

**NOVA SCOTIA FREEDOM OF INFORMATION AND
PROTECTION OF PRIVACY ACT**

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF ENVIRONMENT AND LABOUR** to deny a request for a fee waiver.

REVIEW OFFICER: Darce Fardy

DATE: August 12, 2002

ISSUE: Whether the request for a fee waiver meets the conditions found in Section 11(7)(a) and (b).

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated January 23, 2002, the Applicant asked that I recommend to the Department of Environment and Labour (the Department) that it reverse its decision to refuse her request for a fee waiver.

The Applicant had asked the Department for copies of all documents related to its Environmental Assessment division and a construction company. She also asked for copies of all documents related to site inspections done in September, October and November, 1999. The Department split this application into two. This Review has to do only with the Department's decision respecting the first issue. The matter revolves around the construction company's activities on a site known as "Baltzer's Bog" in the Kentville area.

In its response, the Department told the Applicant that some 1700 pages of documents had to be reviewed and prepared for disclosure. It estimated that it would take four hours of staff time to locate and retrieve and photocopy files and 28 hours to review and prepare

the documents for disclosure. The estimated cost for this is \$600.00. The Applicant was told she may be charged another \$368.00 in copying charges if the decision of the Department is to provide all the documents to the Applicant. The Department used the fee structure which prevailed before April 4 when fees were increased. The Applicant was invited to contact the Department if she wished to amend her Application to reduce the costs.

Section 11(2) allows a public body to charge fees for processing applications for access under the **Act**. Section 6 of the Regulations provides the amounts to be charged.

Section 11(7) allows a public body to waive fees if, in its view

- (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.

The Department, in a representation to the Review, said that the Applicant did not contact it to discuss amending the application. It also said that the Applicant provided no statement to show she could not afford to pay the fees.

The Department also noted that, by virtue of its responsibilities, it could be argued that all documents related to these responsibilities would concern the environment and public safety and that all applications should be processed without fees. The Department does not support this argument believing each application should be considered on its own merits.

The Department also says it believes that this Application, and the other similar ones, constitute “a misuse of the intent” of this **Act**.

It summarized its representation to the Review:

- At no time did the Applicant communicate with the Department when she was invited to when the fee estimate was provided;
- fees have been estimated in accordance with the Act and the Regulations and;
- the information requested by the Applicant has already been provided (for the most part) to a group called the Environmentally Concerned Communities of Kings County Association (ECCKA) and that the Applicant is likely aware of this.

To support her request for a fee waiver in the public interest, the Applicant, in a letter to the Review Office, said that her home, and forty others, are located within 500 feet of Baltzer's Bog and the residents are all concerned with the operations of the construction company.

The Applicant also says fees should be waived because pursuing the matter had been costly to the residents for lawyer fees, water testing and public meetings. She said the expense has exceeded \$20,000.00.

Conclusions:

This Office's Mediator, despite spending a considerable amount of time attempting to settle the matter, was unsuccessful. The Applicant, in response to the Mediator's suggestion that she narrow the focus of the Application to reduce the costs, provided new wording on her Application and this was provided to the Department. The Department was not persuaded to alter its fee estimate. In my view the re-worded Application could not be considered a refinement of the original one.

When I spoke with the Applicant she was unclear on whether the information sought in her Application would be covered by the applications submitted by ECCKA. However, she was aware of ECCKA's efforts to acquire information on Baltzer's Bog, which is not surprising given the group's prominence in its community and beyond.

This Department and the Office of Economic Development (the OED) have received many requests for documents related to this issue. The most frequent requester has been a representative of ECCKA. The Applicant in this Review has not identified herself as a member but the Department believes she is. The Department believes the information being sought has already been provided to other residents of the area through ECCKA.

Since January of 2001, the Department has received eleven applications related to Baltzer's Bog and the construction company. Most of them were received from the same representation of ECCKA. In the majority of these cases, all of the information sought was disclosed in full at no cost. The Department believes it is more than likely that the information sought by this Applicant has already been provided to the representative from ECCKA.

The OED has had somewhat the same experience. It received nine applications on the Baltzer's Bog matter since August 2001. The same representative from ECCKA made five of the requests.

To show the similarity of the applications, the Department and the OED provided me with precis of the applications. They include requests for copies of:

- all correspondence between the Department and the construction company,
- all requests made to the construction company by the Department regarding Baltzer's Bog and all test results at Baltzer's Bog;

- all permits and permit applications for Baltzer’s Bog;
- all correspondence between Department staff and the staff of OED regarding South Bishop Road or the construction company;
- all correspondence, including test results, between the Department and the construction company;
- all records involving 17 staff members, the construction company, Baltzer’s Bog and ECCKA;
- all documents with respect to any financial assistance provided to the construction company.

The Department provided the statistics and the content of the applications to support its view that it lived up to its responsibilities under the **Act** in processing these applications. It is understandable that the Department feels it has already provided the information being sought in this Application. Given the number of documents provided to the concerned community and the number involved in this application, it is my view it would be unreasonable to ask the Department to review them all again to confirm that the information sought has been disclosed.

The **Act** does not address the “misuse of the intent” of the legislation. However, **Section 5** gives a person the right of access to any record in the custody or under the control of a public body if **Section 6** is complied with. Under s.6 a person must make a request in writing, specify the subject matter of the record requested with sufficient particulars to enable an individual familiar with the subject-matter to identify the record and pay any fees required under s.11. These include an application fee and fees for locating and preparing a document for disclosure and for

copying, and shipping and handling the document if necessary.

While the efforts of ECCKA and the concerned community to protect their environment are to be applauded, it is my view that it would be unreasonable to expect the Department to process this “open” Application without charging fees, particularly when there has been no response from the Applicant to its invitation to contact the Department with a view to narrowing the focus of the Application.

In the matter of the size of the estimated fee, in earlier Reviews, while I supported the levying of fees in some cases, I have expressed concern when I felt the fee was so high as to inhibit access to the **Act**. In this case I believe such a fee would reasonably be considered beyond the ability of this applicant to pay.

Recommendation:

That the Applicant be more specific in identifying the information she is looking and that the Department, on receiving a more focussed application, consider reducing the fees considerably.

Section 40 requires the Department to make a decision on this recommendation within 30 days of receiving this Report and to notify the Applicant and the Review Officer, in writing, of the decision.

DATED this 12th day of August, 2002, in Halifax, Nova Scotia

Darce Fardy, Review Officer