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The Right to Know

A Complaint about the Greater Victoria Public Library Meeting Room Policy

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Introduction

The ***Library Act*** empowers a library board to make rules for managing its business and for regulating public use of its facilities and services. A fundamental principle of administrative fairness is that rules and regulations established by public bodies should be clearly written and well publicized. Written rules serve as notice to the public as to how they might be affected by such rules. At the heart of this complaint is the refusal of the Board of the Greater Victoria Public Library (the "Library") to put in writing its expectations respecting the use of meeting rooms.

In 1998, the Jewish Federation of Victoria and Vancouver Island (the "Federation") made a complaint to this Office about the refusal of the Board of the Greater Victoria Public Library (the "Library") to amend the policy that regulates the use of the library facilities. The Federation had requested that the Library's Meeting Room Policy be amended by including a clause that would allow the Library to prevent access to certain groups, if these groups were considered likely to promote discrimination, contempt or hatred. The Library refused the Federation's request on the basis that such a clause would be contrary to the right to freedom of expression.

Libraries hold freedom of expression as one of their most valued principles. Included in this principle is the libraries' stated responsibility "to guarantee the right of free expression by making available all the library's public facilities to all individuals and groups who need them."[1] The debate that occurred between the Federation and the Library has been characterized as being a debate between a pro-tolerance policy versus a freedom of expression policy.

The debate raises questions about the role of public bodies in leading and shaping the opinions and views of society. The debate is a healthy one and one that is appropriate to be conducted by the Federation and the Library. However, it is not for this Office to determine public policy in respect of the use of library meeting rooms; but it is appropriate for this Office to review the operation of any such policy arising from that debate from a fairness perspective. One aspect of fairness is that individuals know the conditions and restrictions under which permission to use public

[1] Canadian Library Association Intellectual Freedom Position Statement

meeting rooms will be granted. This is the focus of the investigation carried out by the Office of the Ombudsman.

The Federation complained to my Office in July 1998 and our investigation was conducted over the next four years. It is important to note that during this time, the complaint was being actively investigated and during our investigation the Library was provided with ample opportunity to comment and respond to our concerns. At the end of a lengthy investigation, however, the nature of the Library's policy with respect to the conditions and restrictions under which permission to use public meeting rooms will be granted was not clear to me. While I was advised at a meeting with the Board that it was its expectation that persons using the meeting rooms would be mindful and respectful of all the laws of the land, the Board later advised me this was not its policy and refused to put it in writing. This claim however was not supported by other statements made by the Board in its submissions to my Office, which clearly suggested that it did indeed expect that members of the public using the library facilities would abide by laws of "general application in British Columbia." Having considered the Board's response to this complaint, I came to the conclusion that the Board's refusal to amend its Meeting Room Policy to clearly state in writing what they said were the Board's expectations was an arbitrary, unreasonable, or unfair procedure.

A procedure is arbitrary when it fails to adhere to relevant principles of natural justice, is designed for mere convenience of the authority, or is based on preference or prejudice. An unreasonable procedure is one which fails to achieve the purpose for which it was established. This test focuses on the rationale for a procedure and the results it produces or is likely to produce. The term may be seen as synonym for a deficient procedure on the basis that such a procedure is contrary to reason.[2] In the case at hand, I found the Board's policy to be deficient because it does not spell out what the Board said the public would be expected to adhere to. In that sense, the policy is incomplete, and the Board's expectation that the public adhere to a policy that is not known, is unreasonable.

[2] Ombudsman's Code of Administrative Justice

Introduction

I note that the recommendation I made to the Library is not what the Federation had requested, and they may feel disappointed by the outcome of this investigation. In this regard, it is important to note that the role of the Ombudsman is not that of advocate nor representative of complainants. By the same token, complainants do not direct our investigations. The Ombudsman can make findings and recommendations to an authority if he comes to the conclusion that the authority has breached the standards of fairness. This was my conclusion in the case at hand.

This report documents the circumstances of the complaint, my investigation, the Board's responses, and the reasons that led me to my conclusions. I am disappointed with the Library's response to my recommendation, and hope that this report will encourage further discussion and reconsideration of this matter

Howard Kushner
Ombudsman
Province of British Columbia
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The Complaint

In July 1998, my Office received a complaint about the Library Meeting Room Policy from the Federation. The complaint related to the Library's decision to allow a group, which the Federation considered to be an organization dedicated to the promotion of hatred, to use a meeting room at the Juan de Fuca Public Library.

The facts relevant to this complaint are as follows:

In the spring of 1998, the Federation became aware that the Library had agreed to rent a meeting room to an organization at its Juan de Fuca Branch. The meetings were scheduled for June 19 and 20, 1998.

On May 15, 1998, three representatives of the Federation met with three representatives of the Library Board to discuss the Federation's concerns about the planned meeting of the group in question at the Juan de Fuca Library. However, as the Federation put it, "there was no meeting of the minds." Subsequently, the Federation wrote to the Library reiterating its concerns and requesting that the Library amend clause No.10 of the Meeting Room Policy, which reads:

> *The library will not knowingly permit any individual or groups to use its facilities in contravention of the Criminal Code of Canada.*

In its letter to the Library, the Federation requested that clause No.10 be amended to read as follows:

> *That public space, facilities and properties within the jurisdiction of the Greater Victoria Public Library Board will not be made available or accessible to any individual or group that promotes views and ideas which are likely to promote discrimination, contempt or hatred for any person on the basis of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, sexual preference, or disability.*

The Library Board, which is comprised of representatives from the Districts of Central Saanich, Esquimalt, Highlands, Langford, Metchosin, Oak Bay, Saanich, and the Cities of Colwood and Victoria, discussed the Federation's request at its meeting of

May 26, 1998, and at the same meeting passed a motion reaffirming its Meeting Room Policy "as it currently stands."

The Federation complained to my Office raising a number of concerns, primarily that, first, the Library's decision was unlawful, in that the Meeting Room Policy, as it stands, offends the ***Charter of Rights and Freedoms*****,** the ***Library Act,*** and the ***Municipal Act*** *(now the* ***Local Government Act***); and second, that the Library had allowed a group to use the publicly funded meeting room to promote hatred and, thereby, had both promoted the group's ideas and had created a climate within the library in which certain minorities were not welcome. While the complainant raised a number of issues, including the moral and ethical implications of the Board's refusal, the focus of our investigation initially was to determine whether the decision was "contrary to law," as alleged by the Federation. The Board's responses to my enquiries later led me to change the focus of my investigation.

The ***Human Rights Code*** prohibits discrimination with respect to the provision of services and it has as one of its purposes the promotion of "a climate of understanding and mutual respect where all are equal in dignity and rights." We advised the Federation that the issue of a "poisoned environment" or adverse climate within the library was one best addressed to the BC Human Rights Commission, as the body responsible for investigating complaints of breach of the ***Human Rights Code***.

The Investigation

On November 27, 1998, I began my investigation by notifying the then Chair of the Board, Mr. Neil Williams, of my receipt of the complaint, as required by section 14 (1) of the ***Ombudsman Act***, which reads:

> 14 (1) If the Ombudsman investigates a matter, the Ombudsman must notify the authority affected and any other person the Ombudsman considers appropriate to notify in the circumstances.

On February 23, 1999, one of my Officers met with Mr. Williams, by then the Board's Past-Chair, with Ms. Valerie Ethier, Chair, and with Ms. Sandra Anderson, Chief Librarian. Arising from this meeting and from subsequent correspondence, I understood the Library's position to be that the decision to reference only the ***Criminal Code*** in its Meeting Room Policy was dictated, in part, by the belief that it would be difficult to determine whether the ***Human Rights Code*** was being breached by those renting the meeting rooms.

By letter of May 18, 1999, the Chair advised my Office that in adopting the current Meeting Room Policy, the Board recognized, "the staff lack experience in determining whether the laws have been breached, where that determination requires considering the boundary between laws prohibiting certain activities and the Charter of Rights and Freedoms' protected rights." The Board's position was that the current Meeting Room Policy, as stated above, enables anyone "who believes that the Criminal Code has been breached, to report the matter to the police."

The Chair further indicated "it is an unreasonable restriction on the Charter of Rights and Freedoms' protected rights of renters to limit rentals based on how GVPL[3] staff perceive the beliefs of the renters."

This response from the Board, that focused on the difficulty in monitoring whether laws have been breached, begged the question: What is the procedure by which the Library satisfies itself that its current Meeting Room Policy is being complied with? And more specifically, how does the Library satisfy itself that users will or have

[3] Greater Victoria Public Library

complied with the ***Criminal Code of Canada***? To my knowledge, the Library did not and does not currently inquire about the by-laws, policies, objectives, or membership of groups renting its facilities. The Board's position is that it is the responsibility of the individual or group renting the facilities to comply with the rental contract, and it is the responsibility of the police to investigate any violation of the ***Criminal Code***. It was not clear to me how the reference in the policy to other legislation would impose a higher burden on the Library staff. We posed these questions to the Board by letter of April 13, 1999. In its response, the Board reiterated its position that library staff are not competent to determine whether laws are being breached.

In July 1999, we requested a meeting with the Board to discuss the matter with a view to better understand the Board's position. Our request was declined.

We continued to attempt to settle the complaint, and by letter of May 19, 2000, we advised the Library solicitor of other public institutions that had amended their Meeting Room Policies in response to community concerns about the use of publicly funded buildings by certain groups. Specifically, we mentioned the Vancouver Public Library, which amended its Meeting Room Policy in 2000, by adding the following clause:

> *In addition to current requirements, all renters agree that they will not contravene the Criminal Code of Canada and the Human Rights Act of British Columbia during the course of their rental.*

We also mentioned that several Vancouver Park Community Recreation Centres had amended their Meeting Room Policies by incorporating the following clause:

> *The Community Centre is a shared and publicly funded community asset and the use of the centre must reflect this fact. Users of the centre must comply with all applicable City by-laws and Federal and Provincial legislation, including the British Columbia Human Rights Code which prohibits discriminatory conduct including conduct that would expose persons or groups to hatred or contempt.*

We referred, as a further example, to a clause contained in the University of Victoria Room Booking Agreement that requires the renter:

> *to comply and conform to the requirements of every applicable statute, regulation, ordinance, or by-law whether federal, provincial or municipal including all fire regulations that are applicable.*

We advised the Library solicitor that we would view a decision of the Board to amend its Meeting Room Policy to include a clause similar to any of the clauses referenced above, as a satisfactory resolution to this complaint. The solicitor responded that the Board wanted to assess the changes made by the above-mentioned institutions before giving further consideration to any possible amendment to its policy.

In a subsequent letter to the Chair of the Board, I noted that the Regional Municipality of Ottawa – Carlton had adopted a bylaw similar to the above-mentioned clauses, and that the City of Victoria had adopted a similar resolution in 1996 (approved in principle, but not adopted as a bylaw).

There is an argument that policies regulating the use of publicly funded facilities should reflect community standards. This argument seems to be supported by the fact that clauses such as the ones mentioned above are becoming more common in rental agreements. It is instructive to note that the BC Building Corporation Accommodation Agreement, a Crown corporation that provides accommodation and real estate services to the provincial government, includes in its rental agreements the following provision:

> Article 4 - General Covenants (corporate owned buildings)
> 4.05 - Comply with laws
> The tenants shall at all times during the Term hereof comply with all applicable laws, statutes, by-laws, ordinances, regulations or other lawful requirements of any government authority having jurisdiction.
>
> 4.05 (leases with private sector landlords)

> The Landlord shall comply at all times during the Term hereof with all laws, statutes, by-laws, ordinances, regulations or other lawful requirements of any government authority having jurisdiction, and the Landlord warrants and covenants that the Premises comply now and shall comply during the term with such laws and regulations.

A further example of institutional response to community concerns is the resolution adopted in June 2000 by the City of Prince George to endorse in principle a recommendation that the City include a provision to ban racist groups from using public space such as libraries for meetings.

On September 20, 2000, I wrote to the Board reiterating my concerns and offering again to meet with the Board with a view to achieving a better understanding of the Board's position.

The Board's Response

The Board responded by letter of October 16, 2000, rejecting my proposal for resolution. In her response, the Chair stated in part, "Libraries cherish freedom of expression…libraries seek to promote freedom of expression when making meeting rooms available to the public." She also stated, that a reference to the ***BC Human Rights Code*** in the Meeting Room Policy "would create an expectation on the part of some that the Library will ban groups that are perceived as holding unpopular beliefs…"

In its response the Board referred to a recent finding of the Human Rights Commission (the Commission) on a complaint against the Library that arose from the same circumstances as the complaint I was investigating. The Commission dismissed that complaint. The Board suggested that the finding of the Commission rendered my process unnecessary, and that my Office was subjecting the Library "to yet another process over something that has been resolved already." My offer to meet with the Board was not acknowledged.

I considered this response to be unsatisfactory. The response suggested a lack of understanding that our process is independent and distinct from the process of the Commission. The fact that a complaint, arising from the same circumstances, is made to the Commission does not preclude the Ombudsman from investigating a complaint made to this Office. The focus of my investigation would be different from that of the Commission. Indeed, in the case at hand, as mentioned earlier, I declined to investigate concerns about the alleged poisoned climate at the library and referred the complainants to the Commission. It further concerned me that the Board's response also suggested a lack of understanding of our process of consultation with authorities, which is explicitly provided for in the ***Ombudsman Act*** and is an essential aspect of our investigative process.

Notwithstanding the Board's response, we continued our attempts to settle the matter. Eventually, I was able to meet with representatives of the Board on March 9, 2001. At that meeting, I was advised that it is the Board's expectation that persons using the meeting rooms will be respectful of all federal, provincial, and municipal legislation. However, the Board continued to be reluctant to put this policy in writing. I advised the Board that the absence of reference in the Meeting Room Policy to any legislation other than the ***Criminal Code*** caused me concern.

Tentative Finding

Section 17 of the ***Ombudsman Act*** (the ***Act***) provides for a process whereby the Ombudsman, after conducting an investigation, informs the authority and other affected parties of possible grounds for making a recommendation under the ***Act***. This process also provides the authority with an opportunity to respond to these grounds before a formal finding or recommendation is made. If the matter is not settled, the Ombudsman is authorized to make findings and issue recommendations, pursuant to s. 23 of the ***Act***.

Following the March 9 meeting, and as it became evident that the matter was no closer to a resolution, pursuant to s. 17 of the ***Act***, I advised the Board of my tentative finding that the omission in the Meeting Room Policy to include reference to

relevant legislation, other than the ***Criminal Code***, may be related to the application of arbitrary, unreasonable or unfair procedures.

As I explained to the Board, while the Board's expectation may be that persons using the meeting rooms will be mindful and respectful of all the laws of the land, the reference in the Meeting Room Policy to only one piece of legislation, the ***Criminal Code***, may be misleading. In reading the Policy, as stated in the Rental Form, it would not be unreasonable for members of the public to come to the conclusion that it is the Library's expectation that while using its facilities, they need only comply with the ***Criminal Code***. While this may not be the Library's intention, the public cannot be expected to understand and abide by a policy that is not written and, therefore, not known to the public. The Board provided me with no evidence that an unwritten policy is reasonable.

It is interesting that in contrast with its position about its Meeting Room Policy, the Library's Internet Policy clearly states that users of workstations in a public space "are expected to adhere to the community standards regarding display of sexually explicit images." And further, the Library's Internet Policy states, "It is prohibited to use a Public Internet Workstation for illegal, actionable or criminal purposes. Criminal law forbids the display or dissemination of hate literature, child pornography, illicit drug literature or obscene material." This Policy clearly articulates what are the prohibited behaviours and, thus, puts the public on notice as to the limitations that apply while using the library computers. From a practical perspective, it may be easier for staff to detect persons who are breaching the Internet Policy than to detect breaches of other laws and regulations. However, by clearly stating its expectation the Library allows patrons to consider their behaviour and act in an informed manner.

In its final letter of response, the Board reiterated its unwillingness to put its policy in writing and provided as one of the reasons for this decision the lack of evidence that the Federation or anyone else "had actually been misled because the Meeting Room Policy does not refer to all applicable laws." It is not necessary for me to produce evidence that the lack of clear, written policy has misled anyone to come to the conclusion that the policy ought to be written. It is my view that a public institution should be proactive in setting an example to others by clearly stating its expectation

that federal, provincial, and municipal legislation and regulations must be respected. Fairness requires that the policies of public institutions be clear and available. Further, making this expectation known in the form of written policy would not restrict anybody's right to freedom of expression. Neither would such a policy require library staff to police or monitor meetings to ensure compliance, any more than a policy that references the ***Criminal Code*** imposes such a duty on staff.

Finding and Recommendation

Given the Board's failure to respond to my investigation in a manner that would have settled the complaint, I made the following finding and recommendation:

FINDING

That the Library's expectation that the public abide by an unwritten, unclear, and unknown policy is an arbitrary, unreasonable or unfair procedure, and, as such, offends subsection 23 (1)(a)(v) of the ***Ombudsman Act****.*

RECOMMENDATION

That the Library's stated expectation that persons using its meeting rooms comply with all federal, provincial, and municipal legislation and regulations be put in written form and be part of its leasing policy.

Appendix

Section 17 of the *Ombudsman Act*

17 If it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman must, before deciding the matter,

(a) inform the authority or person of the grounds, and
(b) give the authority or person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman.

Section 23 of the *Ombudsman Act*

23 (1) If, after completing an investigation, the Ombudsman is of the opinion that

(a) a decision, recommendation, act or omission that was the subject matter of the investigation was
  (i) contrary to law,
  (ii) unjust, oppressive or improperly discriminatory,
  (iii) made, done or omitted under a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory,
  (iv) based wholly or partly on a mistake of law or fact or on irrelevant grounds or consideration,
  (v) related to the application of arbitrary, unreasonable or unfair procedures, or
  (vi) otherwise wrong,
(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority

(i) did so for an improper purpose,
(ii) failed to give adequate and appropriate reasons in relation to the nature of the matter, or
(iii) was negligent or acted improperly, or

(c) there was unreasonable delay in dealing with the subject matter of the investigation,

the Ombudsman must report that opinion and the reasons for it to the authority and may make the recommendation the Ombudsman considers appropriate.

(2) Without restricting subsection (1), the Ombudsman may recommend that

(a) a matter be referred to the appropriate authority for further consideration,
(b) an act be remedied,
(c) an omission or delay be rectified,
(d) a decision or recommendation be cancelled or changed,
(e) reasons be given,
(f) a practice, procedure or course of conduct be altered,
(g) an enactment or other rule of law be reconsidered, or
(h) any other steps be taken.