information, since it was copied to the City. I note that the City did not address this issue in its submissions. Might it not have been cheaper for the City to locate the requested records in its own files?

What concerns me in this case is that the City passed on a request for access to records to its consultant and then proposed to charge the applicant the fee charged to the City by the same consultant. A public body has to treat such a request as for records in its custody and control and should not be charging applicants more than it would cost for the public body to locate its own records.

In that respect, I find that the City has acted beyond the authority conferred on it by the terms of section 75 of the Act. I find that the transmission of a third-party fee estimate to the applicant, without any intermediate steps taken by the City to determine if:

a) the City could produce the records from its own archives; or
b) the estimate provided by the third party was consistent with what the City would charge; or
c) the third party's estimate was otherwise consistent with the Act and fee regulation,

cannot be supported within the language of section 75.

In light of all of the circumstances and, in particular, the fact that the City may have copies of the records in dispute in its custody and control, the City has not provided an explanation for why it (rather than the consultant) cannot locate and retrieve the records, and the City has not provided adequate background information to justify the charges, I find that the City has not discharged its burden of establishing that the fee required by the City in respect of the applicant's access request is appropriate.

8. Order

I find that the fee required under the Act by the City of Kelowna in all of the circumstances to be inappropriate. Under section 58(3)(c) of the Act, I therefore excuse the fee assessed by the City to the applicant in this case. However, as a term of this Order, I authorize the City to prepare its own fee estimate for the applicant based on production of the records from its own files. This estimate must adhere strictly to the requirements of sections 75 and 77 of the Act, as well as the City's *Freedom of Information and Protection of Privacy Act* Bylaw. I direct that this estimate be provided to the applicant within fourteen days of receipt of this Order.

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David H. Flaherty
Commissioner

December 2, 1998