



## Issues

- [4] The issues in this review are:
- a. Is the fee estimate reasonable?
  - b. If so, should CGS nevertheless waive the fee?

## Facts

[5] On January 4, 2023, the Applicant filed an ATIPP request with the Department of Community and Government Services. They paid the \$25 application fee the next day. The request was for (I am paraphrasing) all work orders in 2022 from any one of Nunavut's schools, and any email correspondence between CGS and the schools about the work orders.

[6] It is my practice, when writing decisions, not to give identifying information about an ATIPP applicant unless it is necessary to an understanding of the decision. In this case, it is relevant to say that the Applicant is a journalist.

[7] There was some communication between CGS and the Applicant about the scope of the request. On January 23, 2023, CGS disclosed to the Applicant a spreadsheet giving details of the work orders, amounting to 4,198 in all. That should, said CGS, satisfy the first part of the request.

[8] Because there were so many work orders, CGS said there would be a correspondingly large number of emails. There was further communication about whether this second part of the request could be reduced or eliminated.

[9] The Applicant responded by narrowing the request to emails about three specific categories of repair. There were 133 work orders in these categories.

[10] CGS responded with a fee estimate of \$1,496.25. This amount was calculated as follows: 332.5 pages x 10 minutes per page / 60 minutes per hour x \$27 per hour. In the Analysis section below, I will have more to say about this calculation.

[11] The Applicant requested that the fee be waived. CGS declined to do so.

## Law

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

[13] 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.

[14] 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.

[15] The ATIPPA Regulations, in sections 9 to 14 and Schedule B, spell out in more detail the maximum allowable fees, including \$6.75 per quarter-hour (or \$27 per hour) for:

- a. Searching for and retrieving a record (Item 1).
- b. Reviewing, preparing and handling a record for disclosure (Item 3).

The Regulations were amended in 2015, probably in response to the former Commissioner's decision in *Review Report 14-081 (Re)*, 2014 NUIPC 11 (CanLII), to clarify that fees may be charged for reviewing records for the purpose of redaction.

[16] In *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraphs 37 to 39, I discussed the purposes of ATIPP 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.

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

**[18]** In the same case, at paragraphs 47 to 57, I considered the role of journalists in holding the GN to account, and why they deserve special consideration when it comes to a request for a fee waiver. I will not repeat the whole analysis here, but I adopt all of it for purposes of this decision. I concluded my analysis as follows:

I do not mean to suggest that reporters should always be excused the payment of fees. If the Legislative Assembly had intended reporters to have an automatic exemption from fees, it could have said so in the ATIPPA. Fees do serve the function, albeit bluntly, of sharing the cost of the ATIPPA system and of regulating applicant behaviour. Public bodies should, however, always keep in mind "the vital importance of the media and its special role in society" and the fact that reporters are "the eyes and ears of the public".

## **Analysis**

**[19]** 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, and if so, how much that fee should be.

**[20]** The fee question has two parts: Is the fee estimate reasonable? And if so, should CGS nevertheless waive it?

### *Reasonableness of the fee estimate*

**[21]** CGS's fee estimate is derived from the following elements and calculations:

- a. 133 service requests that meet the criteria stipulated by the Applicant. (This is a known number.)
- b. Average of 5 emails per service request. (Estimate)
- c. 2 emails per standard page. (Estimate)
- d.  $133 \times 5 / 2 = 332.5$  pages of records. (Calculation)
- e. 10 minutes per page for search, retrieval, review, and redaction (Estimate)
- f.  $332.5 \text{ pages} \times 10 \text{ minutes per page} = 3325 \text{ minutes of work}$ . (Calculation)
- g. \$27 per hour. (Maximum allowable rate per regulations)
- h. 60 minutes in an hour. (Definition)
- i.  $3325 \times 27 / 60 = \$1,496.25$  (Calculation)

Of these items, the Applicant takes issue mainly with Item (e), and to a lesser extent with Item (g).

**[22]** Before discussing Item (e), I need to take a brief detour into the issue of records management.

### *Records management*

**[23]** There is an implicit premise in the ATIPPA that a public body's records must be reasonably well-organized. If a public body does not have a good records-management system, an ATIPP Applicant should not have to pay the price.

**[24]** I can illustrate the principle with a hypothetical example. Suppose a public body has hard-copy records well-organized in ten filing cabinets. If a specific file is needed, it might take one person under one minute to find it. But if the public body has its records filed willy-nilly, a diligent search might require several people several hours, because they would have to search every file in every filing cabinet. An ATIPP applicant should not have to pay for all that extra work, even if the work is necessary to find the file.

**[25]** In this case, CGS says that responsive records are not held in any one place. It acknowledges that it would be ideal if all communications about school repairs were in its asset-management software (Asset Planner) but that is not the way things actually work. Each school has a principal, and each school has one or more “school maintainers” who are resident in the community. There are also three regional managers. The responsive e-mail records are most likely to be between the principals and their local school maintainers. The regional managers may or may not be involved in the e-mails.

**[26]** CGS says that there are 133 work orders that fit the Applicant’s criteria. To do a diligent search, says CGS, the e-mail records of all principals, school maintainers, and regional managers involved in these 133 work orders would have to be searched. Some of those people may have left the GN, which will require that someone else obtain and search their e-mail archive. In the course of a year, any one of these people may have gone on leave, in which case someone else will have filled in for them. That is the basis for CGS’s estimate that a diligent search could involve the e-mail records of anywhere from 23 to 35 people.

**[27]** I accept CGS’s position that this decentralized method of dealing with school-repair work orders is a practical necessity in Nunavut. It is not a sign of disorganization. The Asset Planner software captures a good deal of information about the work orders, and the Applicant already has much of that information in a spreadsheet. But Asset Planner does not capture all the communications between individuals involved in the work orders, and it is not reasonable to expect that it should.

*Estimate of time needed*

**[28]** I now return to the key issue in CGS’s calculation of the fee: the estimate of 10 minutes per page to search, retrieve, review and redact the responsive e-mails.

**[29]** In its initial explanation of the 10-minute estimate, CGS cites the ATIPP Manual. The ATIPP Manual is an internal GN document. It has no legal status but it provides useful guidance. The ATIPP Manual says that a good starting point for a fee estimate is two minutes per page, which might, depending on the

circumstances, be varied down to one minute per page or up to three minutes per page. The Applicant and I were puzzled at how CGS had jumped from 1-3 minutes per page to 10 minutes per page.

**[30]** I will save pages of explanation by saying that the reference to the ATIPP Manual turned out to be a red herring. The true basis of CGS's calculation is simply its estimate that responding to the Applicant's request will require 55 person-hours of work.

**[31]** What was the basis for that estimate? The ATIPP Coordinator spent 1.5 days (at 7.5 hours per day, or approximately 11 hours) responding to the first part of the Applicant's request. They then took that known figure and estimated that responding to the second part would require four times as much work (i.e. 44 hours). The total is 55 hours. Using its estimate of 665 responsive e-mails and two e-mails per page, CGS then worked backwards to produce the figure of 10 minutes per page (actually 9.925 minutes per page, which it rounded up to 10).

**[32]** It would have been simpler if CGS had just calculated 55 hours at \$27 per hour for a total of \$1,485. The small difference between that amount and the estimate produced by CGS (\$1,496.25) is due to the rounding introduced by CGS.

**[33]** Is 55 hours a reasonable estimate of the time needed?

**[34]** In my view, the 11 hours already spent on responding to the first part of the Applicant's request cannot now form part of the fee estimate. That work is done and disclosure has been made. As noted in paragraph 14 of the Law section above, the ATIPP Act does not allow for a retroactive fee assessment.

**[35]** The remaining 44 hours is a very rough guess by CGS. I can quibble with bits and pieces of CGS's estimate, but I cannot say the overall estimate is outside the bounds of reasonableness.

**[36]** For example, I do not believe it likely that the ATIPP Coordinator will have to spend much time reviewing the e-mails for purposes of redaction. E-mails about school repairs are not likely to engage section 23 (unwarranted invasion of personal privacy) or any of the other exemptions in the ATIPPA.

**[37]** However, for the reasons given in the “records management” section above, I do accept that significant time will be required to search for and retrieve the e-mail records. We know there are 133 work orders that fit the Applicant’s criteria. CGS’s estimate of the average number of e-mails per work order is reasonable. CGS’s estimate of the number of people involved is also reasonable. Because of the number of people involved, the ATIPP Coordinator will have to play a time-consuming coordination role. The results will have to be collated and reviewed.

**[38]** It is conceivable that CGS could spend less than 44 person-hours on the request, but it is, in my view, equally conceivable that CGS could spend more than 44 person-hours. I therefore have no basis on which to vary the time estimate.

#### *Hourly rate*

**[39]** Item (g) in CGS’s calculation (paragraph 21 above) is the hourly rate stipulated in the ATIPP Regulations. The Applicant points out correctly that this is a maximum rate. A public body is, of course, not required to charge the maximum. It can charge less.

**[40]** The ATIPP Regulations have been in place, with few changes, since Nunavut was created in 1999. As far as I can tell, the \$27 hourly rate has been in place since then. It is outdated and now represents only a fraction of the hourly cost of most GN staff. As long as a public body has turned its mind to the fact that \$27 per hour is the maximum, and not a fixed rate, I will generally not second-guess the public body’s decision to charge the maximum.

#### *Reasonableness of the fee estimate – conclusion*

**[41]** CGS’s fee estimate should be reduced to reflect 44 hours of work instead of 55 hours. A reasonable fee estimate is therefore \$1,188, calculated as 44 hours at \$27 per hour. CGS may also wish to consider deducting the \$25 application fee, as some public bodies do.



### *Fee waiver*

[42] The Applicant seeks to be excused from paying any fee. The test for a fee waiver in Nunavut is whether it is “fair”: ATIPP Regulations, section 14.

[43] The word “fair” is vague. We have to look to previous decisions for guidance on what is fair. The most relevant previous decision is *Department of Health (Re)*, 2021 NUIPC 27 (CanLII), in which I considered the question of fee waivers for journalists. I will refer to this case as the “Iqaluit water” case. My recommendation in the Iqaluit water case was that the fee should be waived. The Department of Health accepted my recommendation and waived the fee.

[44] As I wrote in the Iqaluit water case, there is not an automatic fee waiver for journalists. A request from a journalist for a fee waiver should, however, receive the most careful consideration because of journalists’ role as “the eyes and ears of the public”.

[45] There cannot be any question that the state of Nunavut’s infrastructure is a matter of substantial public interest. School buildings are present in every community and are an important part of the Nunavut’s social and physical fabric. There have been numerous recent issues with the physical condition of school buildings. CGS wisely does not dispute the public importance of the topic.

[46] Rather, CGS’s refusal to waive or reduce the fee is based mostly on its belief that the second part of the Applicant’s request is not as well-designed as it could be. CGS worries that it could do the work to retrieve the requested records, only to find that the records are not all that helpful to the Applicant. Since the records search is going to be disruptive at the community level, CGS wants to be sure the search is likely to produce meaningful results. (All of this paragraph is my paraphrase of CGS’s arguments, not their actual words.)

[47] Generally, it is not relevant for a public body, or this office on review, to know or speculate why an applicant has made an ATIPP request: *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraph 42. It is also unwise for a public body to judge whether an ATIPP request is worthy or reasonable: paragraph 43.

**[48]** When a fee waiver is requested, however, it is permissible for the public body to assess all relevant circumstances, including the purpose of the request: paragraph 44.

**[49]** The relevant circumstances include, in my view, some pertinent differences between the Iqaluit water case and the present case:

- a. In the Iqaluit water case, the public body failed to address all relevant factors when considering a fee waiver. In this case, the public body has not missed any relevant factor.
- b. In the Iqaluit water case, every e-mail was directly relevant to answering the journalist's core question (what was happening inside Health between the first public complaints about water quality and the declaration of a public-health emergency?). In this case, at least some of the e-mails are likely to be routine and of little direct relevance to the journalist's core question about the state of Nunavut's schools.
- c. In the Iqaluit water case, the fee in issue was only \$295. In this case, the fee in issue is \$1,188.
- d. In the Iqaluit water case, the request was for e-mails in a limited period (ten days). In this case, the responsive records potentially cover a calendar year.
- e. In the Iqaluit water case, the request was for e-mails involving only four people (or at least that is the way the request was interpreted), all of whom were based in Health's headquarters in Iqaluit. In this case, the responsive records are for e-mails involving anywhere from 23 to 35 people, distributed around the territory.

**[50]** In my view, these differences are, collectively, sufficient to distinguish the two cases. The request in the Iqaluit water case was more tightly focused than in the present case. There is merit in CGS's argument that the second part of the

Applicant's request is likely to produce some records that are of little interest to the Applicant or to the public.

**[51]** When it comes to the exercise of discretion in a fee waiver case, my role is to ensure that the discretion is exercised and that all relevant factors have been considered. The considerations taken into account by CGS are relevant, nothing relevant has been missed, 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.

*A final comment*

**[52]** Both the Applicant and CGS have communicated well on this file. CGS responded to the first part of the request quickly, providing a substantial amount of information to the Applicant. CGS then continued to work with the Applicant on the second part of the request. Both the Applicant and CGS submitted thoughtful and timely written submissions for this review. I commend both for their work so far and encourage them to continue to work towards a mutually-satisfactory outcome.

**Conclusion**

**[53]** The fee estimate is reasonable if it is reduced to \$1,188.

**[54]** The fee estimate need not be waived.

**Recommendations**

**[55]** I recommend that the fee estimate be reduced to \$1,188. CGS may choose to further reduce the fee, but it is not required to do so.

**[56]** I decline to recommend that the Applicant be excused payment of any fee. CGS may choose to waive the fee, but it is not required to do so.

Graham Steele

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