NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 14-077
July 30, 2014

Review File: 14-152-5

BACKGROUND

The Complainant in this case asked me to review the assessment of fees which he received from the Department of Community and Government Services when he requested a series of records in relation to his business's dealings with the department over a period of approximately 18 months. The sequence of events is important:

December 5th, 2013	initial Request for Information
December 17th, 2013	notification that fees amounting to $1,155.00 would be required to process the request.
January 14th, 2014	a deposit of $577.75 was received, representing half of the total fee amount.
January 29th, 2014	the time for responding was extended to February 29th, 2014 (a date not on the calendar) because of the volume of records involved.
March 14th, 2014	the time for response was extended further to April 17th.
May 9th, 2014	Request for Review made by Applicant to review fees
May 30th, 2014	ATIPP request completed and ready to be released when the balance of the fee assessment paid.

The Applicant does not appear to be protesting the calculation of fees. Rather, he feels that he should not have to pay all of the fees assessed because of the delay in providing the records requested. It was almost five months between the date that he made his request for information and the time that it was ready to be released to him. Because he has not yet paid the second half of the assessed fees, he still does not have the responsive records as of today.

THE DEPARTMENT'S EXPLANATION

Interestingly, the Department's response to my office in connection with this review is dated the same date that a letter was written to the Applicant advising him that the records were ready and would be released upon payment of the balance of the fees assessed. The Department indicated in their response to my office that there were 2053 pages of emails ready to be released to the Applicant and an additional 613 pages which were printed but not included in the final release of documents because they were duplicates or did not fall within the scope of the request once vetted. They addressed the delay in responding to the request by advising that additional time was needed to process the request "due to the large number of pages it produced". Further time was needed to "consult public bodies on the records". From start to finish, they say more than 55 hours were spend processing this request.

The fee of $1,155.00 was calculated based on the following:

Searching and retrieving records	15 hrs @ $6.75 per 1/4 hour = $405.00
Photocopying/printing records	3000 pages (approx.) @ $0.25 per page = $750.00
Shipping	Actual cost

The public body points out that the true cost of processing the request was really much higher than the estimate provided. Based on the total number of hours spent searching, retrieving and processing the records (55 hours @ $6.75 per 1/4 hr = $1,485) and the number of photocopies made (a total of 6769 copies, which includes three copies of each record) the actual true cost of processing the request would have been over $3,000.00.

THE APPLICANT'S RESPONSE

The Applicant was afforded the opportunity to provide a response to the department's submissions but did not do so.

DISCUSSION

The facts of this case raise two issues for me. The first is whether or not the fees assessed are within the parameters of what the Act allows. The second, and probably more important issue for me is whether the delay in responding to the Applicant's Request for Information was within the parameters of what the Act allows. The bottom line question is whether or not the circumstances of this case, including the delay in responding, should result in a full or partial waiver of fees.

1. Fees

Section 50 of the *Access to Information and Protection of Privacy Act* allows public bodies, on a discretionary basis, to require an applicant to pay "the prescribed fees" for services provided. This section requires that, when a fee is assessed, the public body must give the Applicant an estimate of the total fee before providing the services.

The Regulations under the Act deal with the "prescribed fees". Section 9 of the Regulations provides that:

> 9.(1) Where an applicant is required to pay a fee for services, the fee is payable in accordance with sections 10 to 14.
>
> (2) Fees assessed under sections 11 and 12 must not exceed the actual costs of the services provided.

Section 10 of the Regulations set out what must be included in the letter to the Applicant accompanying the estimate of fees pursuant to subsection 50(2) of the Act. This includes:

> a) the time and cost required to search for and retrieve the record, prepare and physically sever the record for disclosure, and copy the record;

b) the cost of computer time involved in locating and copying a record;
c) the cost of supervising an applicant who wishes to examine the original record, where applicable, and
d) the cost of shipping the record

Section 11 of the Regulations deals with fees for non-personal information, which is what is involved in this case. The section provides that an initial fee of $25.00 is required and additional fees cannot be charged unless the total amount of the fees calculated in accordance with the Regulations exceeds $150.00. Where the amount of the fees exceeds $150.00, this section provides that the total amount of the fees is to be charged. Importantly, subsection (6) of Section 11 states:

(6) A fee may not be charged for the time spent in reviewing a record.

Section 13 of the Regulations direct that the public body shall cease to process a request once a notice of the estimate of fees has been forwarded to an applicant and shall recommence only once the Applicant has agreed to pay the fees and has paid 50% of the estimated fee. The balance of any fees owing is payable at the time the information is delivered to the applicant.

Finally, section 14 of the Regulations allows the head of the public body the discretion to waive the payment of 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” to the regulations set out the applicable fees. The relevant portions of that schedule include:

For searching and retrieving a record or for preparing and handling a record for disclosure	$6.75 per 1/4 hr
For shipping a record	actual amount
For copying a record	$0.25 per page

The first observation I would make with respect to the fees is that no fees can be charged for the time spent reviewing a record. While the public body suggests that they spent 55 hours on this file, the vast majority of that time would have been on reviewing and editing the records to apply any applicable exemptions. There is some confusion in the regulations about what can and cannot be charged to the applicant. Section 11(6) of the Regulations to say that the time spent "reviewing a record" is not chargeable to the Applicant. Schedule "B" however, refers to an applicable charge for "preparing and handling a record for disclosure". I have considered this issue before and have concluded that the confusion should be interpreted in favour of the Applicant. The only time that the public body can charge back to the applicant is the time spent in actually searching for and retrieving the records. The public body did not indicate how much time was spent doing this. Fifteen hours seems like a lot of time to me, but I don't know. It appears that the public body did keep time records on this file so it should be possible for them to calculate accurately how long it took to actually search for and retrieve the records. If the public body accepts the recommendations made below, however, this may not be necessary.

The public body also argues that they actually made three copies of each record and that the number of photocopies is, therefore, over 6000 but that the estimate was for only half that many. The Regulations are unclear here as well. Should the Applicant have to pay for extra copies that the public body makes for their own file? Or should he have to pay only for the number of pages that he actually receives in response to his/her response. Again, I would err on the side of the Applicant in this case. If you include all of the pages identified initially as being responsive (2,666 pages) that would be $666.50, not $750.00. The public body cannot charge any more than the actual cost and the cost for photocopies should, therefore, be limited to $666.50. Again, however, in light of the recommendations made below, this may not have much relevance.

2. Delay

Section 8 of the *Access to Information and Protection of Privacy Act* requires public

bodies to respond to a Request for Information within 30 days after a request is received unless the time limit is extended under section 11.

Section 11 of the Act allows a public body to extend the time for responding "for a reasonable period" in certain, narrow, circumstances.

> (a) the applicant does not give enough detail to enable the public body to identify a requested record;
> (b) a large number of records is requested or must be searched to identify the requested record and meeting the time limit would unreasonably interfere with the operations of the public body;
> (c) more time is needed to consult with a third party or another public body before the head can decide whether or not the applicant is entitled under this Act to access to a requested record;
> (d) a third party asks for a review under subsection 28(2); or
> (e) a requested record exists in the control of the public body only in a language other than the Official Language of Nunavut requested by the applicant and additional time is required for translation.

The public body relies on 11(1)(b) in this case, saying that the large number of records involved was the reason for the extension. At some point there was also reference to the need to consult another public body, but no details of the need for such consultation were provided.

Subsection (2) of this section sets out the steps to be taken by the public body when an extension of time is taken:

> (2) Where the time for responding to a request is extended under subsection (1), the head of the public body must tell the applicant without delay
> (a) the reason for the extension;
> (b) when a response can be expected; and

(c) that the applicant may ask for a review of the extension under subsection 28(1).

I have a number of observations about the application of section 11 in this case.

Firstly, there is nothing in this section which suggests that there can be an extension of an extension (or in this case, an extension of an extension of an extension). If a public body is going to extend the time for responding, it may do so only once.

Secondly, an extension of time must be for a "reasonable period". I would suggest that, except in very unusual circumstances, anything more than 30 additional days is unreasonable. The legislation itself deems thirty days as a reasonable response period. A "reasonable" extension then, in most cases, would be no more than that.

Thirdly, an extension of time is not authorized by the Act only because there are a large number of records involved in the response. The Act requires, in addition, that meeting the time limit would unreasonably interfere with the operations of the public body. A public body has the onus of establishing that unreasonable interference. While 2000 pages is a fairly substantial number of records, it is not an unusual number of records for an ATIPP request. The public body has provided no explanation as to how or why meeting the time limit in this case would have "unreasonably" interfered with the operations of the public body. Volume, in and of itself, does not bring me to that conclusion. I completely understand the time it takes to do line by line reviews of large numbers of records. I do it all the time. It is time consuming. But if the Government of Nunavut sees fit to establish legislation requiring it to produce records within a stated period of time, then when a request for information is made that same Government must devote the necessary resources to it to get the job done. It is not good enough simply to have the work done off the side of someone's desk who has a dozen other job responsibilities which are given priority. There must be some evidence that the operations of the public body (and not just the work load of one person within the public body) would be significantly and unreasonably affected by responding within the initial 30 day period. In this case, the public body may well have made a case for the first

extension, but the second and third extensions would need some additional evidence that the 55 hours that it took to complete the response couldn't have been found somewhere within thirty or sixty days. It may have meant that other work would have to be postponed or reassigned, but this does not constitute "unreasonable" interference with the operations of the public body. This happens every day within government.

Fourthly, section 11 requires that where an extension is being taken, the public body must advise the Applicant "without delay" that there will be an extension. This, to me, means, at the very least, that an extension has to be taken within the first deadline period. In this case, the first extension was taken on the very day that the response was due. The second extension was taken 14 days after the response was due under the first extension. The third extension was taken three weeks after the response was due under the second extension. The records were not actually ready for disclosure until almost 45 days after the deadline created by the second extension. As noted, this was well after the Applicant sought a review of the fees assessed because of the delay.

Clearly, the extensions of time taken in this case were not only not in accordance with the requirements for such extensions, they were unreasonable and improperly administered. I have said many times that the old adage "Justice delayed is justice denied" can very easily and accurately be applied as well to access to information. Access delayed is access denied. It is a rare circumstance, in this day and age, that an applicant can wait six, eight or ten months for information he is seeking. The world works at a much faster pace than that.

CONCLUSIONS AND RECOMMENDATIONS

In all of the circumstances of this case, I **recommend** that the head of the public body waive the remainder of the fees assessed on this file and that the response be released to the Applicant immediately.

I further **recommend** that the Department of Executive and Intergovernmental Affairs review the regulations to clarify the confusion created by the wording of the fees provisions.

Finally I **recommend** that the Department of Executive and Intergovernmental Affairs consider amendments to the *Access to Information and Protection of Privacy Act* to clarify that a public body can extend the time for response only one time and further, that the extension be for no more than 30 days, allowing for further extensions only by authorization of the Information and Privacy Commissioner.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner