

Issues

- [4] The issues in this review are:
- a. Is the fee estimate supported by the legislation?
 - b. In the circumstances of the case, should the fee be waived or reduced?

Facts

- [5] The Applicant in this case is the same as in *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII), also known as Review Report 21-196. To understand the fee estimate that gives rise to the present Review Report, it is necessary to review briefly the facts of that previous report.
- [6] The Applicant is a Government of Nunavut (GN) employee. After leaving the workplace in mid-2019, they applied broadly for information about their own employment, covering a period leading up to and following their departure from the workplace. The request was amended, expanded, and reiterated numerous times, but that is the essence of it.
- [7] Because the Applicant had a complex employment record, involving grievances, harassment complaints, leaves, re-entries, and sundry other matters, the number of responsive documents was large, adding up to more than 2000 pages. Some were from the Applicant's home department (Community and Government Services) and the rest were from the Department of Human Resources.
- [8] The GN response to the Applicant's request was slow and poor. The response was affected first by the ransomware attack on the GN in November 2019, and then by the COVID-19 pandemic starting in March 2020, which for an extended period required most GN employees to work from home. The departments were unable to meet the statutory deadlines for a response. This file has generated four previous Review Reports on a variety of matters, including an egregious breach of the Applicant's privacy: *Department of Community and Government Services (Re)*, 2021 NUIPC 8 (CanLII).

- [9]** The responsive records were released in four batches spread over nine months, in June 2020, September 2020, January 2021, and February 2021. The first, third, and fourth batches were from the Department of Human Resources. The second batch was from the Department of Community and Government Services.
- [10]** The Applicant asked me to review the redactions in all documents, which I did in Review Report 21-196. There were heavy redactions in the first batch, no redactions in the second and third batches, and light redactions in the fourth batch. I made recommendations for further disclosure in the first and fourth batches. I also recommended that the department assign the file to someone other than the ATIPP Coordinator who had originally handled the first batch. The minister accepted those recommendations and, at the time this Review Report is being written, the department is working on those revisions.
- [11]** As I wrote in Review Report 21-196, at paragraph 9, “The foregoing narrative does not even begin to capture the processing swamp into which this file sank. To describe it all would fill a book.” After a year and a half, I thought the matter was concluded. I was wrong.
- [12]** On Saturday, June 5, 2021, the Applicant and the department’s ATIPP Coordinator engaged in an exchange of ten e-mails. That exchange gave rise to three Requests for Review, all filed by e-mail by the Applicant that same night.
- [13]** The exchange starts with an e-mail from the Applicant on June 3, 2021, asking for a USB drive that had been promised by the department’s Acting ATIPP Coordinator in early 2021. The Applicant was not aware that the coordinator who had made the promise had left the position. A new person had taken over the ATIPP Coordinator role as “relief” ATIPP Coordinator.
- [14]** On June 5, 2021, the relief Coordinator replied to the Applicant’s e-mail by pointing out that the Applicant already had the USB drive. The Applicant

had even signed a confirmation of receipt in February 2021. The relief Coordinator also addressed the status of the revisions flowing from Review Report 21-196.

- [15]** The Applicant responded by asking about the status of a different request for information. The Applicant then wrote (and this is the key part for purposes of the present review):

As for your new information I am requesting that you provide in hard copy and digital copy ALL of the requests that I have made to HR. I have received some information from HR but as you are indicating HR breached ATIPP processes and procedures and deliberately withheld information from me I think it is best that we start from scratch. There may be additional information added on now due to the Privacy Commissioners recommendations to each request so to keep it organized and comprehensive I would think that it is best if you give me ALL the information for each of the requests that I already was given PLUS the additional information you have said you will provide as the Privacy Commissioner outlined breaches and recommendations from his lengthy review.

Although the Applicant's summary is perhaps not entirely accurate – there was, for example, no suggestion in Review Report 21-196 that the department “deliberately withheld Information” – the Applicant's request is clear. They want to “start from scratch”. They want a copy of everything, in digital and hard copy. This request was repeated in a later e-mail.

- [16]** The relief Coordinator responded by agreeing to provide all four batches on a USB drive, including revisions made flowing from Review Report 21-196. The relief Coordinator added that if the Applicant wanted a new USB drive, the Applicant would have to pay for it, as provided for in section 6(p) of Schedule B to the ATIPP Regulations.
- [17]** The relief Coordinator went on to say that hard copies could also be made available, but at the rate of \$0.25 per page provided for in the Regulations. As per section 13(1)(b) of the ATIPP Regulations, a payment

of at least 50% of the estimate would be required, with the balance due upon delivery.

- [18]** The Applicant responded “I will not be paying anything.” They said they would drop off a USB drive for the digital copy, “but I will not be paying for hard copies.” The Applicant added

HR has made a mess of this situation from the beginning. The Privacy Commissioner gave warning after warning as well. Under these pretenses and other negative pretenses at the hands of HR it is most definitely reasonable to request this information in its entirety in hard copy and digital without charge. It is the least that HR.

Let me know if I need to submit my review to the Privacy Commissioner and if needed I will do so.

- [19]** After several more e-mails back and forth, the exchange concluded. Over the next few hours, the Applicant filed three Requests for Review with my office. I informed the Applicant that the second request was outside my jurisdiction, and the third was broad enough to include the first. Therefore the only Request for Review that I am addressing in this Review Report is the third: a challenge to the proposed fee.

Law

- [20]** The right of access to a record is subject to the payment of any applicable fee: ATIPPA, s 5(3).
- [21]** The head of public body may require the payment of a fee: ATIPPA, s 50(1). This is a permissive requirement. Charging a fee is not mandatory.
- [22]** Before charging a fee for services, the public body must give the applicant an estimate of the total fee before providing the services: ATIPPA, s 50(2). This is a mandatory requirement. By receiving an estimate, an applicant has the opportunity to consider what to do before a fee is incurred.
- [23]** The ATIPPA Regulations, ss 9-14, spell out in more detail the allowable fees. Since the Applicant and the relief Coordinator appear to have

reached an understanding on the USB drive, the only fee at issue in the present case is printing charges for the hard copies requested by the Applicant. Schedule B, item 6, sets out the maximum fee that can be charged for “photocopies, hard copy laser print and computer printouts.” That amount is \$0.25 per page.

- [24] A fee may be waived “if, in the opinion of the head, the applicant cannot afford the payment or, for any other reason, it is fair to excuse payment”: ATIPP Regulations, s 14.

Analysis

- [25] The only issue in this case is whether I should recommend that the fee for printing hard copies be waived or reduced.
- [26] The Applicant advances two arguments in favour of a fee waiver. The first is that the department has not previously charged a fee on this file, so a precedent has been set and the department cannot now change its mind about charging a fee. The second (I am paraphrasing) is that the GN has handled the file so badly that it should not now, in good conscience, be able to charge any fee.
- [27] The department, in reply, advances the argument that the Request for Review is premature, because a fee estimate has not yet been provided.
- [28] I will address the department’s argument first. It is true that a final fee estimate has not been provided to the Applicant but that is, in my view, a technicality. The department told the Applicant the per-page cost, and stated that 50% payment was required before printing would commence. Everybody knew the approximate number of pages. The department could have calculated the precise number of pages – and therefore the precise fee – at any time. It is only because of the department’s failure to sequentially number the pages (standard practice in ATIPP processing) that the precise number of pages was not immediately known. If I accept the department’s argument, the review process will stop, only to be re-started from the beginning as soon as the department does provide the

final estimate. Given the processing history of this file, I decline to accept the department's argument.

- [29] That brings us back to the basic question: Should the department charge the Applicant a fee for the hard copies?
- [30] The fee for printing proposed by the Department of Human Resources (\$0.25 per page) is in accordance with the regulations: Schedule B, item 6.
- [31] We do not know precisely how many pages there are, but it is possible to make a good estimate. I estimate the four batches together total a little over 2000 pages, so the printing fee of \$0.25 per page will produce a maximum fee of about \$500.
- [32] The department may waive a fee: ATIPP regulations, s 14. Sometimes a fee waiver is sought on the grounds of public interest: for example, *Review Report 17-126 (Re), 2017 NUIPC 13 (CanLII)*. More often, a fee waiver is sought on the grounds that the public body has fumbled some aspect of claim processing and therefore it is fair to right the balance by waiving the fee: for example, *Review Report 21-182 (Re), 2021 NUIPC 1 (CanLII)*.
- [33] The department also has the option of reducing the fee. Although the fees in Schedule B of the ATIPP Regulations are usually treated as fixed fees, they are in fact maximum fees. A public body always has the option of charging less than the maximum.
- [34] The charging of a fee has been part of the ATIPPA from its inception. The fees are not meant to be a complete indemnity for the GN, but they are a recognition that processing ATIPPA applications has a cost, sometimes a very substantial cost, in staff time and production costs. Applicants are expected to share some of that cost. The fees that can be charged to an Applicant seeking their own personal information are restricted.
- [35] The charging of a fee also has a secondary function of regulating applicant behaviour. If there were no fees at all, applicants would have little

incentive to craft their applications with care and limit their scope in terms of number, time, subject-matter, location, and public body.

- [36]** On the other hand, trying to regulate behaviour through fees can be a disincentive to those with limited funds, while being insignificant for better-off applicants. That is why the regulations stipulate that fees may be waived where an applicant is unable to pay, or in any other case where it is fair to do so.
- [37]** The unusual feature of this case is that the Applicant's request for a complete set of hard copies was made many months after the completion of disclosure. The four batches were released in June 2020, September 2020, January 2021, and February 2021. In each case, the Applicant received digital copies.
- [38]** The department is still working on the revisions flowing from Review Report 21-196. When those revisions are completed, the department will of course send the revisions to the Applicant. The department's relief ATIPP Coordinator agreed to re-release digitally all four batches to the Applicant with the revisions, even though it is only the first and fourth batches that need revision.
- [39]** But the Applicant wants more than that. In addition to the digital copy, the Applicant wants hard copies of all four batches. To be more precise: the Applicant wants hard copies of all four batches at no charge.
- [40]** The Applicant is within their rights to ask for hard copies. I have concluded, however, that the department is also within its rights to charge a fee.
- [41]** The Applicant argues that they have not previously been charged a fee, which is a precedent that the department is obliged to follow. This is a misunderstanding of what "precedent" is and how it works. The fact that the GN has previously waived processing fees on this file does not bind the GN to continue to do so.

- [42] The legal basis for waiving a fee is in s 14 of the ATIPP Regulations, which says that a fee may be waived “if, in the opinion of the head, the applicant cannot afford the payment or, for any other reason, it is fair to excuse payment”.
- [43] The Applicant has not explicitly argued that they cannot afford the payment. Their argument is based on fairness. To repeat the Applicant’s words to the relief ATIPP Coordinator, “HR has made a mess of this situation from the beginning.”
- [44] There is no question that the Applicant’s request has at times been poorly handled by the GN: *Department of Community and Government Services (Re)*, 2020 NUIPC 11 (CanLII); *Department of Community and Government Services (Re)*, 2021 NUIPC 8 (CanLII); *Department of Human Resources (Re)*, 2021 NUIPC 15 (CanLII). Disclosure was delayed by the November 2019 ransomware attack, and by the COVID-19 shutdowns of GN offices. The GN did not come anywhere close to meeting the statutory deadlines for disclosure. All of this fumbling probably explains why the Applicant has not previously been charged a fee.
- [45] I do not want to paint too broad a brush. At least six different ATIPP Coordinators in three departments have handled some aspect of the file since 2019. Some of them put in substantial time and effort and did their best to deal with a complex file.
- [46] The poor handling of the Applicant’s file has certainly added to the Applicant’s sense of grievance, but it does not, in my view, support a perpetual exemption from fees. The Applicant’s ATIPP request has produced over 2000 pages of disclosure. It is not the largest file that the Office of the Information and Privacy Commissioner has handled since 1999, but it is probably in the top ten. At this late stage in a large and complex file, it is not reasonable for the Applicant to insist that the GN “start from scratch” and provide hard copies of all documents at no charge.

- [47] Providing digital copies are not a problem. Modern technology can digitally copy 2000 pages in seconds, at essentially zero marginal cost. The amount of staff time required is minimal. Even a large digital file can be transferred over the internet at essentially no cost. With Nunavut's slow and expensive internet, however, transferring large files via USB drive is often the better course. The cost of a USB drive is small. In this case the Applicant says they will supply a USB drive to the department; even if they do not, I suggest to the department that they provide a new one to the Applicant without charging for it.
- [48] Hard copies are a different matter. There is a measurable per-page cost to printing, in terms of paper, ink, and other printing supplies.
- [49] In my view, the department is within its rights to ask for a fee before hard copies are provided. I decline to recommend that the fee for hard copies be waived or reduced.
- [50] The department still has options in front of it. I am not recommending that the fee must be waived, but neither am I recommending that the fee must be charged. The department can choose, at any time, to waive the fee. They can also reduce the fee, keeping in mind that the fees allowed in Schedule B of the ATIPP Regulations are maximums, not minimums.

Conclusion

- [51] The fee proposed by the department is supported by the legislation.
- [52] In the circumstances of the case, the department need not waive or reduce the fee.

Recommendations

- [53] I make no recommendation to waive or reduce the fee proposed by the Department of Human Resources.

Graham Steele

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