FAIRNESS FACTS
USING DISCRETION FAIRLY

OMBUDSPERSON
BRITISH COLUMBIA

> Decision makers should exercise discretion fairly and reasonably when making decisions.

What is discretion?

Every day public bodies and their staff use discretion to make decisions that directly impact people. Discretion is:

- the power to decide

- given to public sector employees by legislation or other decision-making rules

Discretionary decision-making power developed because legislation and policy cannot always cover every scenario. Discretion provides the flexibility to consider individual circumstances and situations. It helps to avoid a one-size-fits-all approach that may occur with more prescriptive rules. Discretion can support public bodies and their staff to make decisions that account for people's unique life experiences, cultures and backgrounds.

The amount of discretion a decision maker has depends on the decision and the decision-making rules set in legislation or policy. Rules are sometimes very directive and give little or no discretion. Other times, the rules give the decision maker a significant amount of power to use their discretion to decide based on the circumstances.

Examples of discretionary decisions

Approving a building permit

Issuing a driver's licence

Approving a student loan application

Enforcing a bylaw

Issuing a small business training grant

How to use your discretion fairly

☐ **Act in good faith to further the objective and purpose of the legislation and program**. What does the legislation you're working under and policy say about why your program exists? What is the decision you are making supposed to achieve? Make a good faith effort to make a fair and reasonable decision that achieves the purposes and objectives of the legislation and program.

☐ **Consider the individual circumstances.** Use your professional judgment to make a fair and just decision that considers the individual facts and circumstances and follows the decision-making rules.

☐ **Act within the scope of your discretionary power**. Be sure to understand and act within the scope of the legislation or other rules that give you discretionary power.

☐ **Consider systemic unfairness and discrimination.** Will this decision impact a person or group that has faced systemic discrimination or systemic unfairness? If yes, consider how to make a fair and non-discriminatory decision using your discretionary power.

☐ **Documentation, transparency and consistency.** Discretionary decisions should be documented, transparent and consistent so similar situations are treated similarly. Policy and training can support consistent and fair discretionary decisions.

☐ **Make an unbiased decision.** Ensure you can be an unbiased decision-maker and that you do not use your discretionary power to make a decision that is, or could reasonably be perceived to be, biased.

What can lead to unfair discretionary decisions?

☐ **Using hidden or unwritten criteria or motives.** A decision should not be made for any hidden motives or reasons. It should also not be based on any decision-making criteria or decision-making process that isn't made clear and transparent to the person impacted.

☐ **Acting in bad faith.** Discretionary decisions should not be made in bad faith. This means making a decision for reasons or motives outside of the decision-making rules, such as personal bias or opinions.

☐ **Being arbitrary.** Discretionary decisions should not be or appear to be arbitrary. To be arbitrary means the basis or criteria used to make the decision is random or unclear.

☐ **Policy that limits or exceeds legal authority.** Policies can support decision makers to make consistent and fair discretionary decisions. To do so, the policy must be consistent with the legislation it is intended to support. This includes ensuring policies do not limit decision makers from fully using their discretionary power under legislation. Also, policies must not direct decision makers to exceed their discretionary power.

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