



Nova Scotia

**Freedom of Information & Protection of Privacy Review Office  
Review Officer Report FI-06-25**

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**A REQUEST FOR REVIEW** of a decision by the **DEPARTMENT OF FINANCE** not to grant a fee reduction/waiver.

July 7, 2006

**ISSUE:**

Whether Section 11(7)(a)(b) of the *Freedom of Information and Protection of Privacy Act* supports the decision of the Department of Finance not to grant a fee reduction or fee waiver.

This review arises out of a request by an Applicant under the *Freedom of Information and Protection of Privacy Act* (“*FOIPOP Act*”) to the Department of Finance (“Department”) on January 10, 2006. The Applicant requested access to "... a copy of the contract between the respective company who was instructed to create the PenWeb component as well as all correspondence between the respective company and Nova Scotia government officials. Information is also requested regarding the tendering process for this particular contract and whether or not a contract was rewarded in adherence with the Nova Scotia governments procurement policy.”

After corresponding directly with the Department, the Applicant reduced the scope of the original request and the Department provided the Applicant with a fee estimate in accordance with section 6(1)(c) of the *FOIPOP Act* and sections 6(2) and 6(3) of the Regulations in the amount of \$640.00. The Department estimated it required a minimum of 21 hours to complete the search and prepare the records. After receiving the fee estimate, the Applicant further narrowed the scope of the original request. The final request was for:

“A copy of the contract between the respective company who was instructed to create the PenWeb component, as well as all correspondence between the respective company and the Department of Finance from the signing date of the Memorandum of Understanding (April 9, 2002) to present (January 10, 2006).”

On February 22, 2006, the Department advised the Applicant it would not reduce the fee estimate. In a decision letter to the Applicant, the Department stated, “We are confident that our original estimate of 21 hours is the minimum to perform a detailed search and review of our records and believe the 3<sup>rd</sup> amendment to your application is broader than your 2<sup>nd</sup> amendment and will therefore require additional time.” On February 23, 2006, the Applicant asked the Review Officer to recommend to the Department it reduce the fee estimate.

The Applicant was also concerned the calculation of the fee estimate was incorrect. The Applicant believed the requested information should be readily accessible and, “It is unreasonable to estimate that this request will take 21 hours to complete.”

**RELEVANT LEGISLATION:**

Section 11(7)(a)(b) of the *FOIPOP Act* allows a public body, on request, to excuse an applicant from paying all or part of the fee if, in the public body'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.

To address the issue of public interest in submissions to the Review Office, both the Applicant and the Department were provided with the following guiding factors as outlined in Review Report FI-00-91:

“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:

- has the matter been a subject of recent public debate?
- does the subject matter relate directly to the environment, health or safety?
- would the dissemination of the information yield a public benefit by assisting public understanding of an important policy?
- 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:

- 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?
- is the applicant able to disseminate the information?

It is not necessary for all these factors to apply in order to encourage a public body to waive fees, nor is a public body left with two choices. A reduction of fees is another option. Section 11(7) reads that the public body “may excuse an applicant from paying all or part of a fee” if “in the head's opinion” either subsections (a) or

(b) apply. In any case I agree with the British Columbia Information and Privacy Commissioner that “any attempt to define exhaustively or finally what is meant by the term ‘public interest’ is doomed to failure”. (Order # 332-1999) This is probably why the drafters of the legislation left it undefined. However, I think the factors offer a helpful guide.”

#### **SUBMISSION OF THE APPLICANT:**

In addressing the issue of “public interest” the Applicant submitted the information being sought has been subject to recent public debate when the “Office of the Auditor General of Nova Scotia...brought this issue forward by way of the June 2005 report, and was concerned enough about the issue that during a two hour briefing to the members of the Nova Scotia Legislature’s Public Accounts Committee, spent a significant amount of time discussing the issue.”

Addressing the issue of whether the dissemination of the information would yield public benefit by assisting public understanding of an important policy, the Applicant submitted, “The information requested would provide important analysis of how the Department of Finance has spent a significant amount of money (\$4,342,738) on a system for which they’ve received little or no value. It is important to understand why performance measures for payment were not placed within the contractual agreement (Memorandum of Understanding).”

The Applicant further submitted, “The information requested should provide reasoning as to why the Department did not receive value for the money allocated to the PenFax project. The information requested will also provide understanding as to when the money was allocated - before the work had begun, after the work had begun, or after the realization that little or no value was being received.”

The Applicant questioned the amount of time the Department estimated it would take to process the request. Citing information provided by the Department to the Applicant, the Applicant stated “document storage, both hard copy and electronic, pertaining to the entire PenFax Administration System Project are well organized. If this is the case then it should certainly not take 21 hours to compile the information for the sake of this FOIPOP request and the subsequent amendments.” The Applicant submitted, “For the purposes of due diligence, parties should have an accurate collection of correspondence for reasons ranging from, assessment of progress to potential dispute resolution, and litigation.” Additionally the information for “... any project of such a large scale...would have this information stored and maintained in an organized manner.”

## **SUBMISSION OF THE PUBLIC BODY:**

The Department informed that in making its decision not to grant a fee reduction or waiver, it considered, “Whether the Applicant could afford the payment or for any other reason it is fair to excuse payment. The Department determined the Applicant could afford payment for the information.”

The Department further considered whether the information being sought related to a matter of public interest, health, safety and the environment. After reviewing the records, the Department determined “...they do not meet this criterion.”

In its submission the Department stated, “The main rationale behind the decision to not adjust the fee estimate is as follows; there is a large volume of records that would need to be searched. The volume of estimated records that need to be reviewed is included in the calculation assumptions...” The Department advised material from several staff over a four year period would need to be reviewed and “PenWeb was part of a bigger ongoing project, and therefore the project files would need to be searched.” The Department stated, “There are the equivalent of nine boxes of records that need to be reviewed to determine whether they fall within the parameters of the request. There are other files (e-mails and other electronic files) that also need to be searched, using keywords. Once the cursory review has been completed, the records selected will need to be reviewed and prepared for disclosure purposes. It is estimated that it will take a minimum of 21 hours in total to complete this search and preparation work.” The Department also attached to its submission, a detailed calculation of the fee estimate.

## **ANALYSIS AND FINDINGS:**

When approaching matters of this nature one must bear in mind the purpose of the *FOIPOP Act*, that being to encourage and promote accountability, transparency and openness of public bodies. We must be careful to ensure fees associated with access to information requests are not designed as a cost recovery mechanism, nor as a barrier to public access to information.

When developing it’s fee estimate, I believe the Department reasonably followed the parameters set by the *FOIPOP Act* and Regulations and presented their calculations clearly.

In Report FI-05-60, the former Review Officer commented the imposition of fees is at the discretion of a public body, and “...the time spent gathering and processing the information should not be the only gauge used in assessing fees.” Similarly the Review Officer in Report FI-00-102 wrote, “the number of documents involved in an application is relevant to the fee” however, “...that it is not a factor in the consideration of a fee waiver request.” Similarly an Applicant should not be charged for poor record keeping practices.

The implementation of the PenFax system, and the internet based pension system PenWeb, are Departmental priorities. On page 12 of the Department's 2002-2003 Accountability Report, the Department cites as a priority to, "Deliver pension services to plan members and beneficiaries, effectively and efficiently." Recognizing this priority and the fact the PenWeb system has been the subject of comment by the provincial Auditor General in three reports; has been reported in the public domain; debated in the Subcommittee of the Whole House on Supply and discussed before the Committee on Public Accounts, I am satisfied the records being requested by the Applicant are of "public interest" envisioned by the *FOIPOP Act*. Collectively a public interest exists. It is therefore appropriate for the Department to grant a fee reduction or a fee waiver. In terms of a fee reduction versus a fee waiver, I recommend the Department consider the guiding factors set out by the Ontario Freedom of Information and Protection of Privacy Commissioner in Order P-760 when determining whether it would be 'fair' for fees to be waived.

With respect to the ability to pay, it is important to note the issue of the Applicant's ability to pay (s. 11(7)(a)) is separate from the matter of public interest.

**RECOMMENDATION:**

That the Department of Finance at minimum consider a significant fee reduction.

Section 40 of the *FOIPOP Act* requires the responsible officer to make a decision on these recommendations within 30 days of receiving them, and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, the Department of Finance is deemed to have refused to follow these recommendations, and the Applicant has a right to appeal to the Supreme Court of Nova Scotia.

Dated at Halifax, Nova Scotia this 7 day of July 2006.

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Dwight Bishop  
Acting Review Officer

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