



Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph

REVIEW REPORT 21-03

February 23, 2021

Cape Breton Regional Municipality

Summary: The applicant made a request to the Cape Breton Regional Municipality (CBRM) under *Part XX* of the *Municipal Government Act (MGA)* for records relating to CBRM employment contracts, detailed employee expenses and CBRM dealings with other organizations related to the Port of Sydney. The CBRM issued a fee estimate. The applicant requested a review of the fee estimate as well as the CBRM's refusal to waive it.

The Commissioner finds that the CBRM has not met its duty to assist and has not calculated the fee estimate fairly and accurately. The Commissioner recommends that the CBRM waive the fee in its entirety.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 5, 7, 17, 22, 23; *Municipal Government Act*, [SNS 1998, c 18](#), ss. 426, 467, 471, 490, 493, 498, 501; *Freedom of Information and Protection of Privacy Regulations*, [NS Reg 105/94](#), s. 6.

Authorities Considered: **Alberta:** F2006-009, [2008 CanLII 88754 \(AB OIPC\)](#); **British Columbia:** Audit & Compliance Report F18-02 City of White Rock, Duty to Assist [2018 BCIPC 52](#); Order 02-38, [2002 CanLII 42472 \(BC IPC\)](#); **Newfoundland and Labrador:** A-2011-010, [2011 CanLII 47545 \(NL IPC\)](#); **Nova Scotia:** Review Reports FI-97-17, [1997 CanLII 2206 \(NS FOIPOP\)](#); FI-97-26, [1997 CanLII 1841 \(NS FOIPOP\)](#); FI-97-92, [1998 CanLII 2336 \(NS FOIPOP\)](#); FI-98-40, [1998 CanLII 1541 \(NS FOIPOP\)](#); FI-00-91, [2000 CanLII 8649 \(NS FOIPOP\)](#); FI-02-45, [2002 CanLII 8813 \(NS FOIPOP\)](#); FI-02-92, [2003 CanLII 49818 \(NS FOIPOP\)](#); FI-07-69(M), [2008 CanLII 22887 \(NS FOIPOP\)](#); FI-08-66, [2009 CanLII 1344 \(NS FOIPOP\)](#); FI-11-23(M), [2011 CanLII 79498 \(NS FOIPOP\)](#), FI-14-16(M), [2014 CanLII 51533 \(NS FOIPOP\)](#); 16-05, [2016 NSOIPC 5 \(CanLII\)](#); 19-06, [2019 NSOIPC 7 \(CanLII\)](#); **Ontario:** M-166, [1993 CanLII 4985 \(ON IPC\)](#); IPC Order P-760, [1994 CanLII 6680 \(ON IPC\)](#); MO-2617-I, [2011 CanLII 25438 \(ON IPC\)](#), Reconsideration Order MO-3555-R, [2018 CanLII 4536 \(ON IPC\)](#); MO-3225, [2015 CanLII 47400 \(ON IPC\)](#).

Other Sources Considered: OIPC Guidelines for Public Bodies and Municipalities, online: <https://oipc.novascotia.ca/node/471>; SAP website www.sap.com/canada/index.html.

INTRODUCTION:

[1] The applicant sought a copy of records covering a four-year time frame about Cape Breton Regional Municipality (CBRM) employment contracts, detailed information about employee expenses and financial information about the CBRM's dealings with various organizations. The information requested was in relation to the development of the Port of Sydney in Cape Breton.

[2] The CBRM originally issued a fee estimate of \$42,804.50. The applicant filed a request for review of this fee estimate with this office, the Office of the Information and Privacy Commissioner (OIPC), and made a request to the CBRM that it waive the fee in its entirety. Throughout the review process, the applicant reduced the scope of the access request, the CBRM reduced the fee estimate to \$3,859.20 and declined to waive the fee. This did not resolve the matter. As such, this file was forwarded to me to complete a review report.

ISSUES:

[3] There are three issues under review:

1. Was the fee estimate(s) calculated accurately and in compliance with the requirements of s. 471 of the *MGA*?
2. Did the CBRM respond to the applicant openly, accurately and completely as required by s. 467 of the *MGA* in its fee estimate?
3. Did the CBRM properly exercise its discretion in deciding not to grant a fee waiver in accordance with s. 471(7) of the *MGA*?

DISCUSSION:

Background

[4] On March 23, 2016, the applicant made an access to information request to the CBRM for a significant amount of records covering a range of periods during a four year time frame. The request itself was seven pages long so I will not repeat it here. In summary, the applicant requested:

- Information about the expenses of named CBRM employees.
- Copies of employment contracts and related emails between the CBRM and those named employees.
- Correspondence, business agreements and information about expenses and payments made between the CBRM and a variety of named businesses and organizations.

[5] The applicant said that all the information requested was in relation to the development of the Port of Sydney in Cape Breton.

[6] In response to the applicant's request, the CBRM issued a fee estimate of \$42,804.50 on May 31, 2016, and indicated to the applicant that he would have to pay half of the fee before the CBRM would process the request. The applicant filed a request for review of the fee estimate to

this office. At that time, the applicant also requested that the CBRM waive the fee in its entirety. The CBRM declined to do so.

[7] As part of the OIPC's standard review process, the parties were invited to engage in informal resolution discussions. Through the course of this process, the applicant agreed to narrow the scope of his access request. The CBRM agreed to recalculate the fee estimate in light of the narrowed request and in light of a number of suggestions made by the OIPC investigator. This resulted in a second fee estimate of \$3,859.20 being issued by the CBRM. The CBRM declined the applicant's request for a fee waiver of the \$3,859.20 estimate. Informal resolution was not achieved and as such, this matter proceeded to me to issue a review report.

Burden of proof

[8] Section 498 of the *MGA* establishes that the burden is on the municipality to prove that the applicant has no right of access to a record or part of a record.

[9] With respect to the duty to assist set out in s. 467 and the calculation and waiver of fees set out in s. 471, the *MGA* is silent as to who bears the burden of proof. Therefore, the parties must each submit arguments and evidence in support of their positions. However, it is the CBRM who made the decisions which are under review and who is in the best position to discharge the burden of proof.

[10] Where the applicant has requested the fee to be waived, the burden first lays with the applicant to prove the waiver is warranted. Then the burden shifts to the CBRM to prove it exercised its discretion.

1. Was the fee estimate(s) calculated accurately and in compliance with the requirements of s. 471 of the MGA?

[11] The question in this review is whether the \$3,859.20 fee estimate was calculated accurately in compliance with s. 471 of the *MGA*.

[12] The *MGA* provides fairly detailed guidance on how to calculate a fee. In addition to the \$5.00 application fee,¹ a municipality may charge an applicant a processing fee. In terms of the processing fee, a municipality may require applicants to pay the fee to offset the cost of locating, retrieving and producing the record, preparing it for disclosure, shipping and handling the record, and providing a copy to an applicant.² A municipality is authorized to charge a maximum of \$15.00 for each half-hour of person time only after the first two hours.³ The fee cannot exceed the actual cost of the services.⁴ A municipality must provide an estimate of the total fee and may require complete or partial payment in advance.⁵ The procedure and approved service fee are detailed in the *Regulations*.

¹ The authority to charge a \$5.00 application fee is set out in s. 471(1) of the *MGA* and s. 6(1) of the *Freedom of Information and Protection of Privacy Regulations*, NS Reg 105/94. Section 501(2) of the *MGA* outlines that the *Regulations* apply to the *MGA*.

² See s. 471(2) of the *MGA*.

³ See s. 6 of the *Freedom of Information and Protection of Privacy Regulations*.

⁴ See s. 471(8) of the *MGA*.

⁵ See s. 471(5) and s. 471(6) of the *MGA*.

[13] In deciding to allow for a fee to be charged, the legislature attached a real value to the time and work involved in meeting the requirements of the *MGA*. The charging of fees is legitimate but cannot be used as a means of discouraging access to information requests under the *MGA*. A fee associated with access to information should not act as a barrier to public access to information. Accordingly, the legislation allows municipalities to waive certain fees.

[14] Previous review reports,⁶ as well as the OIPC's guide on how to calculate fees entitled *Duty to Assist #4: How to Calculate Fees*⁷ have stated that municipalities should consider the following principles, as originally set out in the provincial FOIPOP Administrator Manual, and later adopted by previous review reports, to guide them in the preparation of fee estimates:

Authorized: The estimate is prepared in accordance with the *FOIPOP* Act and Regulations. It includes only those services for which a fee may be charged and is based on rates allowable under the Act;

Reasonable: The estimate is proportionate to the work required to respond to the request in an efficient and effective manner; and

Equitable: The estimate is fair, balanced, developed without prejudice and is consistent with similar estimates given the same facts and circumstances.

[15] In Review Report FI-11-23(M), previous Review Officer McCullum relied on an Ontario order (MO-2617-I)⁸ wherein the adjudicator noted that as the burden of proving that the fee estimate was reasonable rested with the municipality, it must provide *detailed evidence* explaining how the fee estimate was calculated in order to meet that burden. The level of detail needed required including separate estimates for severing and time spent searching, and an estimate, based on a representative sample of the records, of what proportion of the records actually required severing. Furthermore, the adjudicator commented negatively on the fact that the public body in that case based its search time estimate on what it claimed was a representative sample of the records but provided no information as to how it established the sample, nor did it indicate the number of hours spent already searching for the records. The adjudicator found that in the absence of information providing a breakdown of the specific elements of the search, the public body had not provided sufficient information to allow him to assess whether the amount of the fee estimate was reasonable and accurate. In that context, the adjudicator would not uphold any portion of the public body's fee estimate that dealt with the fee for searching for the record.

[16] For a review of a fee estimate, it is routine practice for the OIPC to request that municipalities provide a detailed outline of how they calculated the fee estimate. The OIPC recommends that municipalities calculate the fee by pulling a representative sample of the records and processing those records for a specified period of time (e.g. retrieve all expense claims and work on them for one hour to determine the time to process all expense claims, or

⁶ See for example NS Review Report FI-11-23(M) and NS Review Report FI-14-16(M).

⁷ <https://oipc.novascotia.ca/sites/default/files/publications/19-00109%20Fees%20Guidelines%20%282019%20July%2025%29.pdf> .

⁸ *Windsor (City) (Re)*, [2011 CanLII 25438](#) (ON IPC) – see paras 40-44.

retrieve one box of records and determine how much time one box will take to process). In 2019, through the course of the review process, the CBRM provided a one-page representative sample from its accounting system, which is called SAP.⁹ The CBRM did not provide a representative sample of any of the other types of records requested such as hiring contracts and correspondence.

[17] I have reviewed the CBRM's \$3,859.20 fee estimate. I have two concerns with the estimate. The first concern I have is with regard to the CBRM's estimate that it would take 3 minutes per page for the CBRM's review of an estimated 471 pages for a total of 23.5 hours to determine whether an exemption applies and thus information could be severed from the responsive records. The *Duty to Assist #4: How to Calculate Fees* sets out that it takes 30 seconds to 2 minutes per page to process a file for disclosure. It should take closer to 30 seconds per page for less complex documents and closer to 2 minutes per page for more complex records that require more analysis to see if an exemption applies. In this case, most of the records are expense reports from SAP that are unlikely to contain any information that would be subject to an exemption. Arguably, it may take closer to 2 minutes per page for review of the contracts and correspondence requested, but it is difficult for me to comment on that because the CBRM did not provide a representative sample of those types of requested records. In any event, an estimate of 3 minutes per page to review all the records is too high.

[18] The second concern I have is regarding the estimate for how long it would take the CBRM's Department of Finance to compile the requested financial documents. The CBRM estimated that it would take 101 hours for the Department of Finance to produce approximately 403 pages of financial records. It is my role to make a finding as to whether an estimate of 101 hours to search for the records is reasonable and equitable.

[19] As mentioned above, the CBRM did provide a one-page sample (of an estimated total of 471 pages of records) but it provided little information as to how it established this sample. As is routine practice, the CBRM provided the OIPC with its correspondence surrounding the access to information request. In those records were documents wherein the CBRM Department of Finance spoke to how it came up with this estimate that it would take 101 hours to produce the 403 pages of financial records. The documents stated that a search for an employee's expenses for one month for the most complex aspect of the requested records took 2 hours. The writer noted that additional steps needed to be completed and concluded that an estimate of 3.5 hours per month was a fair estimate. I was not able to deduce from the records provided how that 3.5 hours ultimately translated into a total estimate of 101 hours. In any event, I question the choice to use the most complex sample and average it to the rest of the searches that would be required as this would naturally increase the time estimate. Furthermore, in my view, an estimate of 3.5 hours to retrieve one month of expenses for one municipality employee is on its face simply too long. A reasonable person would expect that any municipality could retrieve one month's expenses for one of its employees in a much shorter time than 3.5 hours. Alternatively, it is indicative of poor record keeping. The cost of delays poor record keeping causes in a municipality's ability to efficiently search for records requested under the *MGA* cannot be passed

⁹ <https://www.sap.com/canada/index.html>.

on to an applicant pursuant to the legislation. Fees cannot be charged for poor administrative systems.¹⁰

[20] The OIPC investigator questioned the CBRM on its rationale for why the CBRM's Department of Finance would require 101 hours to produce the records necessary to respond to the access to information request. The OIPC investigator proposed that a reasonable estimate would be approximately one day (7 hours) for each of the 4 years of requested financial information, for a total of 28 hours. In response, the CBRM stated that it disagreed with this assessment and extended an invitation to the OIPC investigator to visit its office for a demonstration of SAP and its searching capabilities. As the OIPC hears matters in writing, this offer was rejected and the CBRM was invited to provide written representations.¹¹ The CBRM did not provide written representations as to why it would take 101 hours to search for the requested expense reports.

[21] The OIPC's guide entitled *Duty to Assist #4: How to Calculate Fees* sets out some fee estimate shortcuts commonly employed in jurisdictions across Canada.¹² There are no shortcuts that address producing records from SAP, or another financial software program, but there is one that addresses email. It provides that it takes 3 minutes per email account to run a query for relevant records. Similarly, queries on Microsoft Excel also take a matter of minutes. The SAP website promises "smart automated processes and insight into every corner of your business."¹³ I am hard-pressed to assume that the SAP system would take longer than other commonly used electronic systems to run queries about expenses.

[22] A query on SAP should take minutes, not hours. After narrowing his request, the applicant was asking for copies of expenses from 4 individuals and 2 companies over about a 4 year period. With some minor variation, largely the applicant requested the same type of information from each individual. This should have made each subsequent query easier to complete than the last because the queries were so similar. Furthermore, the applicant dropped his request for detailed copies of receipts through the course of the investigation, meaning that most, if not all of what was being searched for was on the SAP system. I am not convinced that it would take 101 hours to compile these records from SAP. Moreover, I am of the view that even the 28 hours proposed by the OIPC investigator was much too high. The applicant asked for approximately 23 somewhat different types of expenses over a period of 4 years. A rudimentary calculation of 23 queries per year is equal to 92 queries. Three minutes a query is 276 minutes or just under 5 hours. A reasonable fee estimate would be somewhere in this range, as opposed to an estimate of 101 hours.

[23] In the absence of the records themselves, except for a single-page sample from an estimated 403 pages of records, and without this issue being addressed by the CBRM in its representations, I do not have sufficient rationale in front of me for why it would take 101 hours to compile the requested documents. The estimate of 101 hours was not in the realm of

¹⁰ NS Review Report FI-14-16(M)

¹¹ See s. 490(3) of the *MGA*.

¹² <https://oipc.novascotia.ca/sites/default/files/publications/19-00109%20Fees%20Guidelines%20%282019%20July%2025%29.pdf>.

¹³ <https://www.sap.com/canada/index.html>.

reasonableness. The estimate was not proportionate to the work required to respond to the request in an efficient and effective manner. Nor was the estimate equitable. It was not fair, nor balanced.

[24] I find that the CBRM has not calculated the fee fairly and accurately in accordance with s. 471 of the *MGA* as it relates to the estimate of 101 hours for its Department of Finance to produce the records and to the estimate of 23.5 hours for a review to determine whether an exemption applies.

2. Did the CBRM respond to the applicant openly, accurately and completely as required by s. 467 of the *MGA* in its fee estimate?

[25] Section 467(1) of the *MGA* provides:

467 (1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall

- (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and
- (b) consider the request and give written notice to the applicant of the decision with respect to the request.

[26] The question here is whether the CBRM met its duty to assist the applicant by openly, accurately and completely identifying the records it considered to be responsive to the applicant's request, as required by s. 467(1) of the *MGA*.

[27] There are four elements of the duty to assist. These were set out in Nova Scotia Review Report 19-06 as follows:

1. **Without delay:** Section 7¹⁴ emphasizes that the timeline for response is “without delay” meaning that while the maximum permitted time is 30 days, in fact, public bodies must respond as soon as possible to a maximum of 30 days or longer with permitted extensions. In order to meet this requirement, public bodies must make every reasonable effort. This includes ensuring that there is adequate staff to fulfill this statutory obligation.¹⁵ Any time a public body takes a time extension or places a file on hold it must be in compliance with *FOIPOP*.
2. **Open:** There are numerous elements to openness including:
 - Interpreting the access to information request in a fair, reasonable, open and flexible manner.¹⁶ Public bodies should avoid narrow interpretations and resolve any ambiguity in favour of the applicant.

¹⁴ The same wording is found in s. 467 of the *MGA*. As such this analysis applies to the *MGA*.

¹⁵ The Assistant Commissioner in Newfoundland made a similar finding in *NL Review Report A-2011-010*, [2011 CanLII 47545 \(NL IPC\)](#) at para 34.

¹⁶ See *NS Review Report 16-05 2016 NSOIPC 5 (CanLII)* at para. 40 for a list of best practices when interpreting access to information requests and deciding how to determine whether further particulars are required.

- Communicating with the applicant to explain the steps in the process and to obtain necessary clarifications as to the nature and scope of the request.¹⁷
 - Conducting a reasonable search to find all records responsive to the request.¹⁸ If responsive records are not found, openness requires that public bodies provide an explanation to the applicant for why no records were found.¹⁹
 - Applying the principle that all information in the custody or control of the public body must be released unless a specific and limited exemption applies.²⁰ Openness requires that only information subject to an authorized exemption must be severed so that the applicant receives as much information as possible.
 - Any responses to the applicant must be open. In other words, the responsive records must be clearly marked to indicate where and why information has been withheld.
 - Response packages, especially large packages, must have page numbers so that if the applicant has questions he or she can easily communicate with the public body about the pages of concern. This promotes open and clear communication.
 - Explanations in response letters, fee letters and time extension notifications must all be clear and must provide comprehensible, thorough explanations for the decision the public body is making. Such responses promote transparency and support a meaningful right to access government information. Section 7(2) of *FOIPOP* provides further detail on information that must be provided to the applicant in response to an access to information request.
3. **Accurate:** An accurate response requires that a public body:
- Completes a line-by-line review of all responsive records and only applies exemptions where the evidence available supports the application of the exemption.
 - Discloses the full scope of the responsive records even if some of the records are withheld in full. It should be clear to the applicant how many responsive records there are, how many (if any) have been withheld, and for what reason.²¹
 - Ensures that any explanations for decisions made are accurate. Explanations for delay, explanations for fee calculations, third party notices and explanations for why information has been withheld must all be accurate and must all comply with the law.
4. **Complete:** A complete response includes the following:
- All responsive records are accounted for. If, for example, the public body finds 700 responsive pages but withholds 250 pages under s. 17, the applicant should be able to

¹⁷ See OIPC Guidelines for Public Bodies and Municipalities, “Duty to Assist #1: Communication with Applicants” (online: <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Duty%20to%20Assist%201%20-%20Comm%20w%20App%20Guidelines%20Final%20%2823%20Jan%2019%29.pdf>).

¹⁸ See OIPC Guidelines for Public Bodies and Municipalities, “Duty to Assist #2: Conducting an Adequate Search” (online: <https://oipc.novascotia.ca/sites/default/files/publications/18-00070%20Search%20Guidelines%20%282019%2002%2025%29.pdf>).

¹⁹ See also Audit & Compliance Report F18-02 City of White Rock, Duty to Assist 2018 BCIPC 52 (CanLII) at para. 2.3.2 (online: <https://www.oipc.bc.ca/audit-and-compliance-reports/2260>).

²⁰ Consistent with s. 5(2) of *FOIPOP* which permits public bodies to withhold information “exempted from disclosure pursuant to this Act.” (equivalent to s. 465 of the *MGA*)

²¹ This obligation is supported by s. 7(2)(a)(ii) which requires that public bodies provide a written explanation to applicants where access to a record or part of a record is refused by a public body and that such explanation include the reasons for the refusal and the provision of *FOIPOP* on which the refusal is based (equivalent to s. 467(2)(a)(ii) of the *MGA*).

tell from the package received that there are in total 700 responsive pages but that 250 have been wholly withheld under s. 17.

- The response package is organized in a way that the applicant can tell where information has been withheld. So, for example, if an email includes a 15 page PowerPoint presentation attachment that is withheld, the applicant's package should include a page immediately following the email that indicates that the 15 page attachment to the preceding email has been withheld and the statutory provision under which this decision was made.
- If the records include emails, a complete response would include all attachments to each email.
- All explanations given to the applicant must also be complete. So, for example, all reasons for withholding information under the law must be noted, all fee calculations must be complete and all explanations for delay must be complete.
- The applicant receives all notices to which he or she is entitled under the law. So, for example, if third party notices have been given, the law requires that public bodies provide the applicant with initial notice of the decision to consult with third parties and a second notice of the decision of the public body with respect to third party information.²²

[28] As the issue of delay was not raised by the applicant, I will not address it in this review report.²³

[29] The duty to assist with regards to fee estimates and fee waivers centers largely on the public body's actions in explaining their decisions to the applicant. Explanations must provide clear and through rationale for the decisions made. Those explanations must also be accurate and complete.

[30] In this case, the explanations provided to the applicant as rationale for the fee estimate were scant. The decision letters stated the total estimated person hours and page numbers but that was all. Particularly when the person hours were estimated to be so high, some breakdown should have been provided to the applicant. The *Freedom of Information and Protection of Privacy Regulations*²⁴ establish that a fee can be charged for (a) locating, retrieving and producing the record, (b) preparing the record for disclosure, (c) shipping and handling the record and (d) providing a copy of the record. The CBRM should have explained how the estimated hours fell within the confines of what it could charge for. The letters from the CBRM did not provide a thorough explanation for the fee estimates it made. Finally, the fee estimate itself was inflated and inaccurate. As such, the CBRM did not respond to the applicant openly, accurately and completely within the meaning of s. 467 of the *MGA*.

²² Sections 22 and 23 of *FOIPOP* set out the process for giving third party notices. See also OIPC Guidelines for Public Bodies and Municipalities, "Duty to Assist #3: Third Party Notice" (online: <https://oipc.novascotia.ca/sites/default/files/publications/18-00192%20Duty%20to%20Assist%20-%20Third%20Party%20Notice%20Guide%20%282019%20March%29.pdf>) (equivalent to s. 482 of the *MGA*).

²³ Note that the applicant did comment on 6 months having passed without receiving the records. However, that was in part due to the fee estimate being appealed to the OIPC. There was no suggestion that the CBRM did not reply within the statutory timeframes.

²⁴ Note that pursuant to s. 501(2) of the *MGA*, the *FOIPOP Regulations* apply to the *MGA*.

[31] In responding to access to information requests, municipalities have a duty to assist applicants. They are required to make every reasonable effort to assist applicants and to respond openly, accurately and completely. The duty to assist means that if a municipality decides to charge processing fees as permitted under the law, it must make every reasonable effort to ensure that the fee calculation is accurate. That was not the case here. As such, I find that the CBRM did not respond to the applicant openly, accurately and completely as required by s. 467 of the *MGA* with regard to its fee estimate.

3. Did the CBRM properly exercise its discretion in deciding not to grant a fee waiver in accordance with s. 471(7) of the *MGA*?

[32] The applicant requested a waiver of the \$3,859.20 fee. The CBRM declined to grant the applicant's request. Section 471(7) of the *MGA* authorizes the municipality to waive the fee if the applicant cannot afford to pay the fee or for any other reason it is fair to waive it:

(7) On request of the applicant, the responsible officer may excuse an applicant from paying all or part of a fee referred to in subsection (2) if, in the opinion of the responsible officer, the applicant cannot afford the payment or for any other reason it is fair to excuse payment.

The applicant's position

[33] The applicant's rationale for requesting a fee waiver was twofold: (1) on the basis that he could not afford to pay and (2) on the basis that it would be fair to do so.

[34] With respect to the applicant's request for a fee waiver based on his inability to pay, the applicant said that he earned a modest income and as a result was not in a position to afford to pay for the cost of the disclosure. He said that the fee was much too expensive in order to access documents, which in his view, should be accessible to the public. He also argued:

- The concept of a taxpayer, regardless of their means, should have to disclose or explain their lack of ability to pay fees for information that should be made public in the normal course of business is repugnant to the concept that public officials should be accountable to the public for expenditures and contracts.
- This case could create a dangerous precedent if ordinary citizens are required to pay exorbitant fees in order to obtain disclosure of information that should already be available to the public.
- This case raises concerns about whether a municipality can defeat the intent of the legislation by requiring an unrealistic fee, which an applicant cannot afford, and causing undue delays with the possible intent to frustrate an applicant's request for disclosure.

[35] Finally, the applicant noted that he would be willing to receive the materials on a thumb drive or disc to avoid the cost of photocopies.

[36] With respect to the applicant's argument that releasing the information should be granted based on fairness principles, the applicant said:

- The hiring of persons has been the subject matter of recent debate, particularly considering the manner in which the named individuals were hired and the salaries and expenses being paid to them.

- The public is interested in knowing what contracts have been entered into, expenses paid to, and monies exchanged with the businesses and organizations involved in the development of the Port of Sydney.
- It is important for the public to know how its elected officials are spending taxpayers' dollars in the context of hiring and compensating individuals.
- The information should be readily available and not require one to make a request for information under the access to information legislation.
- He would disseminate this information in a way that could reasonably be expected to benefit the public so that the public will know how their tax dollars are being spent.
- The contracts entered into with the named organizations concern the potential development of a port which is and will be costing taxpayers substantial sums of money. The public has a right to know the process and how the CBRM followed it in awarding contracts to those organizations.
- Given the importance of the port project to Cape Breton and the costs which have been and will be incurred for it, the public has a right to a full disclosure of the information.
- The manner or process in which the CBRM has awarded contracts is in the public interest given that taxpayers' money is being used to pay them.
- It is important for the public to know whether the proper process was followed in the selection process of awarding contracts.
- The disclosure forces municipalities to have accountability for contracts they enter into as to how they spend taxpayer money for expenses and that those expenses are legitimate.
- All contracts should be made public so that the public is aware of their terms and conditions and so that they may evaluate whether the terms and conditions are in keeping with industry standards.
- As the documents requested relate to the Port of Sydney, if a container terminal is built, it raises the spectre of environmental concerns from potential oil spills from delivery container ships. Also, there are potential environmental concerns about what containments, if any, and what kinds of products the containers could hold that may result in environmental or health concerns to the general public.
- The review raises serious concerns about the effectiveness of the access to information legislation to ensure transparency of municipalities and that they cooperate in the review of decisions municipalities make in response to access to information requests.
- Over six months had passed since the request for information was made and none of the information was provided. As such, the CBRM has not responded in a timely manner and the amount of the fee is excessive and an attempt by the CBRM to avoid providing the requested information.

The CBRM's position

[37] The CBRM declined to exercise its discretion to waive the fee. In response to the applicant's argument that he could not afford to pay, the CBRM pointed out that a decision of a previous Review Officer set out that the onus or burden of proof is on the applicant to prove their inability to pay.²⁵

²⁵ *Nova Scotia (Health) (Re)*, [1998 CanLII 1541 \(NS FOIPOP\)](#).

[38] In this case, the applicant anonymously requested the information through a lawyer. The CBRM took the position that the applicant in this case was the lawyer who submitted the access to information request, and not that lawyer's anonymous client. The CBRM said that the person whose ability to pay was at issue was the lawyer and not the lawyer's client. It noted that the lawyer, as its applicant, had not submitted any evidence to support his inability to pay but rather only referred to his client's ability to pay.

[39] The CBRM went on to say that even if the inability to pay of the lawyer's unnamed client was relevant, the onus on the applicant required more than a bare statement of inability to pay to justify a waiver of the fee. The CBRM pointed me to a 2001 order from the British Columbia Information and Privacy Commissioner, where the Commissioner stated:

[89] In my view, the applicant has not established that it cannot afford to pay the estimated fee. General assertions, even in affidavit form, that the applicant has a "limited budget" or "extremely limited" financial resources, do not establish an inability to afford this particular fee. The applicant did not provide any details as to its financial situation that would allow one to conclude that it could not afford the fee. I find that the applicant has not established that it cannot afford to pay the estimated fee.²⁶

[40] The CBRM stated that the lawyer representing the applicant had said nothing more than a bare statement that the person he was representing had "limited means". The CBRM noted how vague this statement was and argued that as no person has access to unlimited funds, every CBRM citizen could reasonably be described as having limited means.

[41] The CBRM argued that if the claims made by the applicant's lawyer were accepted, then every applicant could evade payment of fees simply by making a bare claim that they are acting on behalf of an anonymous person who cannot pay. The CBRM stated that it cannot have been the intention of the legislature that the bar for a fee waiver should be set that low. Furthermore, the CBRM said that s. 471(2) of the *MGA*, which contains the principle that a municipality may require a fee payment, would be meaningless if applicants could compel municipalities to waive fees by simply asking for the fees to be waived without providing any evidence that they cannot pay.

[42] In terms of the applicant's argument that the fees be waived in the public interest, the CBRM indicated that again, the applicant provided only bare claims that the disclosure was in the public interest. The CBRM viewed the applicant's September 30, 2019 representations and noted that he appeared to be primarily objecting to the need to request the documents at all. The applicant's representations focused on the applicant's position that the records should be freely available to the public without citizens having to make a request for them or bear any expense. In this regard, the CBRM pointed me to a 2008 Nova Scotia review report wherein the former Review Officer stated:

On the basis of these factors, in considering the first group of pertinent questions, the only one that could relate to public interest is the possibility that the Record could show how the Town is allocating financial resources. Given the fact that the Record is not yet

²⁶ *Ministry of Transportation and Highways, Re, 2001 CanLII 21578 (BC IPC).*

created and what the Applicant is seeking is for the Town to create information that s/he thinks should already be available and, in his or her opinion, should be part of the Town's financial information available to the public, it is difficult to characterize what the Applicant is requesting as a matter of public interest versus personal interest. There is no evidence to support that this Record has been the subject of recent public debate. It is not a matter directly related to the environment, public health or safety and the dissemination of the information would not assist the public in understanding an important policy, law or service. The Applicant must be aware that an access request that is principally, if not wholly, for his or her personal interests cannot be characterized as in the public interest in order to meet the test for a fee waiver.

Since the first step of the analysis does not point to there being a public interest, it is unnecessary to consider the other factors regarding capacity and intention to disseminate the information. If that is in error and those factors should be considered regardless, I find that the Applicant is making this request for personal use and has indicated that s/he is not making this request for the purpose of disseminating the information, though s/he would be free to do with the information whatever s/he chooses. Indeed, the Applicant takes the position that it is for the Town to disseminate the information as a matter of course.²⁷

[43] The CBRM argued that the above decision was directly on point with the current situation. The applicant in this case was similarly asking to have the municipality create detailed expense lists and accounting of financial information that he believed the public had the right to know and therefore should be made available to the public. Furthermore, the applicant did not provide any evidence that the public interest would be served by the creation of these records beyond a vague suggestion that the public had the right to know. The CBRM's position was that simply because the applicant believed the entire concept of charging a fee was unfair, that was not a basis for a fee waiver.

[44] In response to the applicant's suggestion that the development of a port terminal "raises the spectre" of contaminants and environmental concerns, the CBRM stressed that none of the documents requested by the applicant addressed the issue of environmental hazards. The records the applicant requested did not relate to environmental issues. The CBRM pointed me to a 2015 decision out of Ontario where the Information and Privacy Commissioner addressed a similar circumstance. In that case, the applicant indicated he was concerned about the potential environmental impact of a proposed waste incinerator project but the records he asked for related largely to expenses. In that case, the adjudicator rejected the request for a fee waiver and noted:

[41] I am satisfied that the subject matter of some of the records described in the request relating to the waste incinerator project, concern a community of residents and thus is a matter of public rather than private interest. However, I also find based on the appellant's representations and the broad scope and nature of his request that I do not have sufficient evidence before me that the subject matter of the records relates directly to a public health or safety issue. The appellant's request is for contracts, Oaths of Office, voting records, expenses, authorizations, gasoline tax financing correspondence,

²⁷ *Kentville (Town) (Re)*, [2008 CanLII 22887 \(NS FOIPOP\)](#).

records relating to sporting events, business trips and political party sponsored events, an employment contract, and a construction status report, among other correspondence regarding the waste incinerator project. While the appellant sets out his concerns in his representations about the environmental hazards of waste incinerator projects generally, he has not provided sufficient evidence to demonstrate that the records he has specifically requested, although they may be of public interest, relate directly to a public health or safety issue.²⁸

[45] The CBRM pointed to the criteria that have typically been applied in previous Nova Scotia review reports where the fee was at issue. For example, in Review Report FI-00-91, former Review Officer Darce Fardy stated:

“Public interest” is not defined in the Act. I, and other information and privacy commissioners, have articulated a two step process which we have suggested public bodies follow when deciding whether to grant a fee waiver:

1. has the matter been a subject of recent public debate?
2. does the subject matter relate directly to the environment, health or safety?
3. would the dissemination of the information yield a public benefit by assisting public understanding of an important policy?
4. do the records show how the public body is allocating financial or other resources?

If a public body agrees that the matter is in the public interest it would consider other factors:

1. is the applicant’s primary purpose to disseminate the information in a way that could reasonably be expected to benefit the public or serve a private interest?
2. is the applicant able to disseminate the information?²⁹

[46] The CBRM noted that, despite the onus being on him to do so, the applicant provided no evidence to establish that this matter has been the subject of recent debate except to say that the hiring of various individuals “has been the subject matter of a recent debate.” The CBRM argued that it would be unreasonable to require the CBRM to somehow prove that there has been no public debate with respect to each record sought. Furthermore, the CBRM said that there is no single issue that the requested documents relate to that could be looked to for the purpose of determining if there has been recent debate on that issue, despite the applicant claiming in his representations that the issue is the port terminal project. That, the CBRM argued, was because the requested documents were so broadly characterized.

[47] The CBRM further argued that the records would not assist the public understanding of a policy because the records do not relate to any laws or policies. Rather, the documents relate to business and financial information.

²⁸ *Durham (Regional Municipality) (Re)*, [2015 CanLII 47400](#) (ON IPC).

²⁹ *NS Review Report FI-00-91*, [2000 CanLII 8649 \(NS FOIPOP\)](#).

[48] The CBRM did acknowledge that some of the documents requested, particularly those relating to expenses incurred by CBRM staff, may be of some public interest. However, the CBRM pointed out that the mayor's expense reports have been on the CBRM website since 2013. In addition, although not in the detailed format requested by the applicant, information on the expenses of many of the individuals named in the access to information request are contained in the CBRM's publicly disclosed financial statements. The CBRM argued that as such, the public already has access to a significant part of the requested information and so public disclosure of the records will provide little if any further insight into the allocation of CBRM financial resources.

[49] In any event, the CBRM pointed out that the analysis does not stop there. It noted that the applicant must also be able to show that the public interest is served by disclosure to the applicant. The CBRM pointed me to a case of the Office of the Information and Privacy Commissioner of Alberta, where similar to the present review, the applicant was a lawyer acting on behalf of "concerned citizens" but offered no further information. In that case, the applicant was found to be acting for purely private interests:

[para 37] The Public Body says that the Applicant is a lawyer in private practice in Alberta and there is no evidence at the Inquiry to show that the Applicant's interest is other than a private interest. The Applicant says that he is "acting on behalf of other concerned citizens". However, the Applicant does not explain this comment further or indicate which citizens he is acting on behalf of when requesting the record. I accept the Public Body's submission that the Applicant is motivated by private interests.

- This factor weighs against excusing payment of the fee.³⁰

[50] The CBRM pointed out that in this review, the applicant has similarly not provided any evidence to suggest that he intends to disseminate the records to the public. It is also, the CBRM said, entirely unknown whether the applicant's client has the ability to disseminate the records to the public.

Analysis

Financial grounds

[51] As set out in s. 471(7) of the *MGA*, the CBRM has discretion to waive the fee if the applicant cannot afford the payment. It is the applicant's burden to establish that a fee waiver is warranted.

[52] I am persuaded by the British Columbia case provided by the CBRM, wherein the former Commissioner noted that "General assertions, even in affidavit form, that the applicant has a "limited budget" or "extremely limited" financial resources, do not establish an inability to afford this particular fee."³¹ Similarly, in Nova Scotia Review Report FI-08-66, former Review Officer McCallum noted the applicant's lack of submission of evidence to support a statement of inability to pay when she agreed with a public body's decision to not issue a fee waiver.³²

³⁰ *Alberta Solicitor General and Public Security (Re)*, [2008 CanLII 88754 \(AB OIPC\)](#).

³¹ *Ministry of Transportation and Highways, Re*, [2001 CanLII 21578 \(BC IPC\)](#), at para. 89.

³² *NS Review Report FI-08-66*, [2009 CanLII 1344 \(NS FOIPOP\)](#), at page 11.

[53] In this case, the applicant provided nothing more than a bare assertion of his inability to pay based on having limited means. No affidavit evidence was provided. No detail on the applicant's financial inability to pay was provided. He provided no information as to his financial position, such as income and expenses. It was incumbent upon the applicant to provide details of his financial situation that would allow one to conclude that he could not afford the fee.

[54] The applicant also argued that the fee should not be required because the records should be readily available to the public. However, the legislation is clear that fees may be charged.

[55] Overall, the applicant has not met his burden to show that he cannot afford the fee for the requested records. I find that the applicant has not established that he cannot afford to pay the estimated fee.

Fairness grounds

[56] Although I have found that the applicant did not establish that he cannot afford to pay the estimated fee on financial grounds, the CBRM may also waive the fee for any other reason it is fair to do so. One of the other reasons it would be fair to do so is based on public interest grounds.

[57] The CBRM did not provide this office with the records in question. Furthermore, the CRBM provided only a one-page representative sample that was not comprehensive in the context of an estimated 403 pages of records. This made the public interest grounds test difficult to apply.

[58] As set out by the CBRM, existing case law establishes a two-step process for determining whether to grant a fee waiver based on public interest. First, it must be determined whether a waiver is in the public interest based on the responses to four questions. If it is determined to be in the public interest, the second part of the process is to assess the dissemination of the requested information. It is not necessary for all of these factors to apply in order for a municipality to decide to waive the fee.³³

1. Has the matter been a subject of recent public debate?

[59] The first question is whether the matter has been a subject of recent public debate. While the applicant stated that the matter was of public debate, he did not provide evidence to demonstrate that the records he has specifically requested were a matter of public debate. Nevertheless, a simple search on Google brings up numerous articles about the topics of CBRM expenses, hiring of officials and monies spent on the port development. I am satisfied that the matter has been the subject of public debate.

2. Does the subject matter relate directly to the environment, health or safety?

[60] The second question is whether the matter relates directly to the environment, health or safety. I found Order MO-3225,³⁴ submitted by the CBRM, to be persuasive. Although the applicant said that because the records are about the Port of Sydney, this could raise

³³ Nova Scotia (Department of Environment and Labour) (Re), 2000 CanLII 8649 (NS FOIPOP).

³⁴ Durham (Regional Municipality) (Re), 2015 CanLII 47400 (ON IPC).

environmental issues, that is not enough. The applicant did not request information specifically about environmental issues. Rather, he requested information about expenses in relation to the Port of Sydney. I am not satisfied that the matter relates directly to the environment, health or safety.

3. Would the dissemination of the information yield a public benefit by assisting public understanding of an important policy?

[61] The third question is whether the dissemination of the information would yield a public benefit by assisting public understanding of an important policy. A policy was not requested. The records requested do not relate to a policy. They are about business and financial information. The records could show the expenses of the CBRM and arguably provide some insight into the CBRM's practices in that regard. However, in my view that would not assist public understanding of an important policy.

4. Do the records show how the municipality is allocating financial or other resources?

[62] The fourth and final question is whether the records show how the CBRM is allocating financial or other resources. The records requested relate almost entirely to how the CBRM is spending its money. Although more general information about some of the expenses is publicly posted by the CBRM, the applicant has requested more information than was proactively disclosed. In my view, the records will likely show how the CBRM is allocating its financial resources.

[63] The responses to the four questions in the first step of the two-step process to determine whether to grant a fee waiver based on public interest weigh in favour of both the applicant and the CBRM. As such, I turned to the purposes of the legislation which include ensuring that municipalities are fully accountable to the public by giving the public a right of access to records in order to facilitate informed public participation in policy formulation and ensure fairness in government-decision making.³⁵ In light of that, and recognizing the applicant's arguments to that effect, I am prepared to find that the records are in the public interest.

[64] Although I have found that the records are in the public interest, the second step of the process requires me to analyze the dissemination of the records if released. The applicant's representations were that he would disseminate the records publicly. However, he did not explain how he would do so. He did not provide any representations showing that his primary purpose would be to disseminate the information in a way that could be expected to benefit the public. Moreover, on this issue, I have no way to deduce whether the applicant is able to disseminate the information. As such, although I find that the information is in the public interest, I am not convinced that the applicant has the means to disseminate the information in a way that could be expected to benefit the public. Accordingly, I find that the CBRM's assessment that the fee should not be waived on public interest grounds was reasonable.

Fee waivers for any other reason it is fair to do so

[65] In addition to the public interest argument, I must also assess whether s. 471(7) of the MGA is applicable. This section enables a municipality to issue a fee waiver "for any other reason it is fair to excuse the payment." Previous review reports from this office and from the

³⁵ Section 462 of the MGA.

Ontario Information and Privacy Commissioner have set out that the factors to consider in assessing fairness are as follows:

1. The manner in which the institution responded to the request.
2. Whether the institution worked constructively with the requester to narrow and/or clarify the request.
3. Whether the institution provided any records to the requester free of charge.
4. Whether the requester worked constructively with the institution to narrow the scope of the request.
5. Whether the request involves a large number of records.
6. Whether the requester has advanced a compromise solution which would reduce costs.
7. Whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.³⁶

[66] Additional factors have been added in a variety of review reports out of Nova Scotia. A few examples of other factors to consider when assessing fairness include:

1. Waiving or reducing service fees where the municipality has not met its duty to assist, caused unnecessary delay or otherwise did not observe the requirements of the Act.³⁷
2. Whether some of the time required to locate and retrieve the records results from poor records management and internal disorganization or some other inefficiency.³⁸
3. Whether the records consist of documents containing no information that a municipality believes to be exempt under the Act and should have been identified as appropriate for routine disclosure.³⁹
4. Whether the applicant is given access to the records.⁴⁰

[67] During the review process, the CBRM did take a number of positive steps, including lowering the fee estimate, removing the fee for things that were not authorized under the legislation and providing a two-page sample record to the applicant free of charge. Similarly, the applicant worked with the CBRM to narrow the scope of the request and further narrowed it quite significantly during the investigation. He also suggested that he could receive the records electronically to reduce costs. Both parties took steps during the review process in an attempt to informally resolve this matter.

[68] However, the factors also require me to look at the manner in which the CBRM responded to the applicant's request. There were significant shortcomings in how the CBRM engaged with the applicant when he made his access to information request. The CBRM's decision letter simply stated the number of hours required to process the request and the amount of pages that would be produced. There was no breakdown of how the CBRM came up with these numbers. As I set out above, the CBRM did not meet its duty to assist the applicant.

³⁶ These factors were set out in NS Review Report FI-07-69(M), 2008 CanLII 22887 (NS FOIPOP). They were based on ON IPC Orders P-760 and M-166, which were cited with approval more recently in Reconsideration Order MO-3555-R, 2018, *Toronto (City)(Re)*, [2018 CanLII 4536 \(ON IPC\)](#).

³⁷ NS Review Reports FI-02-92, FI-97-92 and FI-97-26.

³⁸ NS Review Report FI-97-17.

³⁹ NS Review Report FI-02-45.

⁴⁰ *Freedom of Information and Protection of Privacy Regulation* 6(9).

[69] In addition, at the time the fee waiver was requested and refused in November 2016, the CRBM created a memo explaining why it could not accept waiving the fees for this request and sent it to this office. The reasons for not granting the waiver set out in that memo included that the scope was tremendous with no effort by the applicant to reduce the scope, the cost of the staff time and materials would be significant and the fee would only allow it to recapture a small portion of the costs. The CBRM also explained in the memo that the request was unreasonable and would cost the CBRM and taxpayers significant dollars, the documents requested would require a careful and legal review of the files, the request was similar to previous access requests where the CRBM reviewed, eliminated or redacted many portions of the documents due to their confidential nature, and that it was the CRBM's belief that it was not in the public interest to disclose the records.

[70] Whether or not records should be disclosed in the public interest requires the municipality to go through the test outlined above (paragraphs 56-64). Those are the factors that the CRBM should have considered. Aside from assessing the applicant's willingness to narrow the scope, none of the factors outlined in the memo should have been considered by the CBRM as relevant factors. A municipality should not be refusing to waive the fee because the work required to retrieve and apply redactions to requested records would consume too many resources. Nor should a fee waiver be denied because the municipality ultimately may not disclose the records due to the application of an exemption under the *MGA*. Rather, as set out in s. 6(9) of the *Regulations*, municipalities should be considering fee waivers when applicants will not be given access to the requested records.

[71] In response to his request, the applicant faced, to the best of my knowledge, the highest fee estimate ever issued in the history of this province. The CBRM reduced the fee estimate by around 90% through the course of the review process and after the applicant significantly narrowed the scope of his request. However, the CBRM refused to grant the applicant's fee waiver request based at least in part on grounds that were not relevant or appropriate. Even with the second fee estimate of \$3,859.20, I have found that the information the CBRM used to come to that amount (for time spent searching for and reviewing the records) was too high. Overall, in my view, the way the CBRM responded to the request was not reasonable nor aligned with the legislation. I find that the CBRM's refusal to provide a full fee waiver was not fair, as contemplated by s. 471(7) of the *MGA*.

FINDINGS & RECOMMENDATIONS:

[72] I find that:

1. The CBRM has not calculated the fee fairly and accurately in accordance with s. 471 of the *MGA* as it relates to the estimate of 101 hours for its Department of Finance to produce the records and to the estimate of 23.5 hours for a review to determine whether an exemption applies.
2. The CBRM did not respond to the applicant openly, accurately and completely as required by s. 467 of the *MGA* with regard to its fee estimate.
3. The CBRM's refusal to provide a full fee waiver was not fair, as contemplated by s. 471(7) of the *MGA*.

[73] I recommend that the CBRM:

1. Waive the \$3,859.20 fee estimate because it is fair to so as contemplated by s. 471(7) of the *MGA* and provide the applicant with its decision with respect to the fee waiver within 30 days of receipt of this report.
2. Issue a decision, including a copy of the records, to the applicant within 45 days of receipt of this review report.

[74] As set out in s. 493 of the *MGA*, the CBRM must make a decision to accept or reject my recommendations within 30 days after receiving this report.

February 23, 2021

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 16-00120