

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 14-081

September 5, 2014

Review File: 13-119-5

BACKGROUND

In February of 2014, the Applicant requested that I review the fee assessed with respect to his Access to Information request.

The Department of Economic Development and Transportation received the Applicant's Request for Information on August 24th, 2012. The request was for a broad range of records pertaining to a particular RFP. The public body had questions about the request and had a telephone discussion with the Applicant to clarify the request on or about September 4th. During this and subsequent discussions, the public body unsuccessfully attempted to assist the Applicant to narrow the request. On or about September 24th, after several discussions with the Applicant, the parties came to an agreement on new wording for the Request for Information which the public body felt was clear and which satisfied the Applicant that he would receive the information he required. According to the public body, parts of the revised request needed to be transferred to other departments as those other departments would have at least some of the responsive records. The Department says that for internal reasons, however, the transfer was never completed.

The responsive records were duly identified by departmental staff, though the department did not maintain a detailed explanation of the steps taken to identify the records. The Department prepared a fee estimate of \$1,012.50, based on the following calculation:

Searching for, retrieving and preparing

responsive records for disclosure

37.5 hrs @ \$27.00 per hour

Of the 37.5 hours, 17.5 hours were expended on search and retrieval and 20 hours were spend “preparing records for disclosure”.

According to the public body:

The applicant’s choice to maintain expansive wordings such as “pertaining to” greatly contributed to the search and retrieval time as in many instances this requires a line-by-line read of records. Many of the records captured in the request are in media the Government of Nunavut does not promptly file in an organized manner, such as individual handwritten notes and transitory email records. The department chose to discount the total assessed search time by 50% to ensure that we erred in the applicant’s favour.

The department assessed that 31 hours had been spent searching and retrieving records and the fee estimate was assessed using half this total, 17.5 hours.

The majority of the responsive records were electronic and, to save time and cost, the department chose to release the records electronically. They noted that:

The standard 2 minutes per page and 25 cent printing fee was not applicable as it was developed for a hard copy release format.

Instead, they established a 5 minute average time to prepare raw records for electronic release. This process includes:

labelling, identifying duplicates, converting the record to PDF, and (where appropriate) electronically redacting

Further:

For clarity, the process does not include any time spent reviewing the record to determine what exemptions would be applied.

Based on this, the public body estimated 250 records at 5 minutes per record or 20 hours of time.

DISCUSSION

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, without delay, 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 access to a record that is not a record of the personal information of the Applicant. The section provides that, other than the initial fee, fees may not be charged unless the total amount of the fees calculated in accordance with Schedule B of the regulations exceeds \$150.00. However, subsection (5) provides that:

- (5) Where the amount of the fees calculated in accordance with Schedule B, excluding the initial fee, exceeds \$150.00, the total amount of the fees is to be charged

Also relevant is subsection (6) which 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.

Schedule "B" to the regulations set out the applicable fees. The relevant portion of that schedule for the purpose of this review is the following:

For searching for and retrieving a record	\$6.75 per 1/4 hour
For preparing and handling a record for disclosure	\$6.75 per 1/4 hour
For copying a record	
- photocopies, hard copy laser print and computer printouts	\$0.25 per page
- floppy disks	\$10.00 per disc
- any other media not listed above	actual amount charged to public body

The *Access to Information and Protection of Privacy Act* clearly gives public bodies the discretion to require the payment of fees. The fees provided for in the Regulations do not amount to a full cost recovery, but do allow public bodies to recoup some of the costs associated with Requests for Information, most particularly where they involve a large number of records. As I understand it, the general policy throughout the GN is that such fees are to be applied at the first instance except in unusual circumstances. This is what the department chose, in their discretion, to do in this case. The required notice was provided. All of the information required to be included in the letter advising the Applicant of the fee estimate was included in that notice. The only question, then, is whether or not the fee schedule was properly applied.

With respect to the time spent searching and retrieving records, the public body says they have assessed only half the time that “the department assessed” it took to search for and retrieve the records. They indicate that the reason that they discounted the time for this step is because many of the requested records were “in media the Government of Nunavut does not promptly file in an organized manner”. This statement, in and of itself, is cause for concern. If the GN creates a record, it should be properly managed regardless of what media it is in. Good file management should be maintained for all government records. While it may take longer to search for paper records, that time shouldn't be extended by reason of the fact that the records have not been properly managed and stored. While I accept the estimate for the time taken to search and retrieve the records, this problem must be addressed.

With respect to the fee for “preparing and handling the record for disclosure”, I would suggest that the estimate of time provided is excessive.

It is to be noted that the wording of the regulations is less than crystal clear. The Regulations are open to a number of interpretations. Because the focus of the Act in general is to allow the public a right to access public records, in my opinion, any lack of clarity must, in the end, be interpreted in favour of the Applicant.

In this case, it does not appear that actual time records were kept. The wording of the public body's submissions appears to suggest that the time necessary to complete each step was estimated, rather than timed. This makes some sense in that the fee estimate must be given before the response is provided. It would appear that this public body (and perhaps others) have a "general application" chart which they use to estimate the time necessary to deal with information requests. In this particular case, instead of using the "standard 2 minutes per page and 25 cent printing fee" the public body estimated, instead 5 minutes per page and, since the response was provided electronically, no fee for copies. I'm not convinced that it takes more than twice as long to review an electronic record than a paper record. In fact, I would suggest that it would take less time to deal with a record electronically than it would to deal with a paper record. Dealing with an electronic record eliminates several steps in the process.

According to the public body, they estimated 5 minutes per page to label, identify duplicates, convert the records to PDF, and electronically redact the records. However, Regulation 11(6), prohibits fees "for the time spent in reviewing a record". In my opinion, at least two of the steps for which the Applicant is being charged (identifying duplicates and electronically redacting) are part of "reviewing a record", for which no charge can be applied. As noted above, I have difficulty with the accepting that it takes 5 minutes per page to prepare it for disclosure when the record is electronic and only 2 minutes when the record has to be printed from an electronic version and processed on paper. In my opinion, a paper record is more time consuming to process than is an electronic record. For this reason, I would suggest that 2 minutes per page is the appropriate calculation. This would reduce the time to "prepare raw records for electronic release" from 20 hours at \$27.00 per hour to 8.3 hours at \$27.00 per hour or \$224.00. Adding this to the 17.5 hour for searching and retrieving the records (\$472.50), this would be a total of \$696.50, instead of the fee of \$1,012.50 charged to the Applicant in this case.

CONCLUSIONS AND RECOMMENDATIONS

I am satisfied that the public body complied with all of the requirements of the *Access to Information and Protection of Privacy Act* and the regulations attached to the Act with respect to the requirement that the Applicant pay a fee for this request. That said, I do not agree with the amount of the fee assessed. The public body has simply not convinced me that it takes longer to process an electronic record and disclose it electronically than it takes to process a paper record. I therefore recommend that the fee assessed be reduced to \$696.50 and, in the event that the Applicant has already paid the full fee assessed, that he be refunded for the difference.

I further recommend that immediate steps be taken to ensure that all public records are all filed on a timely basis and managed in accordance with the GN's approved file management system. Specifically, I recommend that all records created be appropriately filed in a timely manner to as to ensure that records are not lost and that they can be easily and readily accessed as necessary.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner