

# **NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 05-051

File: 05-136-4

May 6, 2005

## **BACKGROUND**

In April, 2004, the Applicant made a Request for Information from the Department of Renewable Resources and Economic Development . The request was for a long list of items, some of it in the nature of the Applicant's own personal information and some of it more general in nature. The Department responded to the request by advising the Applicant that the request would take a considerable amount of time to respond to and may be subject to certain fees payable by the Applicant because of the breadth of the application. They invited the Applicant to narrow his request or provide more specifics with respect to the request. The Applicant declined the invitation to narrow the scope of his request. Instead, he requested that the office of the Information and Privacy Commissioner provide him with assistance in helping to "motivate a timely provision" of the documents he requested. As Information and Privacy Commissioner, I made a number of suggestions to the Applicant and to the public body which I hoped would avoid long delays and I addressed the issue of possible fees, suggesting that that issue should be dealt with early in the process.

In September of 2004, the Department provided the Applicant with an estimate of a minimum of \$2,500.00 in fees to comply with the Applicant's request. My office passed that information to the Applicant, along with an explanation of section 50(2) of the Act and the regulations which deal with costs applicable on a request for information. By letter dated October 29<sup>th</sup> to the Minister responsible for RWED, the Applicant applied under Regulation 14 to waive or reduce the fee applicable. The Minister considered the matter and, by letter dated December 6<sup>th</sup>, 2004, refused the Applicant's request for a reduction or waiver of the fees. On December 15<sup>th</sup>, 2004, the Applicant asked the Minister to reconsider his decision in this regard. On January 27<sup>th</sup>, the Minister reiterated his decision not to waive or reduce the fee.

On February 16<sup>th</sup>, 2005, the Applicant sent a long letter to this office outlining a number of disagreements he had with the way in which his Request for Information had been handled. I did not initially read this letter as being a request for me to review the Minister's decisions with respect to costs as the contents of the letter did not deal narrowly with the costs issue. I advised the Applicant by letter that, as I had not received a Request for Review with respect to the costs issue, I considered the matter resolved and would be closing my file. The Applicant responded by e-mail on March 23<sup>rd</sup> indicating that he considered his letter of February 16<sup>th</sup> to be a request that I review the decision of the Minister not to waive fees. On that basis, I accepted the February 16<sup>th</sup> letter as a Request for Review and wrote to the Department asking for any further comments they might have on the issue before I made my recommendations.

## **ISSUE**

The narrow issue in this case is whether or not the Minister properly exercised his discretion to refuse to waive or reduce the costs to the Applicant to respond to his Request for Information. However, in making these recommendations, I intend to comment more broadly on the cost recovery provision of the Act, as that discussion will help to focus the recommendations on the narrower issue.

## **DISCUSSION**

As the discussion above might indicate, this Request for Information did not get off to a great start. The Applicant's request is lengthy. He has requested fifteen categories of information.

The first three items requested appear to be for fairly specific documents. None of these three documents would constitute the Applicant's personal information. The next four categories of information requested in the Applicant's request are for "all notes, e-mails and correspondence" concerning certain aspects of the Applicant's specific employment situation, apparently over a fairly narrow time frame between April and December of 2001 and in these instances it does appear that the Applicant is seeking

only records which pertain specifically to him and his application or eligibility for certain positions. As such, these requests would be considered a request for personal information. With respect to these requests, it seems to me that the information sought is not terribly wide in scope, nor would responding be unreasonably difficult or time consuming to complete. There is, in fact, some indication that the Applicant has been provided with some or all of the specific records requested, although it is not absolutely clear from the documentation that I have been provided with.

In addition to the relatively specific records the Applicant requested, however, he has also requested records of a very general nature in very broad categories. Five of those categories or areas of information he has requested are for:

All of [named individual's] notes, documents, e-mails, forms, correspondence, etc. from 1996/97 through 2002/2003 on which my name or a related referencing code appears.

A sixth is for the same information from two more individuals from 1997/98 through 2002/03 (different time frame only).

In addition, the Applicant sought a list of all travel authorizations given by Parks and Tourism for the period of 1996/97 through 2001/02 as well as a list of all Acting Director of Parks & Tourism Assignments given during the same time period.

It is with regard to these very broad and general requests that the impasse has arisen between the department and the Applicant. Although the Applicant suggests that this is a simple, straight forward request for his personal information, I respectfully disagree. The records in these requests date back up to nine years to 1996 and cover a period of 1996 through 2002, a seven year period. In each of these eight categories, the Applicant has requested copies of all "notes, documents, e-mails, forms, correspondence etc" from certain individuals on which the Applicant's name or a related referencing code appears. The Applicant was employed with the Department in

question during the time frame covered by his application, and I understand the same is true for all of the individuals from whom the records were requested, although it is not entirely clear what the relationship was between the Applicant and each of the individuals named. In these circumstances, I would imagine that the Applicant's name or a reference to him appears in many, many documents (likely several for each working day over the seven year period) relating to everything from personnel and administration issues to projects in which the Applicant was involved, to day to day records produced in the normal course of an employee's work. This is not information that would likely be on one file or even in one physical place. Because of the fact that the request dates back more than five years, some of the records responsive to the Applicant's request would likely be archived by now. To provide a comprehensive response will undoubtedly be a significant undertaking and involve thousands, perhaps tens of thousands, of pages of records.

The Access to Information and Protection of Privacy Act and its regulations allow public bodies to require Applicants to pay certain costs. The Act also provides for a fairly comprehensive guideline for the calculation of those costs.

Section 50 of the Act allows a public body to require the payment of fees:

50. (1) The head of a public body may require an applicant who makes a request under section 6 to pay the prescribed fees for services provided.
- (2) Where an applicant is required to pay fees for services, the public body shall give the applicant an estimate of the total fee before providing the services.

The Regulations set out the fee schedule as follows:

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.

10. (1) An estimate of fees provided under subsection 50(2) of the Act must set out

a) the time and cost required to

- i) search for and retrieve the record,
- ii) prepare and physically sever the record for disclosure, and
- iii) copy the record;

b) the cost of computer time involved in locating and copying a record, or, if necessary, programming to create a new 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 or a copy of the record.

(2) An estimate of fees for access to a record of the personal information of the applicant need only set out the time and cost of copying the record.

(3) An applicant has up to 20 days to indicate if the estimate of fees is accepted or to modify the request so as to reduce the amount of fees likely to be assessed.

11. (1) This section applies to a request for access to a record that is not a record of the personal information of the applicant.

(2) An applicant shall pay an initial fee of \$25.00 when a request is made.

(3) A public body shall not process a request until the initial fee has been paid.

(4) Other than the initial fee, fees may not be charged unless the total amount of the fees calculated in accordance with Schedule B, excluding the initial fee, exceeds \$150.00.

(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.

- (6) A fee may not be charged for the time spent in reviewing a record.
12. (1) This section applies to a request for access to a record that is a record of the personal information of the applicant.
- (2) The only fees that may be charged for the processing of a request for personal information relating to the applicant are fees for copying a record as set out in item 6 of Schedule B.
- (3) Where the amount of the fees does not exceed \$25.00, no fee is to be charged.
- (4) Where the amount of the fees exceeds \$25.00, the total amount is to be charged.
13. (1) The public body shall cease processing a request once a notice of the estimate of fees has been forwarded to an applicant and shall recommence the processing of the request without delay on
- a) the receipt of an agreement to pay the fees; and
- b) the receipt of at least 50% of any estimated fee that exceeds \$150.00.
14. The head of a public body may excuse applicant from paying all or part of a fee if, in the opinion of the head, the applicant cannot afford the payment or, for any other reason, it is fair to excuse payment.

Schedule B of the Regulations set out the fee schedule, which includes the following:

For searching and retrieving records	\$6.75 per hour
For preparing and handling a record for disclosure	\$6.75 per hour
For copying records	\$0.25 per page for printed material

Much, but certainly not all, of the information which the Applicant has requested can be classified as his own personal information. Unfortunately, although he has been invited

by the ATIPP Co-Ordinator for the department, by this office and by the Minister's office to sit down and refine his request, he has chosen not to do so. This is his choice. The unfortunate result is that the whole of the Request for Information is put on hold as a result until the costs issue is resolved.

I have some concerns about the way in which the Department has estimated its fees. All that has been provided is a number (\$2,500.00) with no background information as to how that number was arrived at. Section 10 of the Regulations require that the department provide a more detailed outline of the estimated costs involved. Clearly, the department did not follow the procedure set out in the Regulations in this regard. The applicant argues that since the department did not do the estimate correctly, he should be relieved of the obligation to pay any fee. However, had the Applicant had asked me to review that issue alone, the result would have been that the Department would have been directed to provide a more detailed estimate of those fees, not that the Applicant would be absolved of the obligation to pay.

Rather than create further delays by simply sending the matter back to the Department at this point and waiting for them to respond with a more detailed statement showing their estimated costs, I will recommend that a more detailed statement be given, but will not delay the balance of this review recommendation pending the receipt of that estimate. It appears to me that the estimate provided, though lacking in detail, is not outlandish or impossible given that the Applicant is seeking 7 years worth of records and considering that the Applicant was employed in the department during the relevant period so that his name is, therefore, likely to appear in the public records often. If one allows a reasonable amount of time for searching for, retrieving, and handling those records that are not in within the definition of the Applicant's personal information, and considers the likely volume of responsive records that are within the definition of the personal information of the Applicant, \$2,500.00 does not seem to me to be an unrealistic estimate. I am satisfied that one way or another, the estimate will be significant and that \$2,500.00 is, if anything, probably a conservative estimate.

Moving on to the Applicant's request that these fees be reduced or waived in his case, it is clear that the department has determined that it will require the Applicant to pay the fees associated with his request for information. The ability to impose fees is clearly provided for in the Act. Furthermore, it is apparent to me that the recoverable costs in this case will very likely be substantial. Even once the Applicant has received the more detailed estimate, therefore, we will still be in the position of having to deal with the second part of the Applicant's request to this office, and that is the request that all or some of those fees be waived.

The Regulations allow the Minister to waive or reduce those fees in his discretion. Where there is discretion provided for in the act, the only role I have is to consider whether the discretion has been exercised. It is not for me to judge whether I would have exercised the discretion differently or whether I agree with the way in which the discretion was exercised. My only role is to consider whether the person exercising the discretion has actively considered the issues involved in exercising his or her discretion and has made an active decision. In other words, my role is to determine whether discretion was exercised, not whether it was exercised "properly".

In this case, the Minister has considered the matter twice at the Applicant's request. In the first instance, the Minister indicated that he had considered the request and, based on the scope of the request and the fact that not all of the information requested would fall in the category of "personal information", he declined to waive or limit the fee payable. He suggested that the Applicant work with the ATIPP Co-Ordinator to modify the request to make it more manageable and advised that he may be willing to revisit the issue if the Applicant agreed to do this. In the second instance, the Minister declined to reconsider his position because the Applicant chose not to work with the ATIPP Co-Ordinator to modify the request. In the circumstances, I am satisfied that the Minister has considered the various aspects of this case and that he has actively exercised his discretion accordingly.

## RECOMMENDATION

In light of the above, I make the following recommendations:

1. that the Department (now Industry Tourism and Investment) provide the Applicant with a detailed outline of the estimate of the cost to respond to his April 29<sup>th</sup>, 2004 Request for Information, including:
  - a) identifying those parts of the Requests which constitute a request for general information, as opposed to the Applicant's personal information;
  - b) with respect to the information that is not the Applicant's personal information, providing an estimate of the costs for the time and cost required to
    - i) search for and retrieve the records,
    - ii) prepare and physically sever the records for disclosure, and
    - iii) copy the records;
    - iv) the computer time involved in locating and copying the records or, if necessary, programming to create new records;
  - c) estimating the number of pages of records which might be anticipated will be responsive to the Applicant's request (both for general information and personal information) and indicating total cost anticipated (ie: 1000 copies for each year covered by the request for a total of 7000 copies);
2. Once the detailed estimate is provided, that the Applicant be given 20 days pursuant to Regulation 10(3) to indicate if the estimate of fees is accepted or to modify the request so as to reduce the amount of fees likely to be assessed.

3. In the event that the Applicant does not agree with the detailed assessment of fees, or does not provide a modified request so as to reduce the amount of fees likely to be assessed within 20 days, that this Request be considered finalized.
  
4. With respect to the request that I review the Minister's refusal to reduce or waive the fees, I am satisfied that the Minister has actively exercised his discretion in this regard and I make no further recommendation.

Elaine Keenan Bengts  
**Information and Privacy Commissioner, NWT**