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**Nunavut Information and Privacy Commissioner**  
**Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina**  
**Commissaire à l’information et à la protection de la vie privée du Nunavut**

## Commissioner’s Final Report

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### Summary

**[1]** The Applicant, a journalist, requested certain records from the Department of Community and Government Services. CGS provided a fee estimate of \$5550. After several attempts to narrow the request, the fee estimate was reduced to \$248. The Applicant requested that the fee be waived entirely. CGS declined. The Applicant requested review. The Commissioner finds the fee estimate is reasonable and that CGS is not required to waive the fee.

### Nature of Review and Jurisdiction

**[2]** This is a review of a fee estimate provided to the Applicant by the Department of Community and Government Services (CGS). The request was filed under section 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I conducted my review under section 31(1).

**[3]** I have jurisdiction over CGS: ATIPPA, section 2, definition of “public body”.

## **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 May 8, 2024, the Applicant filed an ATIPP request with the Department of Community and Government Services. They paid the \$25 application fee. The request was for (I am paraphrasing) all internal e-mails to or from a specific GN employee during a specific 15-day period. The request included attachments to the e-mails.

**[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]** CGS's preliminary search suggested there would be 4111 pages of responsive records. On May 27, CGS provided a fee estimate of \$5,549.85.

**[8]** Over the next week, the Applicant and CGS went back and forth several times, progressively narrowing the scope of the request so there would be fewer responsive records. The fee estimate was correspondingly reduced, but was still too high for the Applicant.

**[9]** By June 4, the Applicant and CGS had reached an impasse. CGS said that the reduced scope, which was for all emails between three GN employees over two days, would yield 184 pages of records. The fee estimate was \$248.40. The Applicant asked if the fee could be waived entirely if the scope of the request were reduced to a single day. CGS said that, given the substantial time that had already been devoted to the file, it would not further reduce the fee estimate.

**[10]** The next day, the Applicant filed a request for review. Both the Applicant and CGS have made a written submission.

## Law

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

**[12]** 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.

**[13]** If a public body intends to charge a fee, the public body must give the applicant an estimate of the total fee before providing services: ATIPPA, section 50(2). This is a mandatory requirement. By receiving an estimate, an applicant has the opportunity to consider, before a fee is incurred, whether and how to proceed.

**[14]** 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.

**[15]** 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.

[16] 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.

[17] In the same case, 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: *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraphs 47 to 57. 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".

[18] Those are the rules. I now turn to the question of whether CGS correctly followed them.

## **Analysis**

**[19]** CGS has kept meticulous records in this case. They have carefully tracked time spent and steps taken. It is the best file documentation I have seen on any fee review file. I commend CGS's work on this file to the attention of other public bodies.

**[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. Number of pages of records (184, a known number).
- b. Multiplied by three minutes per page for reviewing, preparing, and handling records (an estimate).
- c. Divided by 60 minutes per hour (definition).
- d. Multiplied by \$27 per hour (statutory maximum rate).

This calculation produces the fee estimate of \$248.40.

**[22]** One of the variables in the fee calculation is how much time will be needed to retrieve the responsive records and then review them for possible redaction. The unit of measurement is "minutes per page".

**[23]** In its written submission, CGS cites the ATIPP Manual to support its choice of three minutes per page. The ATIPP Manual is an internal GN document. It has no legal status, but it provides useful guidance for staff working on ATIPP files.

**[24]** The ATIPP Manual says that a good starting point for a fee estimate is two minutes per page. That can be varied down to one minute per page or up to three minutes per page, depending on circumstances. One relevant circumstance mentioned in the ATIPP Manual is having a relatively less-experienced employee

working on the file, which might justify the choice of three minutes per page. CGS says, and I accept, that the employee working on this file falls into that category.

[25] I find the choice of three minutes per page is reasonable. It could be less, but it does not have to be less.

[26] As I noted in *Community and Government Services (Re)*, 2023 NUIPC 8 (CanLII) at paragraph 40, the \$27 per hour rate is the maximum rate, not a fixed rate. In this case, CGS appears to have taken it as a fixed rate. I would prefer if public bodies would at least consider charging a lower hourly rate. At the same time, the \$27 per hour rate has been in place for a very long time, and in 2024 it is nowhere close to the actual hourly cost of a GN employee.

[27] I find the choice of \$27 per hour is reasonable. It could be less, but it does not have to be less.

[28] In summary, I do not see any error in CGS's calculation of the fee estimate. Where choices have been made, CGS's choices are reasonable.

#### *Fee waiver: Introduction*

[29] The Applicant seeks to be excused from paying any fee. That is the real issue in this case.

[30] As noted in the Law section above, the test for a fee waiver is (a) if the applicant cannot afford it, or (b) if for any other reason it is fair to excuse payment. A fee can be waived entirely, or reduced.

[31] The word "fair" is vague. The ATIPPA itself offers no guidance on its meaning. We have to look to previous decisions for guidance on what is fair.

#### *Fee waiver: Precedents*

[32] The most relevant previous decisions about fee waivers are *Department of Health (Re)*, 2021 NUIPC 27 (CanLII), which I will refer to as "the Iqaluit water case"; and *Department of Community and Government Services (Re)*, 2023 NUIPC 8 (CanLII), which I will refer to as "the Nunavut school repairs case".

**[33]** In the Iqaluit water case, my recommendation was that the fee should be waived.

**[34]** I wrote that a request from a journalist for a fee waiver should receive the most careful consideration because of journalists' role as "the eyes and ears of the public". Water-quality reports from a public water utility were, by their nature, a matter of great public interest. Health accepted my recommendation and waived the fee.

**[35]** In the Nunavut school repairs case, I did not recommend that the fee should be waived.

**[36]** The request for records was from a journalist, so (as in the Iqaluit water case) the request for fee waiver deserved the most careful consideration. The condition of Nunavut schools was obviously a matter of public interest. There were, however, a number of relevant factual differences between the two cases: 2023 NUIPC 8 (CanLII) at paragraph 49. The differences were, collectively, sufficient to distinguish the two cases: 2023 NUIPC 8 (CanLII) at paragraph 50.

**[37]** Among other things, the request in the Nunavut school repairs case was considerably broader, and was likely to produce many records of little interest to the Applicant or the public. In addition, the nature of the requested records was such that it would likely take considerable time and effort by CGS to search for and retrieve all responsive records.

*Fee waiver: Applicant's position*

**[38]** The Applicant advances several arguments to support a fee waiver.

**[39]** The first argument is that journalists and media outlets are frequent users of ATIPP, and the reporting based on ATIPP disclosure is an important way in which the GN is held to account for its decisions and actions. Media outlets and individual journalists do not have a lot of money to pay for ATIPP fees. Any fees are likely to discourage requests and weaken the GN's accountability.

**[40]** The second argument is that the GN is inconsistent in charging fees. A recent ATIPP request to the Department of Health, which was similarly worded

and which produced a similar number of records, did not attract any additional fees. Another recent ATIPP request to CGS resulted in disclosure of 261 pages of records, and no additional fee was charged. The Applicant argues that this inconsistency between departments (and sometimes between different requests to the same department) is unfair and may discourage future requests. The Applicant writes: “I’m at a loss to understand how CGS is deciding when or when not to apply a surcharge to information requests”.

**[41]** The third argument is that CGS has recently adopted a new and inflexible policy that fees will be charged in every case in which they are supported by the Act and regulations. The Applicant points to the following paragraph from CGS’s submission, written by the deputy minister:

In accordance with the legislation, my department’s ATIPP Coordinators have been instructed to collect fees for all ATIPP requests relating to non-personal information unless a waiver has been authorized. This approach aims to [ensure] that the costs associated with processing such requests are fairly and consistently allocated and helps manage the extensive resources required for these tasks. Recent exceptions to this approach are attributed to errors made by a new ATIPP Coordinator. Going forward we intend to fully document all fee categories applicable to the request in order to track the actual time spent and related costs.

Based on this paragraph, the Applicant is worried that any future request to CGS will attract additional fees. The Applicant is worried about a bad precedent.

*Fee waiver: CGS’s position*

**[42]** CGS advances several arguments to support its refusal of a fee waiver.

**[43]** The first argument is that the Applicant submitted a request that was “broad in scope with no particular subject, resulting in a large number of files”. CGS worked with the Applicant to refine the scope, but this iterative process took significant time and effort. CGS writes: “Had the applicant provided a more specific request initially, or reduced scope in collaboration with the ATIPP Coordinator, it would have greatly reduced the time and work involved in processing it”.



**[44]** The second argument, related to the first, is that waiving the fee in this case may encourage future applicants “to submit overly broad requests without consideration of the associated costs.” CGS is concerned about setting a bad precedent.

**[45]** The third argument is that the fee estimate is already, in effect, a reduction of what could be charged. The current fee estimate does not include any time for “searching for and retrieving a record”: ATIPP Regulations, Schedule B, Item 1. It includes only time for “reviewing, preparing and handling a record for disclosure”: Item 3. It also does not include time spent by subject-matter experts and senior managers within CGS who would be working with the ATIPP Coordinator to prepare the records for disclosure.

**[46]** The fourth argument is that the Applicant’s request, even with the reduced scope, “remains vague and does not provide any public benefit”.

*Fee waiver: Conclusion*

**[47]** There is merit in both the Applicant’s and CGS’s arguments.

**[48]** 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.

**[49]** 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.

**[50]** In my view, the present case is somewhere between the Iqaluit water case (in which I recommended fee waiver) and the Nunavut school repairs case (in which I did not recommend fee waiver). It is closer to the latter, and I am inclined to reach the same conclusion.

**[51]** I have, in particular, taken into account the following factors:

- a. The Applicant's request strategy, which started as a broad request and was narrowed in several subsequent iterations, did impose on CGS a considerable amount of work, even before the request was in its final form.
- b. CGS is not charging a fee for any of the preliminary work, but it has taken the preliminary work into account when deciding whether to waive the fee. That is, in my view, a reasonable position.
- c. CGS's current fee estimate (\$248.40) does not include everything for which it could charge a fee. In other words, CGS's fee estimate could reasonably have been higher than it is.
- d. It is not certain how many, if any, of the 184 pages of records will be useful to the Applicant or of interest to the public. This may be contrasted with the Iqaluit water case, in which every requested record was related to the Applicant's purpose.
- e. The fact that no fee has been charged in ostensibly similar cases is not, in itself, a reason for no fee to be charged in this case. Consistency is obviously desirable, but it is not a legal requirement.

**[52]** I would be concerned if I thought that CGS had adopted a policy of refusing all fee waivers. Such a policy would be "fettering discretion" and would be contrary to law: *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII) at paragraph 71. That is not, however, how I read the deputy minister's written submission in this case (see paragraph 41 above).

**[53]** The deputy minister says he has instructed CGS's ATIPP Coordinators to collect fees "unless a waiver has been authorized". As I understand the instruction, ATIPP Coordinators are to be diligent about tracking time and allowable fees. If a waiver is to be granted, it will be done by management.

[54] I see nothing in the deputy minister’s general instruction that is contrary to the ATIPPA or the regulations. CGS’s discretion has not been fettered. A request for a fee waiver will still be considered.

[55] It is worth reiterating that a request from a journalist for a fee waiver should receive the most careful consideration because of “the vital importance of the media and its special role in society” and the fact that journalists are “the eyes and ears of the public”: *Department of Health (Re)*, 2021 NUIPC 27 (CanLII) at paragraphs 47 to 57, quoting the Supreme Court of Canada. That is especially important in Nunavut, where the number of media outlets is limited and where non-government organizations that might hold the GN to public account are fewer and weaker than elsewhere in Canada.

[56] The crucial role played by journalists does not mean, however, that journalists should always be excused the payment of fees. If the Legislative Assembly had intended journalists to have an automatic exemption from fees, it could have said so in the ATIPPA: 2021 NUIPC 27 (CanLII) at paragraph 57.

[57] 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 in this case 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.

## **Conclusion**

[58] The fee estimate is reasonable.

[59] The fee estimate need not be waived.

## **Recommendation**

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

Graham Steele

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