



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

REVIEW REPORT 24-10

April 18, 2024

Department of Environment and Climate Change

Summary: The Alton Natural Gas Storage Facility project was the subject of public debate and numerous court proceedings. The applicant requested all documents and correspondence associated with the project from the Department of Environment and Climate Change (public body). In response, the public body informed the applicant that they would need to pay fees for the responsive records pursuant to s. 11 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* and requested a deposit to proceed with processing the request. The applicant asked the public body to waive the fees. The public body responded with a revised fee estimate and an updated deposit amount. The applicant remained unsatisfied with the public body's fee estimate and asked the Office of the Information and Privacy Commissioner to review the public body's decision. The Commissioner finds that although the matter is in the public interest, the public body properly exercised its discretion in its decision to not waive fees. As such, the Commissioner recommends that the public body reconfirm the fee estimate it issued to the applicant.

INTRODUCTION:

[1] In 2007, the Nova Scotia Government approved the development of the Alton Underground Natural Gas Storage Facility (Facility). The approval was for the development of an underground hydrocarbon storage facility in a series of engineered salt caverns by means of a solution mining process near Alton, Nova Scotia. The plan for the Facility included that water for the mining process would be carried between the Shubenacadie Estuary and the Facility near Alton, via approximately 12 km of buried pipelines.¹

[2] Development of the Facility was the subject of significant public debate, opposition and court proceedings.² There were concerns of negative effects to fish and fish habitats due to water withdrawal from the Shubenacadie River into both the water intake and the mixing channel, and

¹ Government of Nova Scotia, *Alton Underground Natural Gas Storage Facility* (undated), online: Department of Environment and Climate Change <<https://novascotia.ca/nse/ea/AltonNaturalGasstorage.asp>>.

² CBC, *Alton Gas project cancelled after years of opposition*, (October 2021), online:<<https://www.cbc.ca/news/canada/nova-scotia/alton-gas-project-cancelled-after-years-of-opposition-1.6221165#:~:text=The%20Alton%20project%20has%20been,a%20straw%20house%20was%20bulldozed>>.

the discharge of brine and sediments into the Shubenacadie River. Nevertheless, the Facility was approved.³ In 2022, decommissioning of the Facility was approved.

[3] The applicant requested all documents and correspondence associated with the Facility project. In response, the Department of Environment and Climate Change⁴ (public body) responded to the applicant with a fee estimate of \$2,000.00 and requested a \$1,000.00 deposit to proceed with the processing of the request, pursuant to s. 11(2) of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*. In an effort to have the fees waived, the applicant narrowed the scope of their original request and provided a submission to the public body on how the records requested relate to a matter of public interest, and as such, the fees should be waived pursuant to s. 11(7) of *FOIPOP*. The public body responded with a revised fee estimate of \$1,200.00 and requested a \$600.00 deposit to proceed with the processing of the applicant's request. The applicant was unsatisfied with the reduction in fees and so asked the Information and Privacy Commissioner to review the public body's decision to deny their fee waiver request.

ISSUE:

[4] Did the public body properly exercise its discretion in deciding not to grant a fee waiver in accordance with s. 11(7) of *FOIPOP*?

DISCUSSION:

Burden of proof

[5] With respect to the issue of fee waivers, *FOIPOP* is silent as to who bears the burden of proof. Therefore, the parties must each submit arguments and evidence in support of their positions. The public body is responsible to support the decision it made, including that it exercised discretion fairly, while the applicant is responsible to support that the criteria for granting a fee waiver as set out in s. 11(7) of *FOIPOP* are met.

Did the public body properly exercise its discretion in deciding not to grant a fee waiver in accordance with s. 11(7) of *FOIPOP*?

[6] Section 11(7) provides that a public body may excuse an applicant from paying all or part of a fee that the public body is authorized to charge to complete an access to information request. The section allows the public body to excuse an applicant from paying all or part of a fee to process the responsive records if the applicant cannot afford to pay or for other reasons that are fair, or the record relates to a matter of public interest. For the reasons provided below, I find that although the records relate to a matter of public interest, the public body properly exercised its discretion in refusing to grant a fee waiver to the applicant.

³ Government of Nova Scotia, Alton Underground Natural Gas Storage Facility (undated), online: Department of Environment and Climate Change <<https://novascotia.ca/nse/ea/AltonNaturalGasstorage.asp>>.

⁴ At the time the access to information request was made, the public body was titled the Department of Environment. Subsequent to the applicant filing their access request, this public body was renamed the Department of Environment and Climate Change.

[7] Section 11(7) of *FOIPOP* provides:

11(7) On request of the applicant, the head of a public body may excuse an applicant from paying all or part of a fee referred to in subsection (2) if, in the head's opinion,

- (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment; or
- (b) the record relates to a matter of public interest, including the environment or public health or safety.

Do the records relate to a matter of public interest pursuant to s. 11(7)(b) of FOIPOP?

[8] The applicant asked for a fee waiver pursuant to s. 11(7)(b) of *FOIPOP* on the grounds that they believed the records relate to a matter of public interest.

[9] As set out in *BC Order F22-18*,⁵ previous orders from British Columbia⁶ have outlined a two-step process for deciding if a public interest fee waiver is warranted under s. 11(7)(b)⁷ of *FOIPOP*:

1. Do the records relate to a matter of public interest?
2. If so, should the applicant be excused from paying all or part of the fee estimate?

[10] I adopt this process.

Step 1: Do the records relate to a matter of public interest?

[11] Step one of the test is to determine whether the requested records relate to a matter of public interest. *British Columbia Order 01-24* describes the way to determine this as:

1. The head of the Ministry must examine the requested records and decide whether they relate to a matter of public interest (a matter of public interest may be an environmental or public health or safety matter, but matters of public interest are not restricted to those kinds of matters). The following factors should be considered in making this decision:
 - (a) has the subject of the records been a matter of recent public debate?;
 - (b) does the subject of the records relate directly to the environment, public health or safety?;
 - (c) could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
 - (i) disclosing an environmental concern or a public health or safety concern?;
 - (ii) contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue?; or

⁵ *BC Order F22-18, British Columbia Utilities Commission (Re)*, [2022 BCIPC 20 \(CanLII\)](#), at para. 15.

⁶ *BC Order 01-24, Ministry of Transportation and Highways, Re*, [2001 CanLII 21578 \(BC IPC\)](#), at para. 32; *BC Order 01-35, Ministry of Forests, Re*, [2001 CanLII 21589 \(BC IPC\)](#), at para. 20; *BC Order F05-36, Ministry of Agriculture and Lands, Re*, [2005 CanLII 46569 \(BC IPC\)](#), at para. 50; and *BC Order F07-01, British Columbia (Environment) (Re)*, [2007 CanLII 773 \(BC IPC\)](#), at para. 54.

⁷ British Columbia's fee waiver provision is similar to Nova Scotia's. See s. 75(5) of *Freedom of Information and Protection of Privacy Act*, [RSBC 1996, c 165](#).

- (iii) contributing to public understanding of, or debate on, an important policy, law, program or service?;
- (d) do the records disclose how the Ministry is allocating financial or other resources?⁸

[12] The applicant provided the following information in their effort to establish that the responsive records relate to a matter of public interest:

1. The public has the right to have this information. It takes to [sic] long to ask questions and get responses in a timely manner.
2. The Shubenacadie River is one of the most important Rivers in Nova Scotia. It is home to a SARA listed species which is the inter-bay Atlantic Salmon – it is on the highest risk list in Canada. The Stripped Bass is also on a threatened species list. These fish are in danger.
3. Fish are in danger from Alton Gas.
4. Peace and Friendship Treaties are not being upheld and fishing rights for the Mikmaq [sic] People are at stake.
5. The project is not in Federal compliance although the province has given permits by industrial approvals. Which we need to know more.
6. There have been so many design changes and industrial approval changes that the public is not aware of these changes. Without this information the risks are unknown to the public. The public needs to see and have a better understanding of how the brine will be released – it confuses the public when too many changes are made and people are unaware -making assumptions based on false information.
7. The media has not done a proper or accurate job of letting the public know the true risks and operations of this project. Leaving people not properly educated to the risks.
8. Brine and trace minerals is a deleterious substance and puts fish and fish habitat at risk. This is against federal compliance laws and is not ok.
9. Mother Earth is precious and future generations will want to fish and enjoy this river and most importantly Mikmaq [sic] People have Fishing Rights under the Treaties it is not ok to put these Rights in jeopardy.
10. Several appeals have been made and given the changes to industrial approvals it is unclear if these appeals were denied with the correct information.
11. This is not a small issue – the community has spent a huge amount of resources time and dedication to try and save the river. And I mean a ton!!!. People have worked extremely hard to help the river it is only fair to provide this information. We dont [sic] have the money or time to come up with that kind of money for documents. One can look up articles online to see the community has done everything in their power to find out more and support efforts to stop the project. There is no social license or approval for Alton Gas. The people say no to Alton Gas we need the information to better help the public understand and protect and stop an environmental disaster.

[13] The subject matter of the request is clearly of significant public interest and relates directly to the environment and public health.

⁸ BC Order 01-24, *Ministry of Transportation and Highways, Re, [2001 CanLII 21578 \(BC IPC\)](#)*, at para. 32.

Step 2: Should the applicant be excused from paying the fee?

[14] If step one is met, step two of the test is to determine whether the applicant should nevertheless be excused from paying a fee for the responsive records. As described in *BC Order 01-24*:

2. If the head of a Ministry, as a result of the analysis outlined in paragraph 1, decides the records relate to a matter of public interest, the head must still decide whether the applicant should be excused from paying all or part of the estimated fee. In making this decision, the head should focus on who the applicant is and on the purpose for which the applicant made the request. The following factors should be considered in doing this:
 - (a) is the applicant's primary purpose for making the request to use or disseminate the information in a way that can reasonably be expected to benefit the public or is the primary purpose to serve a private interest?
 - (b) is the applicant able to disseminate the information to the public?⁹

[15] The applicant's primary purpose is to disseminate the requested material in a way that could reasonably be expected to yield a public benefit by contributing to the public understanding of an important environmental issue. I also accept that the applicant is able to disseminate the information to the public. In other words, s. 11(7) gives the public body discretion to excuse the applicant from paying fees for the responsive records pursuant to s. 11(7)(b).

Exercise of discretion

[16] Although the criteria for excusing fees have been met, the public body still has discretion to not excuse the fees for processing the requested records.

[17] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, the Supreme Court of Canada noted that:

[71] The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see *IPC Order PO-2369-F/February 22, 2005*, at p. 17).¹⁰

[18] In *NS Review Report 18-02*, former Commissioner Tully summarized non-exhaustive relevant factors in the exercise of discretion as follows:

- the wording of the discretionary exemption and the interests which the section attempts to balance;
- the historical practice of the public body with respect to the release of similar types of documents;

⁹ *BC Order 01-24, Ministry of Transportation and Highways, Re, 2001 CanLII 21578 (BC IPC)*, at para. 32.

¹⁰ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII)*, [2010] 1 SCR 815, at para. 71.

- the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a sympathetic or compelling need to release materials;
- whether previous orders of the Commissioner have recommended that similar types of records or information should or should not be subject to disclosure; and
- when the policy advice exemption is claimed, whether the decision to which the advice or recommendations relates has already been made.¹¹

[19] The public body noted that the legislated environmental process for approval of the Facility was transparent as large volumes of records have been made available on its website. The public body explained that the process for approval of the Facility allowed for significant public scrutiny as it posted all documents informing its decision to approve the Facility on its website.

[20] The public body argued that it worked with the applicant to help focus the scope of their request to reduce or eliminate the fees. I agree. The volume of records responsive to the applicant's original request was significant (approximately 4500 pages requiring 41 processing hours) and involved records from federal government departments. The public body responded to the applicant within 30 days of the request, placing the file on hold until a deposit was received. It later provided a general document list to assist the applicant and suggested a narrowed scope could reduce the fees and offered to discuss this option. The public body has responded to seven requests for records that the applicant has made regarding the Facility.

[21] The public body also stated that the matter has been litigated many times in Nova Scotia courts and a significant amount of information is now in the public record as a result. This factor could not have been considered by the public body at the time of its fee waiver decision because these events occurred later since most significant litigation occurred after this request. Therefore, this is not a relevant factor in this review.

[22] In my view, the public body's exercise of discretion was reasonable and fair. It did not consider inappropriate factors or ignore relevant factors in its decision to not grant a fee waiver. As such, the public body properly exercised its discretion to not grant a fee waiver to the applicant and is entitled to charge the applicant fees.

Can the applicant not afford the payment or is it fair to excuse payment for any other reason pursuant to s. 11(7)(a) of FOIPOP?

[23] The applicant also asked for a fee waiver pursuant to s. 11(7)(a) on the grounds that they cannot afford payment of the fees.

¹¹ NS Review Report 18-02, Department of Community Services (Re), [2018 NSOIPC 2 \(CanLII\)](#), at para. 46.

[24] In *Ministry of Transportation and Highways, Re*,¹² former British Columbia Commissioner Loukidelis 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.” 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.¹³

[25] In this case, the applicant provided limited information about their ability to pay, asserting only that they are unable to. This is not enough to establish that the applicant cannot afford to pay the fee and so I find the public body was authorized to decide against excusing the applicant from paying the fee estimate on financial grounds. Because this is my finding, it is not necessary for me to review the public body’s exercise of discretion.

FINDING & RECOMMENDATION:

[26] I find that the public body considered all relevant factors and properly exercised its discretion in its decision to not grant a fee waiver to the applicant.

[27] I recommend that the public body reconfirm its fee estimate to the applicant.

April 18, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

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¹² *BC Order 01-24, Ministry of Transportation and Highways, Re*, [2001 CanLII 21578 \(BC IPC\)](#), at para. 89.

¹³ *NS Review Report FI-08-66*, [2009 CanLII 1344 \(NS FOIPOP\)](#), at p. 11.