

Issues

- [4] The issues in this review are:
- a. In the circumstances of the case, should the Applicant be excused payment, in whole or in part, of any fee?
 - b. Is the fee estimate reasonable?

Facts

[5] The Applicant is a former employee of the GN. They filed an ATIPP request for certain records that are, in the Applicant's view, relevant to a harassment complaint they filed against their former supervisors. According to the Applicant, an independent lawyer has been appointed to investigate and report on the harassment complaint. The Applicant says the investigator's report will be relevant to a WSCC claim filed by the Applicant, and also to a potential lawsuit against the GN.

[6] The original ATIPP request was filed in December 2022. The request focussed on (I am paraphrasing) the overtime hours claimed by the Senior Health Practitioner (SHP) in each of Nunavut's communities except Iqaluit, and the number of overtime hours that were denied by each SHP's supervisor. A time period in 2022 was specified. It is relevant to note that the Applicant was, at one time, an SHP in one of Nunavut's communities.

[7] In Health's written acknowledgement, the request is referred to as "huge". There was then some conversation between the Applicant and Health about the scope of the request.

[8] On February 3, 2023, Health sent to the Applicant a fee estimate of \$30,375. That estimate was based on 150 days of staff time, at 7.5 hours per day, at the maximum allowable rate of \$27 per hour. Health said that the estimate was conservative, but acknowledged that, since there was no precedent for this sort of request ("a unique ask, never before considered") the actual fees might vary up or down.

[9] There was then further conversation about the scope of the request. As a result, the Applicant revised their request. Health sent a revised fee estimate of \$4,374. That estimate was based on 162 hours of staff time.

[10] On February 18, 2023, the Applicant filed a request for review with this office.

[11] After the review was underway, the Applicant further revised their request to reduce the scope of the search.

[12] The final fee estimate from Health is in a letter dated March 2, 2023. The estimate is 102 hours of staff time to search for and retrieve the requested information at the maximum allowable rate of \$27 per hour. The total is \$2,754. That is the amount at issue in this Review Report.

Law

[13] The right of access to a record is subject to the payment of any applicable fee: ATIPPA, section 5(3).

[14] The head of a public body may require the payment of a fee: ATIPPA, section 50(1). This is a permissive requirement. Charging a fee is not mandatory.

[15] Before charging a fee for services, the public body must give the applicant an estimate of the total fee before providing the services: ATIPPA, section 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.

[16] The ATIPPA Regulations, in sections 9 to 14 and Schedule B, spell out in more detail the allowable fees. Although the fees in Schedule B of the ATIPPA 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.

[17] 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": ATIPPA Regulations, section 14. A fee may also be reduced. This is implicit in section 14's reference to excusing "part" of a fee.

Analysis

[18] The Applicant has requested certain records from the GN and is, subject to any applicable exemptions, entitled to receive them. The only question in this case is whether the Applicant should first pay a fee.

[19] The fee question has two parts. Should all fees be waived? If not, is Health's fee estimate reasonable?

Fee waiver

[20] In *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraphs 37 to 39, I discussed the purposes of ATIPPA fees:

[37] 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.

[38] 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.

[39] On the other hand, fees are a blunt instrument to share cost or regulate behaviour. It is a disincentive to those with limited funds, while being insignificant for better-off applicants. The total collected in fees is a drop in the budgetary bucket for the GN, but can be enough to discourage an individual applicant.

[21] In the present case, the Applicant is not seeking their own personal information. The starting point, then, is that the Applicant should pay a fee.

[22] The Applicant seeks a fee waiver on the grounds that they cannot afford the payment. As noted in the Law section above, 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".

[23] The Applicant has identified to me and to Health what they say is their sole, modest source of income. Health has not questioned the truth of this statement, nor do I have any reason to question it. I accept as a fact that payment of the estimated fee, or indeed any fee, would be burdensome for the Applicant.

[24] That is not, however, the end of the matter. The wording of section 14 suggests a residual discretion in the public body to refuse a fee waiver, even if the Applicant has established they cannot afford the fee. If the waiver were intended to be automatic, the regulation would say “shall excuse” instead of “may excuse”: *Legislation Act, S.Nu. 2020, c. 15, section 1(5)*.

[25] Health has exercised its discretion, and has decided not to waive the fee. Their decision appears to be based on three factors, which are mentioned in different pieces of correspondence:

- a. The request, even with the narrowed scope, will still require a significant amount of staff time.
- b. Retrieving the records, even with the narrowed scope, will interfere with Health’s operations in community health centres.
- c. This is the fourth ATIPP request from the same Applicant within a relatively short period. The other requests involved a substantial number of records (439 pages, 133 pages, and 237 pages). No fees were charged for these other requests.

[26] When it comes to the exercise of discretion in a fee waiver case, my role, as I conceive it, is to ensure that the discretion is exercised and that relevant factors have been considered. This is not a case in which the deputy minister has failed to address a key consideration: see, for example, *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraph 40.

[27] The considerations taken into account by Health are relevant and I cannot say that the deputy minister’s exercise of discretion is unreasonable. For that reason, I decline to recommend that the fee be waived. I do, however, have two additional comments.

[28] First, unreasonable interference with a public body's operations is a relevant consideration, but not quite in the way cited by Health. In this case, I think Health's confusion arises from the fact that the Applicant's request is at least partly a request for information, rather than a request for records. Answering the request will require retrieving some records and creating others.

[29] Section 7(2) of the ATIPPA stipulates the conditions in which a public body must create a record for an applicant: see, for example, *Department of Health (Re)*, 2022 NUIPC 7 (CanLII). One of those conditions is that "creating the record would not unreasonably interfere with the operations of the public body". When the conditions in section 7(2) are met, the public body does not have to create the records at all, regardless of whether the Applicant is willing to pay a fee.

[30] Second, there is another consideration, not mentioned by Health, that I think tips the balance against the Applicant.

[31] Normally the purpose of an ATIPP request is not relevant, either for a public body or for this office on review. However, when the issue is the fairness of a fee, it is permissible for the public body and this office to assess all relevant circumstances, including the purpose of the request: *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraphs 42 to 44.

[32] The purpose of the request, as explained to me by the Applicant, is to provide evidence to the independent lawyer who is investigating the Applicant's harassment complaint. But there is no indication the investigator has asked for this information or will find it useful. If the independent investigator wants this information, they can get it from Health directly. The investigator can craft their request to be precisely relevant to their inquiries, without going through ATIPP and at no cost to the Applicant.

[33] There is a real risk here that Health will go through the time-consuming process of retrieving the records requested by the Applicant and compiling them into intelligible form, only to find that the investigator is uninterested in them. The Applicant acknowledges that the requested records may or may not show evidence of discrimination. Given the size of the request, and the impact it would

have on Health's operations in the communities, the risk that the records will be of little or no probative value should not be borne entirely by Health. The Applicant should share in the cost.

Reasonableness of the fee estimate

[34] I have concluded that Health is not required to waive any fee. There remains the question whether the fee estimate is reasonable.

[35] The final fee estimate from Health is for 102 hours of staff time to search for and retrieve the requested information, with 17 different staff members involved for an average of six hours each, at the maximum allowable rate of \$27 per hour. The total is \$2,754.

[36] The Applicant says that they would not need six hours to find the requested records in a given community health centre, but acknowledges that may be because they (the Applicant) knows exactly what they are looking for.

[37] I have no basis on which to conclude that Health's fee estimate is unreasonable. I take into account the fact that the GN still uses paper records in many of its HR processes, to a degree surprising in this digital age; that the records to be retrieved are in many different communities; that some new records will have to be created in order to make sense of the paper records; and that Health's ATIPP coordinator will, in the circumstances, have to play a time-consuming coordination function, given the number of communities and staff members involved in the search.

Conclusion

[38] Health has, in deciding not to waive all fees, exercised its discretion reasonably.

[39] The fee estimate in Health's letter of March 2, 2023, is reasonable.

Recommendations

[40] I decline to recommend that payment of any fee be waived. Health may choose to waive the fee, but is not required to do so.

[41] I decline to recommend that the fee estimate of March 2, 2023, be reduced. Health may choose to reduce the fee, but is not required to do so.

Graham Steele

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