

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 07-30
November 6, 2007
Review File: 07-221-5

A. BACKGROUND

In a letter dated August 2nd, 2007, the Applicant requested that I review a decision by the Department of Human Resources to levy a fee for photocopying the records responsive to a request for information made by him. He also asked that I review the amount of the estimate which the department quoted to him for the copies. It appears that the Applicant chose to pay the estimated fee to avoid a delay in receiving a response to his request for information. He has, nonetheless, asked me to review whether or not the fee should have been assessed as well as the amount of the fee. I provided the public body with a copy of the Applicant's correspondence and asked them to provide me with any background information or explanation they felt would address the Applicant's complaints. Their response was received in my office on September 10th, 2007 and a copy of that response was provided to the Applicant so that he could provide any further comments or submissions he wished to provide.

The Applicant made no further submissions.

B. THE ISSUES

The relevant sections of the *Access to Information and Protection of Privacy Act* (ATIPPA Act) with respect to fees provide that:

- 5(3) The right of access to a record is subject to the payment of any applicable fee.
- 50(1) The head of a public body may require an applicant who makes a request under section 6 to pay the prescribed fees for services provided.
 - (2) Where an applicant is required to pay fees for services, the public body shall give the applicant an estimate of the total fee before providing the services.

The regulations passed under the ATIPP Act go on to provide as follows:

- 12(1) This section applies to a request for access to a record that is a record of the personal information of the applicant.
 - (2) The only fees that may be charged for the processing of a request for personal information relating to the applicant are fees for copying a record as set out in item 6 of Schedule B.
 - (3) Where the amount of the fees does not exceed \$25.00, no fee is to be charged.
 - (4) Where the amount of the fees exceeds \$25.00, the total amount is to be charged
- 13(1) The public body shall cease processing a request once a notice of the estimate of fees has been forwarded to an applicant and shall recommence the processing of the request without delay on
 - a) the receipt of an agreement to pay the fees; and
 - b) the receipt of at least 50% of any estimated fee that exceeds \$150.00.
- (3) An applicant shall be charged the lesser of
 - (a) the amount of the estimate of fees provided under subsection 50 (2) of the Act; and
 - (b) the actual fees calculated in accordance with Schedule B.
14. The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head, the applicant cannot afford the payment or, for any other reason, it is fair to excuse payment.

Schedule B of the Regulations provide as follows:

The amount of the fees set out in this Schedule are the maximum amounts that can be charged to applicants.

For copying a record:

- | | | |
|-----|---|-----------------|
| (a) | photocopies, hard copy laser print and computer printouts | \$0.25 per page |
|-----|---|-----------------|

C. THE PARTIES' POSITIONS

The Applicant takes the position that section 50 of the Act is permissive, not mandatory and that the Minister, therefore, has discretion as to whether or not to impose the fee. He felt that it would be "fair" in the circumstances, to excuse payment of all or part of the photocopying fee because:

- a) he is broke and destitute
- b) his employment had been terminated by the Government of Nunavut in 2002 and he had not worked since;
- c) there is a significant public interest in the disclosure of the records requested because, in his view, the records would show that:
 - i) the union and the government had engaged in improper collaboration to injure him;
 - ii) an employee of the Government of Nunavut counseled other government employees on how to sabotage his grievances, compromising the integrity of the Collective Agreement

The public body, in its submission to me, pointed out that the *Access to Information and Protection of Privacy Act* allows for the charging of fees to cover photocopy costs and that there is nothing in the Act or the Regulations which requires a public body to consider any particular issues when making the determination as to whether or not to assess a fee. Although Regulation #14 allows for the waiver of fees upon request of the Applicant, they point out that the granting of a waiver is couched in discretionary terms. They also point out that at no point did the Applicant request a waiver of fees in accordance with Regulation #14.

According to the public body, the reason they imposed a fee in this case is that the number of records requested by the Applicant was large. They also pointed out that the fee estimate given turned out to be very conservative because of the number of records eventually identified as being responsive. They also indicated that the fee estimate provided included the cost of making only one copy of each record even though it is necessary to make several copies of each record when responding to an Access to

Information request. It turns out that although the fee estimate given was for \$40.00, the actual cost of photocopying one copy of each record was \$78.50 (314 pages @ .25 per page).

D. DISCUSSION

Both the Applicant and the public body agree that whether or not a fee is assessed in any particular case is a matter of discretion. It is not mandatory that fees be assessed in any case.

In other cases where the exercise of discretion has been in issue, I have consistently said that the Act gives me no jurisdiction to question whether or not a public body has exercised discretion "correctly". My only jurisdiction is to determine whether or not the discretion has, in fact, been exercised. In this case, the Act gives the public body the discretion to assess a fee in accordance with a procedure which is fairly clearly articulated in the Act and the Regulations. In this particular case, they chose to do so, and provided me with cogent reasons for their decision, which included the large volume of records responsive to the request and number of person-hours that went into preparing the response. I am aware, as well, that this Applicant has made significant use of the *Access to Information and Protection of Privacy Act* in recent months, which is his right. The Public Body has not indicated that this was a factor in their decision although it may be a legitimate matter for consideration in the exercise of the discretion given by the Act.

In short, I am satisfied that the public body has actively exercised their discretion in deciding to assess a fee in this case. That being the case, I have no jurisdiction to make any further recommendations with respect to the issue.

As an aside, I would like to comment on something argued by the public body in their submissions to me. They pointed out that Regulation 14 provides that the Head of a Public body can excuse the applicant from paying all or part of a fee if, in the opinion of the head, the applicant cannot afford the payment or, for any other reason, it is fair to

excuse payment. There are obviously two ways that this can happen. The Minister could make that determination on his own initiative. That would require him to be aware of the ATIPP Request and the fee assessment and I imagine that in most cases that would be unlikely. The second way that this can happen is if the Applicant requests that the fees be reduced or waived. That did not happen in this case. The public body suggests that before I can review the matter, the request should have been raised with the Minister.

Although the wording of the Regulation does not strictly prohibit the Applicant from bringing the matter directly to the Information and Privacy Commissioner it seems to me that the more effective, and certainly the more expeditious way of dealing with it, would be to first ask the Minister for relief from the fees. I say this because a review through the ATIPP process can take up to six months to complete and I imagine that a request to a Minister could be dealt with much more quickly than that. However, the Act does not require that that step be taken before this office is asked to review the matter.

E. CONCLUSION AND RECOMMENDATIONS

As noted above, it is my opinion that the public body in this instance actively exercised their discretion to impose a fee for photocopying on the Applicant. So long as I am satisfied that discretion has been actively exercised, it is not for me to comment on the way in which the discretion was exercised. recommendation other than that the fee assessment can stand.

Elaine Keenan Bengts
Information and Privacy Commissioner