

FAIRNESS IN PRACTICE GUIDE

A Guide to Administrative Fairness
in the Public Sector



OMBUDSPERSON
BRITISH COLUMBIA

CONTENTS

Role of the Ombudsperson.	2	Decision Fairness.	17
Investigative process.	3	Making good decisions	17
Why Does Fairness Matter?	4	Discretion	20
The Fairness Triangle.	5	Equitable treatment in decision making . . .	21
Fair Process: How was the decision made?..	6	Decision making checklist	22
Fair Decision: What was decided?	7	Service Fairness.	23
Fair Service: How was I treated?	8	Informal complaint resolution	23
Administrative Decision Making	9	Next steps in responding to a	
Where does the power to make		complaint	29
decisions come from?	9	Responding to challenging communication	30
The role of administrative law	10	Resolving substantiated complaints	33
Power in public service delivery	10	Resolving unsubstantiated complaints	35
Process Fairness	11	Providing a Good Response	36
What is process or procedural fairness?. . .	11	Summary Thoughts	37
Why is process fairness important?	11	Sources	38
1. Impartial decision maker	12		
2. Participation rights	15		

ROLE OF THE OMBUDSPERSON

The Office of the Ombudsperson is an independent office of the Legislature. We act under the authority of the *Ombudsperson Act*. Our office has been serving legislators and the public since 1979 and we have more than 1,000 provincial and local public bodies under our jurisdiction.

Our office's vision is to be BC's independent voice for fairness and accountability. We do not advocate on behalf of people making a complaint about public services, or on behalf of public bodies. Instead, we advocate for fairness and good public administration.

As an independent statutory office, our mandate is to ensure that the people of British Columbia are treated fairly by public bodies, promote fairness and accountability in public administration, and provide independent and impartial oversight of public bodies in BC. We fulfill this mandate by responding to complaints and enquiries from members of the public, and by conducting investigations of complaints made about local and provincial public bodies.

In 2019, the Ombudsperson received a second mandate to investigate allegations of wrongdoing under BC's new whistleblower protection law, the *Public Interest Disclosure Act*. Under this law, current and former BC public servants are able to seek advice and make disclosures of public sector wrongdoing to the Ombudsperson and are protected from reprisal for doing so.

Since 2017, the Ombudsperson has also offered training and consultation services to public sector organizations, strengthening fairness in service delivery, complaint handling and program design as well as supporting the implementation of the *Public Interest Disclosure Act*.



Investigative Process

Ombudsperson staff respond to an average of 8,000 complaints and enquiries each year from the public. Many of these complaints are referred back to the public body if the person has not raised their concerns with them directly before approaching our office. In addition, many of these complaints do not fall within our jurisdiction under the *Ombudsperson Act*, or are simply requests for information and therefore do not result in investigation.

Our Intake and Early Resolution Team determines which complaints can be resolved with minimal intervention from our office, and which should be referred for further assessment and possible investigation. We conduct approximately 1,000 individual investigations per year. These are handled by our three specialized investigative teams, divided into program and service areas. Our Systemic Team conducts more in-depth Ombudsperson-initiated investigations into broader issues that have an impact on many people.

Ombudsperson investigations are independent, impartial and confidential. These are key features of ombuds work worldwide, and differentiate our process from other types of reviews such as public inquiry processes or reviews undertaken by advocacy organizations. We do not prejudge complaints; instead, we collect information and hear both sides before reaching any conclusions about whether a public body has acted fairly in delivering its services.

Our work is consultative and resolution-focused. We aim to work together with public sector employees to search for solutions to problems we identify through our individual investigations. Through consultation with a public body, we are usually able to reach a resolution to individual complaints and make suggestions for improvement to the administration of public policies.

Although the Ombudsperson has the authority under the *Ombudsperson Act* to report findings and recommendations to the Legislative Assembly, it is our preference to work cooperatively with public bodies to reach consensus on needed improvements, and we are able to achieve this in the vast majority of our investigations.

Common resolutions to our individual investigations include:

- a better explanation or clearer reasons for a decision
- a new hearing or reconsideration of a previous decision
- an apology
- a refund or reimbursement of expenses
- access to a benefit previously denied
- a commitment to follow policy in the future
- recommendations for employee training
- changes to policy, procedures, and sometimes legislation

WHY DOES FAIRNESS MATTER?

Fairness in public service delivery has several important features. It includes allowing people to be heard in processes that affect them, ensuring decisions are made without bias and acting consistently with the rules that apply. It is also about making decisions that are considerate of the individual's needs and circumstances and based on relevant information. Fairness is also about providing clear and meaningful reasons for decisions so the person affected can understand what process your organization followed and how it came to the decision it did.

By following a fair process, members of the public can better understand the reasons for decisions being made by those in positions of authority. It helps to build public trust in public services if decision makers can clearly demonstrate and explain how and why decisions are made. We find in our work that when public bodies deliver their services in a fair and transparent manner, people are more likely to accept a decision or outcome, even when they don't agree with the decision itself.

Fairness in public service delivery is in everyone's best interests. Ensuring your policies, procedures and practices are fair is good for your organization, your employees and the people you serve.

Cultural Humility

In public service, both clients and public sector employees bring their own history, expectations, experiences and beliefs to each encounter. Fairness in public service delivery requires public sector employees to adopt a stance of cultural humility in their work.

In public service delivery, cultural humility is the capacity of public sector employees and organizations to respond appropriately and effectively to people of diverse backgrounds and identities. The goal in developing a stance of cultural humility is to create an environment of respect and cultural safety for all service users.

There are three main tenets of cultural humility, which invite public sector employees to:

1. Engage in lifelong learning and critical self-reflection on their own cultural biases, assumptions and practices, recognizing that we all have cultures, not just the people receiving services from public bodies.
2. Recognize and challenge power and privilege imbalances that are often inherent in the public service provider/client dynamic.
3. Challenge institutional-level barriers that affect marginalized communities and emphasize institutional accountability.

Adopting an approach of cultural humility encourages public sector employees to develop respectful partnerships with clients and helps to ensure fairness in public service delivery.

THE FAIRNESS TRIANGLE



Although each of us has an instinctive sense of what fairness is, it can be a difficult concept to define and there are often different views on the requirements of fairness in any particular case. We offer the Fairness Triangle as a tool to help understand what fairness means in public service delivery. The Fairness Triangle provides standards for fair actions and decisions in the delivery of public programs and services. By using the Fairness Triangle, it is easier to understand why a service user may perceive a decision or experience as being unfair. It also helps to pinpoint what can be corrected.

The Fairness Triangle illustrates that fairness in public service delivery has three main dimensions: fair process, fair decision and fair service. It is important to note that the three parts of the Fairness Triangle overlap.

Fairness means more than just making the right decision and following the right process. Fairness is also tied to interpersonal treatment and interactions. Even where a person has received a fair process that resulted in a fair decision, the quality of the interaction with the public body may still cause them to feel unfairly treated.

Fair Process: How was the decision made?

A fair process, also known as procedural fairness, refers to the process that public bodies follow to make decisions that affect a person, group of people or organization. It includes the steps a public sector employee takes before, during and after making a decision.

A fair process requires:

An impartial decision maker	Reasonable notice that a decision is going to be made
Clear information about the decision-making criteria	
An opportunity for the person affected to be heard and have their views considered	A timely decision
Clear and meaningful reasons for decisions	Information about any available review or appeal processes

Example of an unfair process:

Maryam's mother moved into a residential care facility for people with dementia three years ago. Recently, Maryam relocated to a different city to take on a new and exciting opportunity at work. However, this move meant that she was now a two-hour drive away from her mother. After talking with her mother, she requested that the health authority transfer her to a facility that would be closer to her new home. The health authority denied her request. When she asked why it was denied, the health authority simply responded that was their policy, but did not provide Maryam with a copy of the policy or any further explanation for the decision. When Maryam requested that a supervisor review the decision, she was told that there was no review process available and that the decision was final.



Fair Decision: What was decided?

A fair decision, which is also known as substantive fairness, refers to the decision itself and includes following the relevant rules to reach a fair outcome for the person affected.

Fair decisions are:

Made with appropriate legal authority

Made in accordance with applicable rules, laws and policies

Based on relevant information

Considerate of the individual needs and circumstances of the person affected

Based on rules that are fair (not unjust, improperly discriminatory or unreasonably burdensome)

Example of an unfair decision:

Luis applied for income assistance after he lost his job a year ago and was unable to find a new one. He makes around \$150 a month selling his paintings. When Luis applied for income assistance, he was denied because he made over \$100 a month. Luis did not think this decision was fair as the policy that he found online said that a person could make up to \$500 a month while still qualifying for income assistance.



Fair Service: How was I treated?

Fair service, also called relational fairness, refers to how a person is treated in their interaction with a public body. If a person feels that they were treated disrespectfully, or that a public sector employee was not honest and forthright with the information they provided, even if the decision was procedurally and substantively fair, the person might still raise a concern about the service they received.

Fair service includes:

Active listening	Making information clear and easily accessible
Being honest and forthright	Offering respectful and courteous treatment
Being transparent about what you can and cannot do	Respecting confidentiality
Being accountable and apologizing if you or your organization makes a mistake	
Being trauma-informed	Demonstrating cultural humility

Example of unfair service:

Jonathan applied to his local government for a business licence for his new restaurant. Jonathan uses a wheelchair and was concerned about accessing the permitting department of his local government so he called ahead to find out where to go. The clerk on the phone did not know, and put him on hold for 20 minutes to find out the answer. When the clerk returned, they did not acknowledge the long delay. However, the clerk confirmed that Jonathan could access the permitting department through the main entrance of City Hall and also confirmed that it was wheelchair accessible.

When Jonathan arrived at the main entrance of the building, there was one step into the entry. Frustrated, he waited until a security guard came around to show him where the accessible entrance was at the side of the building. After he had received his business licence, he asked why the clerk hadn't informed him of the accessible entrance on the phone, to which the clerk just shrugged. Though he received his business licence, Jonathan felt that his local government had not treated him fairly.

ADMINISTRATIVE DECISION MAKING

Administrative decisions are decisions made by a public sector employee under legislation. Administrative decision making is a key part of delivering public services and despite the routine nature of many administrative decisions, they can have a significant and immediate impact on people's lives. Examples of administrative decisions include:

- processing an application for a driver's licence, homeowner's grant, building permit, student loan, or PharmaCare coverage
- deciding whether to issue a business licence or income assistance benefits
- determining whether to place conditions on a registered psychologist's practice

Administrative decisions are different from public policy, political or court decisions. They are also different from clinical decisions, such as whether a person receives a particular medical treatment, or other decisions reflecting the exercise of professional judgment.

Where does the power to make decisions come from?

The power to make administrative decisions comes from legislation. In order to make a decision, public sector employees must have legal authority to do so and must know and understand the legislation, including the specific provisions that authorize them to make decisions.

Some public programs and services operate under policy only. In these cases, public sector employees should ensure that they are familiar with their governing policy and that they are the appropriate decision maker pursuant to that policy.

The public sector employees who are authorized by legislation to make administrative decisions are sometimes called *administrative decision makers*. Administrative decision makers also include boards, tribunals and committees created by legislation to determine specific issues, as well as individuals working for public bodies from deputy ministers to executive directors to junior employees. Administrative decision-making power is also often delegated. This means legislation may authorize a particular person, such as a minister or director, to make decisions and also authorize that person to delegate their decision-making power to other employees in the organization.



The role of administrative law

Administrative law governs the exercise of power and authority by public bodies. A key principle of administrative law is the *rule of law*, which requires those exercising public authority to act within the authority they are granted under legislation. This means administrative decision makers are required to follow and comply with the law that empowers them to make a decision.

Power in public service delivery

Depending on the type of service or program your organization provides, you may hold significant power in your relationship with the people that your organization serves. It is important to be aware of this power and consider how it affects your decision making and interactions with the people your organization serves.

People accessing your service may also have certain perceptions about the power you have to make decisions or to address their situation. They may not fully understand your decision-making power, which can lead to conflict if the person misunderstands your authority or holds certain beliefs about what you can accomplish for them. It is important to clarify any misunderstandings a person has and ensure that information about your organization's programs and services is easily accessible to the public.

In some contexts, such as health care, corrections, and for families with children in care, a person may be an involuntary client and obliged to receive services from your organization. This can affect the person's sense of power and control over their life, and also likely their perception of your organization. In these situations, it is important to consider whether the person you are dealing with has a choice about whether they receive services from your organization. Clients who are obliged to receive services may appear to be uncooperative, distrustful or hesitant.

As a result, when working with involuntary clients it is important to:

- be mindful that it can be an upsetting and disempowering experience to be obliged to receive government services
- listen to and try to understand and acknowledge their perspective and experience
- incorporate the person's perspective into your decision making
- develop a respectful, effective working relationship with them
- explain what your role is, the power you hold in their situation and the decisions you may make that could affect them

PROCESS FAIRNESS

What is process or procedural fairness?

Process or procedural fairness is a concept that evolved from the rules of natural justice that were developed by the courts in order to guarantee a fair hearing to a person affected by a court's decision.

The rules of natural justice require the right to an independent and unbiased hearing and the right to be heard. Historically the rules of natural justice were limited to court decisions, meaning that they did not apply to decisions made by public bodies.

However, with the increasing engagement of public bodies in delivering a wide variety of public programs and services, Canadian courts concluded the rules of natural justice (now known as the duty of procedural fairness) should similarly apply to decisions made by public bodies where those decisions affect the rights, interests or privileges of a person.



Adrian Raeside

Procedural fairness is now commonly referred to in short form as simply “fairness” or a “duty of fairness.” Despite this change in wording, the focus remains on ensuring that public bodies use fair procedures in making decisions that affect the people they serve.

Why is process fairness important?

Think for a moment about the number of different regulatory areas where important decisions are made by public bodies. These are just some:

land use/zoning/density

forestry and mining

medical and drug plans

employment and labour standards

income assistance and housing

law/medicine/dentistry/nursing

health and safety

human rights

As you can see, decisions of government touch almost every area of human activity. These types of administrative decisions being made by public bodies can have a profound and immediate impact on the people they serve.

In these next sections, we look at the two constituent elements of process fairness in greater detail.

How process fairness can benefit you:

- supports decision making that is transparent and understandable
- ensures your organization is using consistent and fair procedures when making decisions
- promotes sound public administration by ensuring that decisions are made with input from those affected by them
- supports making well-informed decisions. Well-informed decisions are likely to be better decisions

1. Impartial decision maker

The right to an impartial decision maker means that decision makers must approach each decision with an open mind, be open to persuasion and should not prejudge or form an opinion about the person or case before hearing from the affected parties.

Those who make administrative decisions must do so without bias or prejudice, either real or perceived. Being an impartial decision maker means that the person making decisions must not have any personal interest in the decision being made, and must not have predetermined the matter prior to hearing from the parties and considering their information and evidence.

The question is not merely whether there is actual bias, but whether a reasonable person could *perceive* bias. There are a variety of situations that can give rise to a reasonable apprehension of bias. These include a personal, family or business relationship with a party, a history of hostility towards a party, or a decision maker's active involvement in a matter prior to their review, reconsideration or appeal. The appearance of bias can also arise through a decision maker's interactions with a party, such as treating a person affected by their decision in a rude or inconsiderate manner.



Members of the public who do not agree with the outcome of a decision sometimes allege that the decision maker was biased. Although bias can be difficult to prove, it is important to remember that it is not necessary to demonstrate actual bias in order to bring the fairness of a decision into question. The fairness of a decision-making process can be undercut by the mere perception of bias, where that perception is deemed to be reasonable. The test for reasonable apprehension of bias was originally set out by former Supreme Court Justice de Grandpré:

“What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that the [board member], whether consciously or unconsciously, would not decide fairly?”

– Committee for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369 at para 394, [1978] 1 RCS 369.

Courts across Canada have repeatedly endorsed this test, explaining that a reasonable apprehension of bias does not require a finding of actual bias. It merely requires that a reasonable person, informed of the circumstances, would reasonably perceive bias on the part of the decision maker.

Implicit bias

Implicit bias is another type of bias. Unlike the legal concept of bias that focuses on preventing consciously biased decision making, implicit or unconscious bias presents a unique challenge because it suggests the possibility that we treat others differently, without any awareness of doing so, based on a set of unconscious mental shortcuts. These mental shortcuts, also known as attitudes or stereotypes, include both favourable and unfavourable assessments of other people based on their characteristics. The implicit associations we hold are difficult for us to recognize because they are activated without our awareness and are deeply rooted in our thinking processes. They are influenced by all of our life experiences, including our upbringing and the information, popular culture and media we have been exposed to.

Talking about bias can be uncomfortable. However, in public service delivery, we have a duty to identify our own potential biases and step through any discomfort so that we properly consider how our biases might influence the way we deliver services to others.

Addressing implicit bias

While there is no simple answer or solution to address implicit bias, there are some steps you can take to counter it. These are:

- **Acknowledgement and mindfulness:** Research has shown that if a person believes they are unbiased, they are more likely to discriminate. It is important to acknowledge our biases and monitor our own thinking to see where implicit bias may be at play. Being more deliberate in our thinking is a key step to guard against implicit bias.

- **Take adequate time to make decisions:** Because implicit bias is a result of unconscious mental shortcuts, it is more likely to affect us when we are tired, in a hurry or distracted. To prevent implicit bias from affecting decision making, it is helpful to slow down and reflect before taking an action or making a decision.
- **Think of counter examples:** Research has shown that thinking of a counter example that is different from what our automatic thinking process suggests is one of the most powerful ways to counter implicit bias. For example, if when you think of a doctor you automatically think of a person of specific age, ethnicity or gender, you can recognize this thinking as being driven by implicit bias, label it as biased, reflect on what led you to think this (past experience, popular culture, etc.) and replace this example with a counter example. In this example, you might think of a doctor who helped a family member or friend who does not meet the description of who you automatically thought of.



2. Participation rights

The right to participate in decisions that affect a person's rights, interests or privileges is the second element of process fairness. In this section, we look at participation rights, which include reasonable notice of a future decision, proper disclosure of the decision-making process, an opportunity to respond to information that may adversely affect a person, and adequate and appropriate reasons for decisions.

Given the wide range of decisions that occur within government and the broader public sector, the scope of a person's participation rights will vary. However, generally speaking, a person affected by a decision should have a fair opportunity to present their information and evidence to the decision maker before a decision is made.

The scope and extent of the participation rights required will depend on the nature of the decision, the importance of the decision to the person affected and the specific circumstances of the case. There may be legislated requirements and limits to a person's participation rights that must be followed.

Generally, a fair process is one where the following key participation rights are included:

Notice of the decision being considered

A fair process is one where reasonable notice of the decision being made is provided, along with sufficient time for the person to gather information and evidence and prepare a response. Decision makers should also consider whether there are any circumstances or factors that could affect a person's ability to make a submission or provide a response. In these circumstances, decision makers should make appropriate allowances – for example, provide an extension, where appropriate.

Information about the decision-making process

As a general rule, reasonable notice should also include disclosure of sufficient information about the decision-making process to the person affected by a decision, including:

- the specific rules and criteria (e.g. legislation and/or policy) being used to make the decision
- any information you require from the person in order to make the decision
- any information relevant to the decision that you already have received so the person affected can respond to this information. It is important that you provide the person sufficient access to the information you will rely on, particularly where that information is adverse to their interests.

Opportunity to be heard

The opportunity to be heard requires that decision makers provide the person affected by a decision with an opportunity to tell their story, present their case and share any information or evidence they have that is relevant to the decision-making process. They must have a fair opportunity to present their case, to challenge or correct the facts that the decision maker is relying on, and to provide alternative or contrary information in support of their position. A person affected by a decision should have an opportunity to be heard in a meaningful way before a final decision is made. Consider whether there are any barriers to meaningful participation such as education or language differences, and ensure that accommodations are made in those circumstances, including access to translators, advocates or other support as needed.

Reasons for a decision

Providing clear and meaningful reasons for decisions is a fundamental part of process fairness. Giving reasons for decisions helps a person see the facts and reasoning that were the basis for the decision and see that the decision was not made arbitrarily. It also ensures that the person affected by a decision is able to see to what extent any arguments they put forward were understood, accepted or formed a basis for the decision.

We find in our work that when decision makers provide clear and meaningful reasons that connect the dots for people, from the facts to the law to the conclusion, these reasons are more likely to be accepted by the person affected because they are able to see why that decision was made, even if they do not agree with it.

Decision makers who provide reasons and who record them in some manner, even if just in note form, are also better able to see if the relevant rules have been complied with based on the information before them. While providing written reasons is not a complete answer to the issue of addressing implicit bias discussed earlier, being more deliberate and intentional in decision making can help to counter the automatic and largely involuntary feelings and attitudes about others that can creep into and affect the decisions we make.

When decision makers provide reasons, external oversight bodies are also sometimes in a better position to assess whether or not a decision was reached based on relevant considerations. The Ombudsperson might decline to investigate a complaint where a public body provided adequate written reasons that clearly tie the existing evidence and relevant rules to the decision made. Without reasons, public bodies are often not able to demonstrate that a decision was made fairly or reasonably.

Decision makers should also be sure to make and communicate their decisions in a timely manner. Sometimes legislation or policy will provide a specific decision-making timeframe. Where legislation or policy is silent, decision makers should still be sure that they make and communicate their decisions with as little delay as possible.

Generally speaking, reasons should include:

- the issue to be decided
- the information and evidence relevant to the issue
- the applicable rules (legislation, policy etc.)
- any legislative, policy or procedural requirements the decision maker was required to follow
- how the information and evidence gathered was considered and assessed in the decision-making process
- what decision was made
- information about any appeal or review mechanism available to the person

DECISION FAIRNESS

Making good decisions

As a general rule, decision-making processes in the public sector should be transparent and understandable to the people who are accessing the program or service. We have identified some basic steps that can assist administrative decision makers in making fair decisions for the people they serve.

The five basic steps that help public bodies make good administrative decisions are as follows:

1. clarify the issue or question
2. determine the applicable rules
3. consider the relevant information
4. apply the rules to the information provided to reach a conclusion
5. document your decision

STEP 1

Clarify the issue or question

First, it is important that you are clear about the issue or question you have to decide. Sometimes the issue is obvious - for example, does the person meet the eligibility criteria, or did the person meet the filing deadline. However, sometimes the issues are more complex, and you will need to clarify what issues or questions you have been tasked with deciding.

STEP 2

Determine the applicable rules

Before making a decision, you need to determine the relevant rules in the situation. Knowing the rules that are relevant to the issue will help you determine what information you need to consider in order to make the decision. For administrative decisions, these rules are often found in legislation, regulation or policy. They can also be found in other documents, like procedures, guidelines, technical manuals, rules, codes, interpretative bulletins or practice directives.

STEP 3

Consider the relevant information

It is important that you request and consider all of the relevant information that you need to make an informed decision. Relevant considerations include information and evidence that speak to the decision-making criteria. For example, if you are determining eligibility for an energy-efficiency home renovation grant, relevant information would be information that shows a person does or does not meet the eligibility criteria for the grant.

Your decision should not be based on evidence or information that is irrelevant to making the decision. In the example above, an irrelevant consideration might include the frequency with which the homeowner called to check on the status of their grant application.

In order to ensure you have access to the necessary information, you may need to interview the person affected by the decision, speak with others with relevant knowledge, and/or review documents and records. Some public bodies have the power to conduct investigations and may engage in more fact-finding as a part of their process. It is important to follow a procedurally fair process when gathering this information – the goal here is to ensure you have all of the relevant information needed to make a decision.

This information may be provided to you in a variety of ways from a phone conversation with an applicant for a benefit, to a formal in-person hearing with legal counsel representing the different parties. The key is to ensure that the person affected by the decision is provided an opportunity to tell their story and make their case.

You will then need to evaluate the extent to which this information is reliable and relevant to the situation at hand. It is helpful to start with identifying the facts that everyone agrees on. Then analyze the contested facts, and determine if you need to ask for more information in order to weigh the evidence and make a decision. You may have to go back and request additional information in order to make an informed decision.

STEP 4

Apply the rules to the information provided to reach a conclusion

Once you have gathered all of the relevant information, apply the rules to make your decision.

The standard of proof for administrative decisions is typically a balance of probabilities. This means that when weighing all of the information in the context of the rules that apply, it should be more probable than not that the matter should be decided in a specific way. This requires decision makers to give adequate weight to a relevant fact, and not excessive weight to a matter of little importance to the decision at hand. If you ascribe less weight to a piece of evidence that the person believes is important to the decision, be prepared to explain how you considered their information in your analysis.

In conducting your analysis, ask yourself whether an objective and reasonably well-informed person would reach the same conclusion given the evidence available.

STEP 5

Document your decision

Lastly, it is important to document the decision you make and the reasons for it by making a record at the time the decision is made. Without a record of the decision, it can be difficult to later recall what the decision was or the reasons for it. Communicate your decision verbally or in writing depending on your established policy or rules.

The level of detail and the formality of your documentation will depend on the decision you are making. For some decisions, it is sufficient to make point form notes of your decision and the reasons for it. In other cases you will need to set out in detail the issue you considered, your analysis of the information you gathered, and how you applied the applicable rules to reach your conclusion. Where the decision is important and has a potentially significant impact on a person, your documentation should contain a greater level of detail.



Discretion

Discretion is the ability to make a choice among one or more different possible courses of action and it is a fundamental part of administrative decision making. Legislation and policy cannot cover every possible scenario with one set of rules. Effective decision making relies on public sector employees being able to apply their judgment and use discretion to consider the given circumstances of a case.

The exercise of discretion must comply with all applicable legislation and be consistent with its purpose. Discretionary decisions should demonstrate a reasonable interpretation of the applicable legislation or policy, and should be considerate of the individual needs and circumstances of the person affected.



Discretion can exist both in the choice of decision-making procedures and in the actual substantive decision. The use of the word “may” in law or policy indicates that a decision maker has discretion. Non-discretionary decision rules often include the words “must” or “shall”.

Where discretionary decision making is permitted by legislation, public bodies should develop clear policies to help guide staff and promote consistent and fair practice. A well-written policy should contain a clear explanation of the purpose of the policy and what factors should be considered in making discretionary decisions. This can help to avoid arbitrary or inconsistent decisions, and also provides the public with clarity and details on how and why discretionary decisions are made.

Fettering discretion

Fettering discretion can occur when a public body binds itself to policy, and does not allow staff to make exceptions or consider each case on its own facts. Although administrative decision makers can be guided by policy, they must not uncritically apply policy to the exclusion of the individual case they are deciding. It is common for public bodies to develop policies to guide staff in exercising their statutory authority. In our experience, when policies are written in a more restrictive way than the legislation intended, sometimes the interpretation and application of the policy becomes more restrictive over time. When making discretionary decisions, it is important not to apply policy or guideline documents in a “one-size fits all” approach, without making an independent judgment about how the policy should apply in the individual circumstances. Policies must be flexible enough to reflect the full discretion allowed by legislation.

As an example of how discretion works, a government policy may request that a person submit their income tax return on an annual basis to maintain eligibility for an ongoing benefit or subsidy. Let’s assume that the person receiving the benefit or subsidy failed to submit their income tax return by the deadline as a result of an extenuating circumstance, such as a temporary health or family crisis.

In this case, in the absence of a specific legislative provision that states otherwise, the decision maker could consider whether the rules provided some flexibility to extend the deadline to submit the required documents, or whether they could accept other income verification documents such as bank statements as proof of income for determining eligibility. If the intent of the policy is to determine whether a person continues to meet the financial eligibility criteria for a benefit or subsidy, in the circumstances it may be reasonable to either extend the deadline or accept another form of income verification.

Equitable treatment in decision making

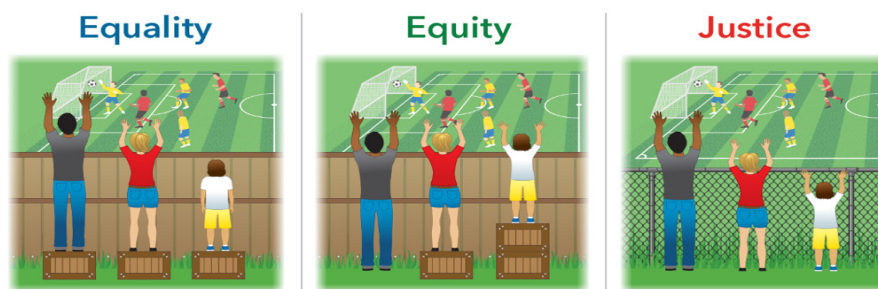
Equity and equality are two approaches we can use in an effort to promote fairness. Although people often use these terms interchangeably, there are important distinctions between them.

A focus on equity or substantive equality means recognizing that people differ in their abilities, resources and experiences and that these differences can become barriers to accessing opportunities and benefits. When we ignore these barriers, we can end up inadvertently reinforcing privilege. Not everyone starts at the same place or has the same needs. As a result, equity focuses on ensuring that people have what they need in order to access important resources.

Equality, in contrast, aims to ensure that everyone gets the same things, but it ignores that everyone has a different starting point socially, economically and environmentally.

You can see in this picture how the concepts of equality and equity differ and why it is important to consider people's individual circumstances.

Although treating everyone exactly the same without regard to their individual circumstances may be treating them equally, treating people according to their needs is treating them equitably and fairly. This is the difference between equality and equity. By removing the barriers entirely, in the third picture we achieve greater justice for everyone.



Adapted from concept by Craig Froehle

By using this particular image, we want to emphasize the point that fairness doesn't mean everyone gets the same treatment, but rather that everyone gets what they need, to the extent that can reasonably be expected in the circumstances.

There is a legal requirement for public bodies to consider an individual's unique circumstances and to ensure all members of the public have full access to the service being provided. This *duty to accommodate*, which is set out in human rights legislation and case law, requires public bodies to accommodate and respect the individual differences that exist in our diverse society, and prohibits discrimination based on personal characteristics that are protected by the BC *Human Rights Code*, RSBC 1996, c 210.

Decision-making checklist

This checklist outlines important aspects of decision making for you to consider before making a decision on behalf of your organization.

Before making a decision

- ☐ Can I make this decision?
 - ☐ Ensure you have the power/legal authority to make the decision.

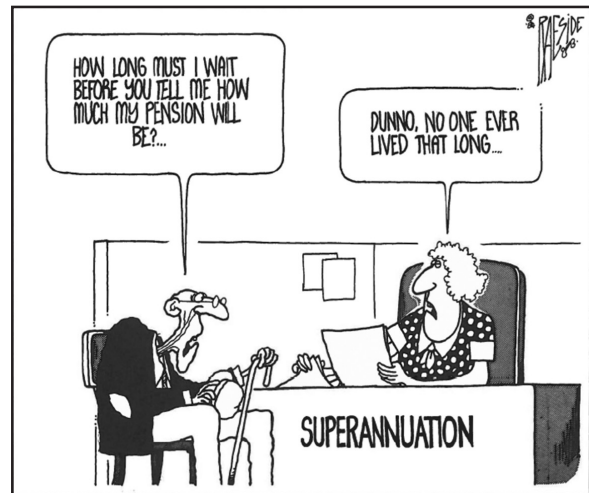
Decision-making process

- ☐ What rules apply to this decision?
 - ☐ Legislation? Regulations? Bylaws?
 - ☐ Policy? Procedures? Guidelines?
- ☐ Do I understand the rules relevant to the decision I am making?
- ☐ What information is required to make a decision? Who has to establish the facts of the case?
- ☐ Is the decision-making process fair?
 - ☐ Am I an impartial decision maker? Do I have an open mind, and am I unbiased in this matter? Could someone perceive bias on my part?
 - ☐ Have I provided the person affected by the decision:
 - ☐ Adequate notice of the impending decision with sufficient time to prepare a response.
 - ☐ Information about the decision-making criteria and process.
 - ☐ The information or evidence that I will use to make the decision so they can respond and present any contrary information.
 - ☐ An opportunity to present their case and have their information considered as part of the decision-making process.
- ☐ Do I have all the information I need to make a fully informed decision? Do I need to seek further information and evidence in order to make the decision? From whom?
- ☐ What evidence is the decision based on? Have I explained how I weighed competing evidence to reach my conclusion?
- ☐ Have I applied the rules correctly to the facts of the case?
 - ☐ Have I considered only relevant information? Do I have discretion? Have I exercised the discretion I have appropriately?
 - ☐ Have I understood and interpreted the rules correctly?
 - ☐ Have I explained to the person how the rules applied to their case and is my analysis of the facts reasonable considering the person's individual circumstances?
- ☐ Have I provided sufficient reasons for my decision? Do my reasons explain what I considered in reaching my decision and why I made the decision? Should I provide reasons verbally or in writing?
- ☐ Have I adequately documented my decision?

SERVICE FAIRNESS

Service is another important aspect of fairness in public service delivery. We think of it as the relational or human side of fairness. It includes taking time to listen to people accessing your services, showing courtesy and respect, demonstrating cultural humility, being trauma-informed in your approach, maintaining confidentiality, being honest and forthright, ensuring transparency in decision making and being willing to apologize if you make a mistake.

When a person believes that the service they received was disrespectful, difficult to access or unresponsive to their needs, their reaction may be immediate and emotional.



Adrian Raeside

In public service, despite our best efforts, mistakes happen. When they do, it is important to identify a complaint or concern early and then use an approach that will prevent the situation from escalating into a more serious conflict.

In this section, our focus is on what to do when someone has a concern or complaint about an aspect of their experience with a public body. Although complaints about a public body are not necessarily about a service issue (they could also be about a perceived flaw in the process, or the decision itself), the practice of complaint resolution highlights the type of skills that are integral to ensuring fair service – the final side of the Fairness Triangle.

Informal complaint resolution

A complaint is an expression of dissatisfaction with the quality of an action, a decision made or a service provided. People often raise complaints about public bodies in an effort to right a wrong, seek accountability from the service provider, prevent a similar occurrence from happening again, or to request compensation or access to a benefit previously denied. Many times, people simply want an acknowledgement from the public body and an apology for what transpired.

The most effective level of complaint handling, and the best time to resolve these concerns, is at the first point of contact. We find that depending on the response received at this first level, the person can be satisfied that their concerns were adequately heard and addressed. If their concerns were not addressed, there may be further escalation of the person's complaint. The following tips for informal complaint resolution can help public sector employees at any level to respond effectively, and fairly, to a person's complaint or concern.

Welcome the complaint

As a starting point, it is important to have an organizational culture that values complaints and to have a system in place to assist people who wish to make a complaint. Although it can be uncomfortable to get negative feedback about the work that we do, being receptive to complaints gives us a chance to resolve problems and promote the public service value of accountability. Complaints also give us important information that we can use to improve our services and maintain good relations with the public.

It is also important to have multiple channels available for people to make complaints. For instance, service fairness and accessibility may include accepting complaints in multiple languages, having flexible hours, allowing authorized representatives to make complaints, and accepting complaints in different formats (e.g., by telephone, in-person, online or in writing).

Once a public body receives a complaint, it is important that there are staff trained in effective complaint handling to provide a response. Listening is the single most important skill required for effective complaint handling. Often, the person making the complaint will be unclear as to what they want to achieve. As a result, they may provide too much information because they are not sure what is relevant, or not enough information pertaining to the core of their complaint. It is important to use active listening techniques and be trained to ask the right questions in order to determine what the core issue of their complaint is.



Mike Baldwin



The importance of active listening

Active listening is an important part of service fairness and is particularly important in complaint handling. For informal complaint resolution to be effective, it is important to listen to what the other person is saying and to demonstrate that you are listening to them. You can do this through active listening. Active listening involves providing the person with your full attention, maintaining appropriate eye contact, using positive body language and avoiding unnecessary interruptions. Active listening is critical in order to ensure that you understand the person's concern and what they hope to achieve by bringing their complaint to you.

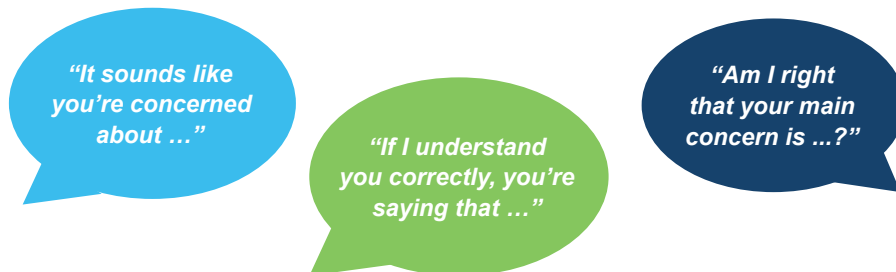
Tips for active listening

Attending

Provide your full attention and demonstrate awareness of the person through appropriate eye contact, open body language and the use of (some) silence to give the person time to think as well as to talk. Avoid interrupting or jumping in. Work on developing your comfort with silence.

Paraphrasing

Repeat what you think the other person has said to check if your understanding is correct. Paraphrasing should not be a verbatim repetition of the person's statement. Skilful paraphrasing can also involve restating negative words, phrases or ideas into neutral, non-judgmental or even positive terms, while retaining the basic points that were made.



Encouraging

Use brief, positive prompts to encourage the person to continue telling their story. Nodding, leaning slightly toward the speaker, and note taking, where appropriate, can also be effective encouragement.

Reflecting

Reflect the person's words in terms of feelings to demonstrate you have heard them. Reflecting is about acknowledging a person's feelings. It does not mean that you agree with them.



Asking questions

Open-ended questions

Questions serve a number of purposes. They can demonstrate that you are listening as well as assist you in gathering and organizing information. Generally, at the beginning of a conversation with a person who wants to share a concern, your questions should be open-ended, rather than closed-ended. Open-ended questions encourage the person to explain or clarify their concern in complete sentences.



In terms of specific open-ended questions to ask, it is a good idea to ask the person what they want to have happen as a result of bringing their concern to you. An effective way to do this is to ask an open-ended question using the word "we". These questions can help to not only clarify the person's objective in raising their concern, but also signal to them that you are open to working cooperatively with them.



Closed-ended questions

Although closed-ended questions invite a "yes" or "no," or specific one-word answer like "Wednesday" or "five," they too have an important function. Closed-ended questions are good for confirming important facts. In addition to confirming facts, you can also use closed-ended questions to resolve confusion or confirm that you have understood the person correctly.



Managing the flow of communication

Avoid the temptation to try to move the conversation on too quickly where you notice that a person is repeating themselves. Repetition often indicates that the subject is very important to the person, and that the person believes that you haven't really heard them yet. Repetition can therefore be a cue that you need to offer feedback on what the person is saying, in terms of paraphrasing or reflecting on the person's words in order to demonstrate that you have heard them.

"It's clear to me that your daughter's care is very important to you. Is there anything else that's also important for me to understand about this?"

Adding extra information

Sometimes you will be aware of additional information not known to the person that is relevant to their complaint. While ensuring compliance with privacy laws and as permitted by policy, it is important that you advise the person of this information and its relevance to their complaint, giving them an opportunity to question its relevance and/or reliability. This aspect of active listening is important in providing fair service to a person, as it ensures the person has access to all of the relevant information that you are considering and an opportunity to respond to any information that may be adverse to their interests. This ties back to the importance of process or procedural fairness discussed earlier.



Although active listening takes time, it has many benefits. These include:

- a better understanding of what the person's complaint is about
- a greater likelihood that the person will share important information with you
- it demonstrates that you are interested in their concerns and willing to look into the matter in order to try to help them

Using empathy to diffuse anger

Sometimes the person making a complaint about your organization may present with challenging behaviour. It is important to remember that the experience that prompted them to make a complaint could be a significant source of stress, confusion, worry or pain, and that they may also have previously had a bad experience with a public body that causes them to doubt whether their concern will be appropriately dealt with this time.

Even when a person's conduct appears unreasonable, they could have a valid complaint that your organization should be aware of, and it is important to demonstrate empathy in these situations.



Some people who present challenging behaviour may also have underlying conditions or past trauma that you may not be aware of, and responding without judgment is integral to maintaining a good relationship with them. Make it clear that any questions you have come from a desire to understand and help, as opposed to an interest in challenging their information or proving them wrong.

Monitoring your own reaction to the complaint

Responding to complaints from members of the public requires self-management skills and an ability to tolerate other people's strong emotional expressions. It is easy to react to a person making a complaint, especially one who is exhibiting confrontational behaviour. When we feel criticized, we tend to defend ourselves – it is a reflexive habit. However, in order to be effective in responding to complaints and in dealing with conflict, we have to be able to manage our reactions and act intentionally in a way that will ensure fair service to the person making the complaint.

Some self-management techniques include:

- notice your reaction silently (e.g. I am being triggered)
- take a pause and say nothing
- attend to your physical body. Take a deep breath, focus on how your feet feel on the ground, relax your jaw, etc.
- coach yourself with silent self-talk
- remember, it's not personal. It is about the person's experience interacting with your organization

Using some of these techniques can help stop the chain of reactivity that can escalate a complaint into a more prolonged or intractable conflict, and instead allow you to focus on identifying the person's key issues and immediate concerns.

Next steps in responding to a complaint

Explain to the person what will happen next, including how you will address their complaint and when the person can expect follow up from you. Know your limits, and tell the person you will attempt to resolve their concern but are willing to get help from someone else in your organization with more knowledge or authority as needed. It is helpful if you can try to meet any reasonable short-term requests that might immediately resolve the matter. Complaints are best resolved at the first instance, and if not then in as quick a time as the circumstances will allow.

It is important to explain your organization's procedures for dealing with complaints so the person making the complaint knows what to expect. This is about managing expectations in order to minimize the likelihood that the person will be frustrated or disappointed with the complaints process.

The person making the complaint should understand:

Who is handling their concern	What issues you are considering
Approximately how long it will take to investigate and/or respond to their concerns	
The level of involvement they can expect to have with their complaint	If known, what possible outcomes may result from their complaint
What you will do with their information	

When people have realistic expectations about what they can expect after making a complaint, they are more likely to perceive the outcome of the complaints process as fair.

It is also important to discuss any steps that the person needs to take or responsibilities they have in relation to their complaint. These include:

Cooperating with requests for information

Providing all relevant information

Being honest

Treating you and others in your organization with respect

Responding to challenging communication

There are a variety of reasons why people may present with challenging behaviour depending on their individual circumstances, life experience, or other pressures they may be facing. It's important to keep in mind that even when a person's behaviour appears unreasonable, they can have a valid complaint that your organization should be aware of, and being open and giving fair consideration to each complaint is important.

Although we need to ensure a fair process is offered in these more difficult situations, setting limits may be necessary when you find someone's behaviour to be unacceptable. The key to limit setting is to avoid language that is accusatory or passes judgment, and to give the person a choice to respect your limits.



LIMIT SETTING USING THE DESC SCRIPT

The DESC technique was developed by Sharon and Gordon Bower and is discussed more fully in their book, *Asserting Yourself*. DESC stands for **D**escribe, **E**xpress, **S**pecify and **C**onsequences. The DESC technique suggests that after acknowledging the person's concern, you:

DESCRIBE

Describe the behaviour or problem situation as objectively as possible. Stick to the facts and use non-judgmental descriptions of behaviours.

“Your voice is getting loud.”

EXPRESS

Express your concerns or thoughts about the behaviour/situation. Try to phrase your statements using “I” statements rather than “You” statements. Beginning sentences with “You” can put the person on the defensive.

“I find it difficult to hear your main concerns when you are speaking loudly” or “I appreciate that this is difficult for you. However it’s difficult for me to understand the issue you want me to look into when your voice is so loud.”

SPECIFY

Specify what the person can do that you would prefer, and then seek their agreement.

“I would appreciate if you could lower your voice so that I can hear you better.”

CONSEQUENCES

Specify the consequences (both positive and negative) relating to the person's behaviour, and then seek their consensus to move towards resolution of the matter. Generally, it is a good idea to start with the positive consequences, which lets the person know that you would prefer to continue to work with them.

Positive: “So that I can better understand your concerns and assist you.”

Negative: “If you are not able to lower your voice, I will need to end our call for now.”

Be prepared that the person may not alter their behaviour. If you have to disengage from the conversation, it's important that you indicate to the person how to reconnect. For example, suggest that they call back when they believe they can resume the conversation, or suggest a time when you will call them back.



Document the interaction

It is important to have a clear, consistent system for recording complaints. This may help to avoid the frustration that people can experience when they are asked to repeat their story to multiple people in the same organization. It also provides a clear record of your interaction, including what you told the person in response to their concerns, in the event that the matter escalates to a higher level.

When recording your interactions, record only the facts: the date, time, location and nature of the interaction and the issues discussed. Try to stay away from recording opinions surrounding the complaint, or any assumption or speculation about the person's intentions or mental status at the time unless they are statements of fact that he or she has provided to you directly. If the person complains to our office that they were not treated fairly in their interactions with a public body, it is extremely helpful to have a clear record of these interactions with the facts that demonstrate how the public body responded to the person's concerns.

Resolving substantiated complaints

Where there is evidence to support the merits of a person's complaint and you find their concerns are substantiated, the resolution of the complaint should be remedial and forward-looking, and not about apportioning blame. This means that the focus should be on how to best address the concern or problem raised by the person. The exact nature of the remedy will depend on the unique circumstances of the complaint, including such factors as the issues raised, the parties involved, as well as any legislative requirements.

Importance of an apology

In circumstances where you are able to identify a mistake or error that your organization made, it is a good idea to offer an apology as soon as possible. Offering an apology is important when things go wrong because we all have an obligation to take appropriate steps to fix problems that we are responsible for, and to restore people's trust in our organization.

In 2006, former BC Ombudsman Howard Kushner wrote a report on the role of apologies. In this report entitled *The Power of an Apology: Removing the Legal Barriers*, Kushner said:

“ *In more than six years as the Ombudsman for British Columbia, I have witnessed, again and again, how one action can make a difference in a small but meaningful way. I have observed that a sincerely offered apology will often satisfy a person who has a complaint.* **”**

Following this report and a discussion paper published by the Attorney General's office, BC became the first province in Canada to enact apology legislation in 2006. [*The Apology Act*](#), SBC 2006, c 19 was enacted in order to promote the early and effective resolution of disputes by removing concerns about the legal impact of an apology. The Act provides that an apology does not constitute an admission of fault or liability, and that an apology cannot be taken into account by any court in determining whether a person is at fault for an event.

It is inevitable that in the delivery of public services, errors or mistakes will happen. We all make mistakes, and so delivering a sincere apology in appropriate circumstances is critical to fair service delivery. An effective apology given at the right time is more likely to resolve a complaint than any other action you might take.

THE 5Rs OF APOLOGY

Effective apologies tend to share five common elements, which we call the 5Rs.¹ The chances that an apology will be effective are greatly increased if your apology addresses the 5Rs. These are:

RECOGNITION

Includes a description and recognition of the wrong and an acknowledgement of the harm caused.

“Our staff did not ensure that you understood the steps required to make an application.”

RESPONSIBILITY

An acceptance of responsibility for the problem.

“We should have explained the process to you adequately and we did not.”

REASONS

An explanation of the cause of the problem, or a promise to investigate the cause.

“Upon review, we learned that staff have not been consistent in explaining the procedures applicants need to follow in order to submit an application.”

REGRET

This is where your apology statement comes in and it must be an expression of sincere regret.

“We are sorry that we did not provide you with adequate information about our application process and that this delayed your ability to submit your application within the timeframe that you needed to.”

REMEDY

Effective apologies should also explain what you and your organization are going to do to remedy the problem. This is a statement of the action taken, or proposed to be taken, to address the problem.

“We have now fast-tracked your application. We have also used your experience to remind staff of the importance of ensuring that they provide applicants with the information necessary to submit an application.”

¹ Adapted from Kleefeld, J. C. (2007). Thinking Like a Human: British Columbia's Apology Act. *UBCL Rev.*, 40, 769 and New South Wales Ombudsman. (2009). *Apologies: A practical guide.*

Resolving unsubstantiated complaints

If you conduct a review in response to a person's complaint and find you are unable to substantiate their concerns, it is important that you take special care to demonstrate that you took the person's complaint seriously. This includes:

- outlining the steps you took to look into the issue they raised
- explaining that while you tried to address the issue they raised, you were unable to substantiate their specific concerns with the evidence available to you
- telling them that in the absence of further supporting evidence, you are unable to accept one person's word over another and must make your decision based on the information available
- being sensitive to the fact that when you tell the person that you were unable to substantiate their complaint, they are likely going to be unhappy with this response



PROVIDING A GOOD RESPONSE

Once you have considered the person's concerns, whether you were able to substantiate their complaint or not, it is important to communicate with the person who made the complaint about your decision, in addition to any steps you took to remedy the practice, policy, or system that may have contributed to the problem they experienced with your organization.

This follow-up is best done in writing and is an important way of closing the loop and checking to ensure that you have taken appropriate action to satisfy the person's concerns. Without this step, the person may believe you are still reviewing the matter or taking it further, and this can result in anger or disappointment when they learn that your organization is not taking any further action on their complaint.

If the matter can be resolved immediately in-person or over the phone, a written response should be sent as a follow-up to summarize and expand upon your prior discussion and confirm any agreed-upon actions.

Keep these tips in mind as you compose your response:

- detail your organization's understanding of the issues the person raised in their complaint
- address the issues raised by the person and indicate what was done to resolve each issue
- if appropriate, offer an apology early in the letter
- avoid taking the position that everything was handled correctly, as this was not the person's experience
- do not attempt to minimize the person's experience
- outline options for further review or appeal if the person is dissatisfied with the decision

Get feedback before finalizing your response. Written responses to complaints should be drafted with the assumption that they could appear on social media or on the front page of a newspaper. Before sending your response, ask a colleague to read it.

We find in our work that if a public body acknowledges a person's concerns, describes what steps they have taken in response to their complaint, and clearly explains how they considered the evidence obtained in the course of their review, a person is more likely to feel they had access to a fair service.

Tips for setting the right tone when providing your response:

- use the active voice
- address your reader directly
- use plain language
- avoid unnecessary jargon
- avoid including irrelevant personal details

SUMMARY THOUGHTS

Ensuring fairness in public service delivery can be challenging and complex. As we conclude, here are some key thoughts:

- Consider using the Fairness Triangle to help you identify the process, decision and service standards that apply when delivering public services.
- A fair process requires an impartial decision maker who is free from real or perceived bias. It also requires that those who are affected by decisions are provided with a full opportunity to be heard and participate in the process before a decision is made. Following a fair process, consistent with the relevant rules that apply, helps to ensure fairness in the delivery of an organization's programs and services.
- Fair decisions are made by decision makers who have the appropriate authority, are consistent with relevant rules, are based on relevant information, and are considerate of the individual needs and circumstances of the person affected. Providing clear and understandable reasons for decisions helps to demonstrate how the relevant information was considered and the rules were applied to the facts in reaching a decision on a matter.
- Fair service requires that public sector employees use active listening, demonstrate courtesy and respect, make information clear and easily accessible, make timely decisions, and apologize if they make a mistake.

We recognize the important contribution that all public sector employees make in the delivery of effective and efficient services to British Columbians. It is our sincere hope that the information included in this guide will assist you in meeting your organization's objectives for high quality service delivery.

For more information about the Ombudsperson's Public Authority Consultation and Training Team (PACT) or to request further training, consultation or support, please contact us at: consult@bcombudsperson.ca.

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