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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 137-1996
December 17, 1996**

CONSOLIDATED INQUIRY RE: In the Matter of certain requests for review between an applicant, the applicant's spouse, and the Ministry of Agriculture, Fisheries and Food (public body) and In the Matter of a complaint, between the applicant and the Ministry of Agriculture, Fisheries and Food

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.cafe.net/gvc/foi>**

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, British Columbia on August 30, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry is being held to dispose of the issues raised by the applicant in four separate matters; three of these are requests for review, and one is a complaint under the Act. It is appropriate that these four matters should be disposed of by Orders in one inquiry, since they all involve the same applicant or the applicant's spouse, and the same public body, being the Ministry of Agriculture, Fisheries and Food.

However, to facilitate a logical, sequential examination of the issues, I will treat these four matters as separate inquiries within an inquiry. I will follow my customary division of each inquiry into the description of the review, review of documentation, issues under review, etc., but will repeat this sequence in each of Parts 1, 2, 3 and 4 in this consolidated inquiry.

Part 1: A fee estimate dispute in a request for deleted e-mail and other records

1.1 - Description of this review

This is a request for review by which the applicant and the applicant's spouse seek a review of the Ministry of Agriculture, Fisheries and Food's refusal to lower its fee estimates, after the applicant and spouse submitted revised search criteria which, in their view, should have caused the Ministry to reduce the fee for providing the records sought.

1.2 - Documentation of the inquiry process

The applicant's spouse, on April 12, 1996, requested "...records regarding topics of e-mail, deleted e-mail, backup records, security, confidentiality originated and received by (1) the Information and Privacy Unit and (2) Information Technology Branch." The time period for which the applicant's spouse was concerned was October 1, 1995, to February 29, 1996.

The applicant's spouse later altered the time period covered by this request to be the period of January 15, 1996 to February 29, 1996 and received a revised (lower) fee estimate from the Ministry of Agriculture, Fisheries and Food. The applicant's spouse then further narrowed search criteria to exclude "... Study, Report, Memorandum, Manual, Regulations, Procedures ... etc. for government-wide or ministry-wide distribution. Specifically, this request is for communication records such as letter, memorandum, written notes ... etc. directed to and from specific person(s) on matters covered in the original FOI request."

The applicant put in an almost identical information request on April 22, 1996 seeking "... records regarding topics of e-mail, deleted e-mail, backup records, security, confidentiality originated and received by (1) the Information and Privacy Unit and (2) Information Technology Branch." Only the time period was different for this records request: October 1, 1995 to November 30, 1995.

The Ministry of Agriculture, Fisheries and Food consolidated this latter request with another similar outstanding request from the applicant, which amended the time period covered by the request to the period of October 1, 1995 to January 15, 1996. The applicant then narrowed his search criteria to exclude "... Study, Report, Memorandum, Manual, Regulations, Procedures ... etc. for government-wide or ministry-wide distribution. Specifically, this request is for communication records such as letter, memorandum, written notes ... etc. directed to and from specific person(s) on matters covered in the original FOI request."

After considering the revised search criteria, the Ministry of Agriculture, Fisheries and Food refused, by way of letters to the applicant and the applicant's spouse dated June 5, 1996, to alter its previously revised fee estimates. The applicant thereupon submitted a joint request for review on behalf of himself and his spouse to the Office of the Information and Privacy Commissioner June 10, 1996 with respect to the public body's refusal to alter its fee estimates.

3. Issue under review at the inquiry and the burden of proof

The issue under review in Part 1 of this inquiry is the appropriateness of the Ministry of Agriculture, Fisheries and Food's exercise of discretion under section 75 of the Act and, more specifically, its refusal to alter a fee estimate. Section 75 of the Act reads 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;
 - (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 exceed the actual costs of the services.

Section 57 of the Act deals with the burden of proof in an inquiry into a decision to refuse access. It is silent with respect to the burden of proof in a matter such as a fee dispute.

However, because it is the public body which has prepared the fee estimate based on its own calculations of time spent on providing chargeable services under section 75 of the Act, and has refused to alter that estimate--again, based on its own assessments--it appears to me appropriate that the public body should bear the burden of proof in this matter.

1.4 - The applicant's case

The applicant emphasizes that under section 6(1) of the Act a public body must make every reasonable effort to assist applicants and asserts that the Ministry of Agriculture, Fisheries and Food has not done so in this case. He contests the reasonableness of the fee estimate provided to him and his spouse and objects to the fact that two requests were consolidated into one.

This type of arbitrary administrative decision making, unsubstantiated allegation and poor attitude as demonstrated by the public body is counter to the spirit and intent of the Act - promote/encourage openness of the government. (Submission of the Applicant, p. 8)

1.5 - The Ministry's case

The Ministry is of the view that the primary applicant is making applications under various names, including his wife's, in order to avoid paying fees. (Submission of the Ministry, paragraphs 1.04, 1.06) It has also set out in detail the complicated facts of the various requests. (Submission of the Ministry, paragraphs 1.07-1.19)

The Ministry is of the view that it has complied with sections 6 and 75(4) of the Act in handling this series of requests. (Submission of the Ministry, paragraphs 4.01-4.08)

1.6 - Discussion

The issue in this case is the gradual narrowing of several requests by the applicant and his wife, coupled with a refusal by the public body to alter related fee estimates. The Act establishes the responsibility of the public body to implement the law. I am reluctant to interfere in this process without significant reason to do so. This applicant is an experienced user of the Act. (Submission of the Ministry, paragraph 1.03) The Ministry has exercised its discretion under section 75 to set a fee estimate, which was under approximately \$100. They did so under established criteria under section 7 of the *Freedom of Information and Protection of Privacy Act Regulation* for hourly rates and copying. (Submission of the Ministry, paragraphs 4.01-4.06)

I have to emphasize how concerned I am in a time of limited resources at various levels of government with both responsible use of the Act by requesters and cost-effective administration. From these perspectives, I am of the view that the Ministry of

Agriculture, Fisheries and Food exercised its discretion appropriately on all aspects of this issue.

1.7 - Conclusion

I find that the Ministry of Agriculture, Fisheries and Food has discharged its duty to the applicant under section 6(1) of the Act and that it was in compliance with section 75 of the Act and section 7 of the Regulation with respect to the fee estimates.

Part 2: Compliance with time requirements in producing records

2.1 - Description of this review

This request for review seeks a review of the public body's production of records to the applicant's spouse beyond the basic time permitted by the Act, but within the time permitted under an extension as provided by section 10 of the Act.

2.2 - Documentation of the inquiry process

This review involves an information request by the applicant's spouse on May 7, 1996 for "... records regarding awarding of a contract to QVI Consulting." In processing this request, the Ministry of Agriculture, Fisheries and Food extended the 30 day time limit under the Act for complying with the information request by a further 30 days, pursuant to section 10(1)(b) of the Act.

The applicant's spouse requested a review by way of letter to the Office of the Information and Privacy Commissioner dated June 5, 1996. In that letter, the applicant asserted that the public body was in non-compliance with section 6 of the Act.

2.3 - Issue under review at the inquiry and the burden of proof

Was the Ministry of Agriculture, Fisheries and Food justified in taking a further 30 days to comply with this request for information, pursuant to section 10 of the Act? Does this extension constitute a breach of the public body's duty to assist as outlined in section 6 of the Act?

Sections 6 (the duty to assist), 7 (the basic time limit for responding) and 10 (criteria and procedure for extensions) read as follows:

- 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.
- (2) Moreover, the head of a public body must create a record for an applicant if

- (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.
7. The head of a public body must respond not later than 30 days after a request is received unless
- (a) the time limit is extended under section 10, or
 - (b) the request has been transferred under section 11 to another public body.
- 10(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the commissioner's permission, for a longer period if
- (a) the applicant does not give enough detail to enable the public body to identify a requested record,
 - (b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body,
 - (c) more time is needed to consult with a third party or other public body before the head can decide whether or not to give the applicant access to a requested record, or
 - (d) a third party asks for a review under section 52(2) or 62(2).
- (2) If the time is extended under subsection (1), the head of the public body must tell the applicant
- (a) the reason,
 - (b) when a response can be expected, and
 - (c) that the applicant may complain about the extension under section 42(2)(b) or 60(1)(a).

Section 57 of the Act is silent with respect to the burden of proof in a matter such as failure to comply with section 10. However, because it is the public body which has taken the extension of time based on its own assessment of time necessary to comply,

given its other concurrent duties and obligations, it appears to me appropriate that the public body should bear the burden of proof in this matter.

2.4 - The applicant's case

The applicant states that his wife made this particular request. The public body stated that it could not respond within the thirty-day time period, because of the large number of requests "from you." His point is that she has not made a large number of requests.

This unreasonable allegation by the public body illustrates the administrative biases and discriminatory practices against frequent access requesters (which my spouse is not). The purpose of this type of attitude of the public body is obvious - discourage frequent access requesters - which is in direct conflict with Sections 2(1) and 4(1) of the Act. (Submission of the Applicant, paragraph 3.19)

The applicant adds that the use of the "limited resources" argument is inappropriate in this circumstance.

2.5 - The Ministry's case

The Ministry simply states that it made every reasonable effort to assist this applicant and responded, without delay, openly, accurately, and completely. (Submission of the Ministry, paragraph 4.10) At the time of this request, the public body was dealing with ten other outstanding requests from the applicant and his wife. A large number of records needed to be searched: "Additionally, the program area in which the records were held, the Food Industry Branch, was dealing with 4 other requests for information." (Submission of the Ministry, paragraph 4.11)

2.6 - Discussion

The applicant seeks to make his own judgment on whether his requests consume limited resources. Only the public body, I should note, has the true picture of the burden of work facing it under the Act. In the absence of evidence of bad faith, I am inclined to accept a public body's explanation of strain on its existing resources when taking a time extension in order to respond to a request. (See Submission of the Ministry, p. 24, note 18; and Affidavit of Merv Scott, paragraph 20; and the Reply Submission of the Ministry, pp. 7, 9) I accept the Ministry's explanation for why it needed extra time.

The Ministry also argues that the issue is moot because it provided the applicant access within the extended time period. It submits that the remedial powers in section 58(3)(b) are to be used only where a public body has not yet responded to a request because of a time extension taken or granted under section 10. While an order confirming or reducing an extension of time would have more practical effect if made before a public body responds, this does not mean, in my view, that the power to make an

order under section 58(3)(b) is limited to such circumstances. The effect of confirming or reducing an extension of time after the fact is to establish whether the public body was in compliance with section 10 of the Act.

2.7 - Conclusion

I find that the Ministry of Agriculture, Fisheries and Food has discharged its duty to the applicant under section 6(1) of the Act and that it was in compliance with section 10(1)(b) of the Act with respect to its use of a time extension.

Part 3: A Complaint by the applicant that requests from other persons have been treated by the Ministry of Agriculture, Fisheries and Food as one request from the applicant for the purpose of preparing a fee estimate

3.1 - Description of this review

This complaint involves requests by four individuals having the same surname and address as the applicant. The substance of the information sought in each request was similar in nature to that sought in other requests by the applicant. The Ministry of Agriculture, Fisheries and Food chose to treat these requests as having originated from the applicant and, on that basis, calculated a fee estimate under the Act which it charged to the applicant. The applicant now complains that the approach taken by the Ministry under the Act is not consistent with the requirements of sections 4 and 6 of the Act.

3.2 - Documentation of the inquiry process

The four requests referred to in 3.1 above were all submitted by way of letter dated May 10, 1996, to the Ministry of Agriculture, Fisheries and Food. The substance of the requests is as follows:

“... for records regarding e-mail, deleted electronic document and computer security originated and received by the Ministry’s Personnel Branch. Time line: December 2, 1994 to December 31, 1995.”;

“... for records regarding deleted e-mail, backup records, security, originated and received by (1) the Information and Privacy Unit and (2) Information Technology Branch. Time line: October 1, 1995 to December 31, 1995.”;

“... for records regarding e-mail, deleted electronic document and computer security originated and received by the Ministry’s Personnel Branch. Time line: December 1, 1993 to December 1, 1994.”;

“... for records regarding deleted e-mail, backup records, security, originated and received by (1) the Information and Privacy Unit and (2)

Information Technology Branch. Time line: January 1, 1996 to February 15, 1996.”

When the public body, for the purpose of calculating a fee estimate, consolidated these four information requests and treated them collectively as having originated from the applicant, he complained to my Office by way of a letter dated June 1, 1996. The applicant argued that this action by the public body was not in compliance with sections 4 and 6 of the Act, and, as the authorized representative of the other applicants, asked that the Commissioner resolve this by way of inquiry.

3.3 - Issue under review at the inquiry and the burden of proof

The issue in this part of the Inquiry is simply whether the Ministry of Agriculture, Fisheries and Food, in these circumstances, is entitled under the Act to treat the four requests as having originated from the applicant for the purpose of calculating a fee estimate for the records search. Or, conversely, does the language of sections 4 and 6 of the Act militate against the action taken by the Ministry?

Sections 4 and 6 of the Act read as follows (Section 6 is printed earlier in this decision, but is printed here again for ease of reference):

- 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
- (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.
- (3) The right of access to a record is subject to the payment of any fee required under section 75.
- 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.
- (2) Moreover, the head of a public body must create a record for an applicant if
 - (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

- (b) creating the record would not unreasonably interfere with the operations of the public body.

Section 57 of the Act is silent with respect to the burden of proof in a matter such as failure to meet a duty to assist. However, because it is the public body which has taken this consolidation action based on its own analysis of the origin of these requests, and because its actions have a financial impact on the applicant, it appears to me appropriate that the public body should bear the burden of proof in this matter.

3.4 - The applicant's case

In the context of this specific issue, the applicant claims that the Ministry is attempting to deny members of his family the right to make their own access requests: "The applicant assumes the public body reached this conclusion on the basis of the same surname, same address, same telephone number and same printer that produced all 4 separate access requests." (Submission of the Applicant, paragraph 5.14) In fact, the applicant argues, the Ministry has invaded the privacy of the other five persons who live in his household by these allegations. (See also the Reply Submission of the Applicant, pp. 6-7, 11)

3.5 - The Ministry's case

The Ministry states that it has received 41 requests from the applicant or apparent members of his household. Furthermore, it claims that the applicant made a statement to the Ministry to the effect that he was submitting requests under different names in order to avoid a section 43 application by the public body. (Submission of the Ministry, paragraph 4.14) It argues that he is the "directing mind" of these requests.

This is not a case of the Public Body making unfounded assumptions as to the identity of an applicant. This is a case where the Public Body would have to be willfully blind not to see what [the applicant] is attempting to do. (Submission of the Ministry, paragraph 4.15; see also the Reply Submission of the Ministry, pp. 5, 13-15)

The Ministry submits that the applicant is also trying to avoid fees under the Act.

3.6 - Discussion

I am of the view that making requests under the Act should not be, or should not become, the standard way of employees obtaining access to information from their employers (as opposed to routine disclosure). I also believe that former employees should not be allowed to use the Act to engage in what may eventually amount to information warfare against their former employers. For this reason, I am prepared to consider a section 43 request to deter irresponsible use of the Act by any applicants, just as I am very concerned to ensure that public bodies treat all applicants fairly and in compliance with the various provisions of the Act.

This particular applicant has the temerity to accuse the public body of promoting “inefficiency and waste in its administration of the Act.” (Submission of the Applicant, p. 16) My review of the voluminous records in this inquiry persuades me that it is not the public body that is promoting inefficiency and waste.

I am also of the view that much of the applicant’s submission on this particular complaint (at least as I understand it) revisits issues that I have dealt with, in some way, in earlier Orders involving this applicant. (See Order No. 121-1996, September 3, 1996; Order No. 111-1996, June 6, 1995; and Submission of the Applicant, pp. 14-20)

I agree with the Ministry that this applicant’s use of the Act is “irresponsible.” (Submission of the Ministry, paragraph 4.16; and the Reply Submission of the Ministry, p. 8) Ironically, the applicant invokes the fact that the Ministry has not used section 43 against him as evidence, apparently, of his virtue in this regard. (Reply Submission of the Applicant, pp. 10-11)

In my view, the Ministry made an intelligent and practical decision to combine several requests into one in this case.

3.7 - Conclusion

I find that the Ministry of Agriculture, Fisheries and Food was entitled to treat the four requests as having originated from the applicant for the purpose of calculating a fee estimate for the records search. Thus it acted in compliance with sections 4, 6, and 75 of the Act.

Part 4: A refusal by the Ministry of Agriculture, Fisheries and Food to lower a fee estimate

4.1 - Description of this review

This part of this Inquiry is a request for review in which the applicant objects to the Ministry of Agriculture, Fisheries and Food’s refusal to lower a fee estimate after the applicant chose to narrow the scope of a request.

4.2 - Documentation of the inquiry process

The applicant submitted an information request May 31, 1996 to the Ministry of Agriculture, Fisheries and Food for

“(1) ... all records retrieved and retained by the Food Industry Branch from the Harvest and PC systems used by [the applicant]...”

(2)... a listing of all records retrieved and destroyed by the Food Industry Branch from the Harvest and PC systems used by [the applicant] ...

(3) all records which were retrieved by the Food Industry Branch as identified in (1) above and which were forwarded to the Personnel Branch.”

The applicant also requested that the public body “... proceed to freeze any unauthorized destruction of records, including deleted e-mail backup tapes, from appropriate sites particularly the Food Industry Branch.” The applicant’s time line for this request was October 17, 1995 to April 4, 1996.

The public body provided the applicant with a fee estimate for complying with this request. The applicant subsequently requested a revised fee estimate based only on providing the records identified in part 3 of his request. The public body declined to do this, based on the amount of work already performed relating to the applicant’s request.

The applicant asserts that the public body is not in compliance with sections 4, 6 and 75 of the Act in its decision not to provide the applicant with a revised fee estimate. The applicant requested a review of the public body’s decision by way of a letter to the Office of the Information and Privacy Commissioner dated July 16, 1996.

4.3 - Issue under review at the inquiry and the burden of proof

Has the public body complied with sections 4, 6 and 75 of the Act in its refusal to provide a revised fee estimate in response to the applicant’s request? Conversely, do sections 4, 6, and 75 create a duty to respond affirmatively to the applicant’s request for a revised fee estimate.

Sections 4, 6, and 75 of the Act have been reproduced for reference earlier in this consolidated inquiry decision.

Section 57 of the Act is silent with respect to the burden of proof in a matter such as failure to meet a duty to assist. However, because it is the public body which has made the revised fee estimate and refused to revisit it, it seems to me appropriate that the public body should bear the burden of proof in this matter.

4.4 - The applicant’s case

The applicant is of the view that he has been treated inappropriately with respect to the matters under review in this part of the inquiry.

4.5 - The Ministry’s case

The Ministry provided me with a breakdown of its fee estimate for the three-part request, based on an hourly search rate and copying charges. The Ministry declined to

provide the applicant with a revised estimate or breakdown of the fee. In its view, the applicant would attempt to use information on the breakdown of fees to split or restructure his requests in order to avoid paying fees. (Submission of the Ministry, paragraphs 4.17-4.20)

4.6 - Discussion

The applicant asserts that the Ministry of Agriculture, Fisheries and Food has a “negative attitude” about him. (Submission of the Applicant, p. 24) This is perhaps to be expected, given the applicant’s repeated and aggressive use of the Act. (See my discussion at 3.6 above.)

4.7 - Conclusion

I find that the Ministry of Agriculture, Fisheries and Food was in compliance with section 75 of the Act and section 7 of the Regulation with respect to the fee estimates.

Summary of conclusions and Orders in this Inquiry

Part 1: I find that the Ministry of Agriculture, Fisheries and Food was in compliance with section 75 of the Act with respect to the fee estimates. Under section 58(3)(c), I confirm the fee estimates provided by the Ministry.

Part 2: I find that the Ministry of Agriculture, Fisheries and Food complied with section 10(1)(b) of the Act with respect to its use of an extension of time for responding to the applicant’s requests. Under section 58(3)(b), I confirm the extension of the time limit taken by the Ministry under section 10.

Part 3: I find that the Ministry of Agriculture, Fisheries and Food was entitled to treat the four requests as having originated from the applicant for the purpose of calculating a fee estimate, and thus the Ministry was in compliance with sections 4, 6, and 75 of the Act.

Part 4: I find that the Ministry of Agriculture, Fisheries and Food was in compliance with section 75 of the Act with respect to the fee estimates. Under section 58(3)(c), I confirm the fee estimates provided by the Ministry.

David H. Flaherty
Commissioner

December 17, 1996