



REPORT
Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-50(M)

- Report Release Date:** September 10, 2008
- Public Body:** The Municipality of the District of Lunenburg
- Issues:** Whether the Municipality of the District of Lunenburg [“the MODL”] appropriately exercised its discretion in not granting a complete fee waiver, as requested by the Applicant based on public interest, specifically in relation to the environment. Also, whether a conflict of interest affected the exercise of discretion by the MODL regarding a fee waiver request.
- Summary:** An Applicant requested a Review of the decision of the MODL to refuse to waive the photocopying charges related to an Application for Access to a Record. The Applicant completed the Request to Waive Fees on the Form 1.
- The MODL made a decision at the outset to waive all of the fees associated with locating, retrieving, producing and preparing the Record. The only charge was the fee for providing a copy of the Record at the rate set by Regulation at the maximum of twenty cents per page and the actual cost of reproducing maps. The Applicant filed a Request for a Review of the decision not to waive the fee in its entirety.
- The Applicant was successful in demonstrating that fairness required the MODL to exercise its discretion to consider a waiver or fee reduction in the Application for Access to a Record. The MODL exercised its discretion fairly when it did not charge the Applicant any fees associated with responding to the access request, which were substantial, other than the copying charge, including pages that were severed.

- Recommendation:** It is recommended that the MODL confirm its decision with the Applicant as to its exercise of discretion of this fee waiver request and not return any monies paid by the Applicant for copying the Record.
- Key Words:** conflict of interest, discretion, environment, fairness, fee estimate, fee waiver, fees for services shall not exceed the following amounts, for any other reason it is fair to excuse payment, copying, prejudice, procedural error, public debate, public interest
- Statutes Considered:** *Nova Scotia Freedom of Information and Protection of Privacy Act s. 11(7); Part XX of the Municipal Government Act, s. 461(h), s. 462(a)(b)(c), s.465, s. 468(3)(a)(b), s. 471(2) & (7); Freedom of Information and Protection of Privacy Regulations, s. 6(2) & (3).*
- Case Authorities Cited:** *NS Report FI-00-91; NS Report FI-98-34; NS Report FI-06-12; NS Report FI-07-69(M).*
- Other Cited:** *Department of Justice Procedures Manual – FOIPOP (2005).*

REVIEW REPORT FI-07-50(M)

BACKGROUND

This Review is about the issue of whether or not the Municipality of the District of Lunenburg [“the MODL”] has appropriately refused a request by the Applicant to waive the fee for copying costs related to an Application for Access to a Record.

On August 9, 2007 the Applicant made an Application for Access to a Record to the MODL by submitting a Form 1, which requested:

Any and all information and/or documentation relating to the Seaview Properties Development Proposal for property between civic numbers 1704 and 1648 Oakland Road, including but not limited to, any and all amendments to the original proposal and any and all correspondence, e-mails, notes of meetings or telephone conversations concerning the said proposal or amended proposal from February 18th, 2004 to date. The Municipal personnel who are believed to have such contacts and have such information include, but are not limited to Tammy Wilson, Jeff Merrill, Ed Curran and Pierre Breau.

At the time of submitting the request to access information, the Applicant completed the “Request to Waive Fees” section and indicated as follows:

I hereby request to be excused from paying fees related to the above application because:

The records relate to a matter of public interest including the environment, see section 11(7)(b) of the Act. [sic]

The Applicant made reference to the section in the *Freedom of Information and Protection of Privacy Act* [“FOIPOP Act”]. The applicable section in the *Municipal Government Act* [“the MGA”] while similar is not the same and it is s. 471(7) of the MGA that ought to have been referenced. I find this to be a procedural error and it does not affect the Applicant’s Request to Waive Fees.

On August 20, 2007, the MODL made a decision with respect to the request to waive fees, which stated:

Please be further advised that, as FOIPOP Administrator, I am not prepared to waive the fees resulting from your request in their entirety. Your request will result in a substantial amount of staff time and copying costs being incurred by the Municipality of the District of Lunenburg. In accordance with Section 6(2) and (3) of the Freedom of Information and Protection of Privacy Regulations, fees payable for the service shall be the actual costs incurred by the public body in providing the service, not to exceed that prescribed by the regulations. Fees can be related to:

- (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.*

In your application, you note that a waiver of fees is requested as this is a “matter of public interest including the environment...” The Sea View Property matter has been surrounded by public debate at the community level. I would point out that the matter has not yet come before Council for debate. Given the community/public interest in this matter, I am prepared to waive part of the fees associated with this request, being the staff time to locate and retrieve the record. I am not prepared to waive the copying costs for this information. In accordance with the aforementioned regulations, these costs will be:

- a) 20 cents per page photocopied;*
- b) Actual costs of copying maps/drawings which are too large for the Municipality to photocopy using a conventional photocopier; and*
- c) Actual shipping costs to you, the applicant (if applicable).*

Please note that the actual number of pages to be photocopied, the number of maps/drawings to be sent for copying and the shipping costs are not known at this time. In accordance with the Section 471(7) of the Municipal Government Act, you are to be provided with an estimate of the costs. As such, the estimated number of pages to be photocopied is 1000 sheets; the estimated number of maps to be copied is eight (the approximate cost per map is six dollars). As such the estimated copying cost is \$250.00.

The shipping costs will be dependent upon whether you are willing to pick up the material or will be requesting it be shipped.

On August 29, 2007 the Applicant filed a Form 7 requesting a Review of the decision made by the MODL on August 20, 2007. The Form 7 requested:

The applicant requests that the review officer recommend that

- (i) Municipality of the District of Lunenburg reduce the requested extension [This issue was resolved under a separate file.]*
- (ii) Municipality waive the assessed fees for environmental reasons*
- (iii) That the FOIPOP Administrator of the Municipality be replaced with an alternate.*

A letter accompanied the Applicant's Form 7 from the Applicant to the FOIPOP Review Office, which made a detailed submission that is outlined in the Applicant's Submission section below.

On August 30, 2007 the Applicant forwarded correspondence to the MODL, this, in part, provided:

Thank you for your correspondence dated 20 August 2007, and your clarifications with respect to the Municipal Government Act. Attached you will find a money order for \$250.00 (the amount you advised) so that my FOIPOP request may go forward without any delays.

The Applicant wanted the request for information processed in a timely fashion so he paid the MODL \$250.00 by money order, the amount it requested as an estimate of the copying costs. Normally, once the fee is paid it is deemed to be acceptable. The MODL, however, did not object to the Applicant's Request for Review on the issue of the fee waiver. The fact that the Applicant paid the fee in order to have the access request processed in advance of this Review does not prejudice the outcome.

On October 9, 2007, the MODL provided the Applicant with a final breakdown of the costs. The costs were as follows:

<i>Photocopying (8.5 X 11 sheets) Total Sheets (796+143) = 939 pages =</i>	<i>\$187.80</i>
<i>Map Reproduction (13 maps) – 4 maps produced internally</i>	<i>\$24.00</i>
<i>9 maps produced externally (copy of receipt attached to Oct 1 letter)</i>	<i>\$24.30</i>
<i>Total</i>	<i>\$236.10</i>
<i>Amount Paid</i>	<i>\$250.00</i>
<i>Amount Owing to you</i>	<i>\$ 13.30</i>

On October 16, 2007, the Review Office made a request to the Applicant to provide a submission containing the rationale for requesting a fee waiver and a submission from the

MODL containing its rationale for not granting a total fee waiver. Factors to consider were provided to the parties.

On October 26, 2007, the MODL provided a representation to the Review Office outlining how it exercised its discretion not to grant a total fee waiver. On November 13, 2007, the Applicant provided representation to the Review Office indicating the rationale regarding public interest, the basis for the request for a total fee waiver. Outlines of these submissions are detailed in their respective Submissions below.

On January 7, 2008, the Review Office corresponded with the MODL to attempt an informal resolution between the parties. The MODL was asked to consent to having the Review Office provide the Applicant with a copy of their submission. This request was an attempt to assist the Applicant to know the factors that were taken into consideration by the MODL during its exercise of discretion, in an attempt to resolve the matter informally. By letters dated January 14 and 15, 2008 [note this latter date is incorrect and it was likely meant to be February 15], the MODL objected to the Applicant receiving a copy of its submission.

The matter was referred to Mediation on June 12, 2008. The MODL and the Applicant were advised on July 24, 2008, that the Mediation was unsuccessful and were invited to make a final submission to the Review Officer for the purpose a formal Review. All submissions to the Review Officer are considered objectively and impartially by the Review Officer during the formal Review. Both parties responded with additional submissions, which are included below.

ISSUES UNDER REVIEW

There is no Record at issue in this Review. The MODL has released the Record requested by the Applicant subject to any exemptions claimed. The MODL has agreed to waive the fees in part, including the fees for locating, retrieving and preparing the record. There were no costs associated with shipping the Records as the Applicant picked up the Records at the MODL office. The Applicant does not take issue with the way in which the fees have been calculated in relation to those waived. The issues at hand are the fee being charged by the MODL for re-producing [copying] the requested Record and if a conflict of interest affected the exercise of discretion regarding a fee waiver request.

APPLICANT'S SUBMISSION

On August 29, 2007 when the Form 7 was filed with the Review Office, the Applicant's submission is summarized below:

1. The purpose of the letter was to appeal the MODL's immediate demand of a 30-day extension and to appeal the fees for which they had requested an advance.
2. Regarding the immediate request by the FOIPOP Administrator for an additional 30 days, the Applicant was disappointed there was no effort made to try to meet the nominal 30-day request deadline. As a result of the request being extended to 60 days for a response, it meant the Applicant would

receive a decision from the MODL on or before October 9, 2007. The MODL had ordered the local area advisory committee to produce its final report regarding the development by October 21, 2007, which, according to the Applicant's calculations, left only 5 days to digest all the material to make a coherent recommendation. [This issue was resolved under a separate file.]

3. Regarding the request for a complete fee waiver, the Applicant relies on the unprecedented involvement of the area residents. The Applicant argues that because of a prior environmental debacle caused by a developer in the Mahone Bay area, over 50% of the area residents have written to the MODL. Because of the potential for an environmental disaster, the fees should be waived completely.
4. The Applicant argues the FOIPOP Administrator should be precluded from overseeing the request for information because prior to being named the Chief Administrative Officer and the FOIPOP Administrator, she was the Senior Planner for the MODL and some of the information requested will include communications from her while in the previous post.

On November 13, 2007, the Applicant made a submission to the Review Office. The purpose of the letter was to briefly outline the matter of public interest. It provided:

1. One way to measure public interest is the attendance at the Oakland Area Advisory Committee meetings. The meetings were attended by 25% or more of the estimated 132 local families, which is a considerable number given that the process had limited opportunity for open public debate and discussion;
2. A second measure of public interest is the number of letters submitted. Of the 132 families more than 60% responded with letters to the Oakland Area Advisory Committee voicing opposition to the proposed development. The Committee forwarded the letters to the MODL. That number would likely have increased, according to the Applicant, if the process had not been truncated when the developer abandoned the process;
3. A final measure is the extent to which meetings of the Committee and input from the public are reported in the media; almost every meeting of the Committee is reported in the Chester Clipper. Subsequent meetings were also reported in the Bridgewater Bulletin and the [provincial] Chronicle Herald.
4. The information from the application made by the Applicant was disseminated to the local area advisory committee and the local residents' association. Valuable information became known to the local residents through the access to information process not otherwise available to determine the status and progress of the project.

On June 19, 2008, the Applicant submitted comments in response to the Investigative Report. In that correspondence, the Applicant raised the following issues:

1. The Applicant reiterates points made earlier to put more emphasis on them including "the existence of public debate, measuring the amount of public debate and the degree to which the public body has waived expenses";

2. With respect to public interest, the Applicant takes issue with the Investigative Report reiterating the extent of the public interest in the community and the attention given to the development by the local residents' association, which is comprised of the total population of the community, and the local and provincial media. In gauging public interest, the Applicant argues that the actual community should be the measure;
3. In calculating what constitutes the local community, the Applicant again makes the point that Oakland is a separate community from Mahone Bay and lists a number of factors supporting that point; separate water supply, sewer system, storm drainage and town council;
4. The Applicant takes exception to the fact that approximately one in four pages is withheld by the MODL and yet the copying charges include those severed portions of the Record. The Applicant argues that based on the hourly rate charged, the MODL has contributed \$120 to the "cause" while the Applicant has paid \$236.10;
5. The Applicant claims that the Investigative Report is biased, contains convoluted logic, incorrect figures and ignores information and makes flawed findings.

On August 18, 2008, the Applicant made a final submission for the purpose of the formal Review by the Review Officer. A summary of that submission is as follows:

1. A summary of the history of the development; process initiated in 2006, two alternatives including "As of Right" subdivision or a developer's agreement through a local area advisory committee for a condominium project, and a discussion of why one of the choices was more favourable;
2. Provided that the way to gauge public interest is through four variables:
 - i. attendance at appropriate meetings;
 - ii. written interest;
 - iii. press coverage;
 - iv. fundraising.
3. With respect to attendance at the meetings; there was an impressive attendance at the Advisory Committee meetings given that the public play an observation role only of the meeting between the Committee, Municipal staff and the developer, attendance level remained up over the summer until the Committee process was bypassed through to the As of Right Subdivision application;
4. Written local public interest; the Record at issue contained 62 signed letters of protest against the development, 62 letters is high given that the population of the Oakland area [not to be confused with Mahone Bay that is a distinct and separate community] is 132 families;
5. Extent of press coverage; the Applicant provided copies of all articles written on an action against the Municipality in local and provincial newspapers, advised of an upcoming interview on national television;

6. Effectiveness of fundraising; all legal expenses have been paid out of funds raised, documentation of a fundraiser provided, some funds resulting from international attention;
7. The final point made is with respect to the amount charged by the MODL for copying; the comparison is made between the cost when copies of a municipal file was done at Staples [8 cents per page] versus the cost charged by the MODL for the Record they provided [20 cents per page].

PUBLIC BODY'S SUBMISSION

On October 26, 2007, the MODL made a submission to the Review Office explaining how the MODL exercised its discretion in not granting a total fee waiver. The submission stated that the approach to this fee waiver request was reasonable and fair and took into account the interest of the community and the interest of the overall Municipality, referred to as the public interest. In addition, the submission provided the following details:

1. The application was for any and all records pertaining to a local development proposal. This involved copying 1,100 records, 9 maps and duplicate copies of the same. The records needed to be compiled from three different municipal departments' files, which meant it took an extensive amount of time to retrieve, review and copy the records. The FOIPOP Administrator provided a Log of File Activity for the period from August 13, 2007 through to October 5, 2007 inclusive that outlined in detail what activity was undertaken vis a vis the records, who was the staff person responsible and how many hours were involved on each occasion. The total number of staff hours involved were 54.5, of which approximately 20 hours were done in the evenings and on weekends in order that preparing the response to this request did not interfere with the day to day operations of the MODL;
2. As the Applicant had requested an exemption to all fees because the information pertained to a matter of public interest, the FOIPOP Administrator was prepared to waive the portion of the fees attributable to staff time to locate and retrieve the records;
3. The FOIPOP Administrator was not prepared to waive the photocopying copying costs for this information;
4. As a result of the Applicant implying a conflict of interest, the FOIPOP Administrator for MODL arranged for an external review by an administrator from another municipality. The costs associated with that external review [copying and courier] were not charged to the Applicant and were paid out of general revenue by MODL;
5. The Applicant was asked to provide \$250.00 in advance for an estimated 1,000 sheets making up the record, which was paid. In the end, there were 939 copies provided to the Applicant along with a refund of \$13.90.

On August 15, 2008, the MODL provided its final submission, to be considered by the Review Officer in the formal Review in addition to what it had already submitted, with respect to

the exercise of discretion by the head of the public body to not grant a complete fee waiver. That submission provided:

1. The access request involved “all and any records” pertaining to a development proposal. This involved retrieving and duplicating a significant number of records; 939 pages and 13 maps compiled from the paper and electronic files of three different departments.[The wording of the Form 1 was “any and all information and/or documentation relating to the...”];
2. The Applicant requested an exemption for all fees on the original Form 1 filed August 9, 2008;
3. The decision by the MODL was to not waive the fees in their entirety; the fee for the staff time [54 hours totalling \$1,620.00] was waived and the copying costs of \$236.10 were not waived;
4. The MODL stated that its rationale for its decision based on s. 471(7) of the *MGA* was because the waiver request was made on the basis of public interest in an environmental matter;
5. In determining the issue of public interest, the MODL did not consider this matter, at the time of the access request, to be a matter of public debate. This was based on the fact that the matter had not come before Municipal Council for a full public debate when the request was made. The MODL acknowledges that there was debate respecting the matter but that it was limited to a community within the Municipality, namely the local residents’ association and the local area advisory committee;
6. With respect to the argument of the information relating to environment; the record that was the subject of the access request had only a small component involving environmental issues. The majority of environmental information were accessible through the public meetings of the advisory committee;
7. The MODL states that the records pertained to the administration of two policies; a planning strategy and a land use by-law. Both of the latter are already available as public documents;
8. The Record did not demonstrate how the MODL was allocating financial or other resources;
9. The MODL acknowledges that the Applicant sought the information to disseminate it to the residents’ association, which the Applicant was able to do;
10. In summary, the MODL believes it exercised its discretion properly because “the matter did not satisfy all the relevant factors to be a matter of public debate in its entirety.”

DISCUSSION

The purpose of the Part XX of the *MGA*, which has a broad and purposeful interpretation, provides:

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(a) ensure that municipalities are fully accountable to the public by

- (i) giving the public a right of access to records,
- (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
- (iii) specifying limited exceptions to the rights of access,
- (iv) preventing the unauthorized collection, use or disclosure of personal information by municipalities, and
- (v) providing for an independent review of decision made pursuant to this Part;
- (b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to
 - (i) facilitate informed public participation in policy formulation,
 - (ii) ensure fairness in government decision-making, and
 - (iii) permit the airing and reconciliation of divergent views; and
- (c) protect the privacy of individuals with respect to personal information about themselves held by municipalities and to provide individuals with a right of access to that information.

The Applicant has a right of access to any record in the custody or under the control of a public body pursuant to s. 465 of the *MGA* once a request has been received. Subsection 461(h) of the *MGA* defines record as follows:

“record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

Both statutes governing access to information in Nova Scotia make provision for waiving the fees that a public body can charge to an applicant, the amount of which is set by the Regulations. The *MGA* differs slightly from *FOIPOP Act* in respect to fee waivers. The latter provides as follows:

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.*

The *MGA* does not specifically identify that the matter must be of public interest and relate to, for example, the environment in order for the Administrator to use his or her discretion to waive the fees. The *MGA* reads:

*471(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. [Emphasis added]***

The FOIPOP Administrator, therefore, may exercise her or his discretion to waive fees based on any reason(s) he or she deems fair. As the section reads “may”, it is up to the Administrator of a public body to exercise his or her discretion on what it considers is fair, regardless of the subject matter. This means that the reason, based on the fairness test, *could* include the assertion that the waiver is one of public interest and relating to the environment, as claimed by this Applicant. The Applicant’s request to waive fees, therefore, could be characterized as fairness requiring that a decision be in favour of a waiver based on public interest in an environmental matter.

The *Department of Justice Procedures Manual – FOIPOP (2005)* states the following, with respect to Fee Waiver, at p. 3.13:

The Act and the regulations authorize a public body to waive a processing fee, in whole or in part, on request from the applicant when certain conditions apply.

Consideration as to whether a fee should be waived should be carried out in a fair, reasonable, and without prejudice manner.

*Decisions to waive fees are discretionary and not dependent on the quantity of records to be disclosed. A considerable amount of work may be necessary to locate, retrieve, produce, and prepare the records. The public body must take a balanced approach, consider the circumstances of the request and representation of the applicant, and then decide whether it is fair and reasonable to excuse the applicant from paying for estimated, and subsequently performed, services of locating, retrieving and preparing the record for disclosure.
[Department of Justice Procedures Manual – FOIPOP (2005)]*

In a former Review Report, the Review Officer outlined the relevant considerations in addressing public interest, details of which were provided in letters from the Review Office to the parties at the Intake stage and during the Investigation phase of this file. In *FI-00-91*, that Applicant was a not-for-profit environmental group seeking access to information that related to the environment and the Record of the Department of Environment and Labour in protecting natural ecosystems. The Applicant in that case made a specific submission of what impact paying the fee estimate would have on its limited resources and how the information will be of interest to a considerable percentage of the public.

The Review Officer’s discussion in that case, cited in correspondence in this case to the Applicant and the Public Body, provided as follows:

“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 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.

[NS Report FI-00-91]

I will consider these criteria in relation to this Request for a Fee Waiver:

1. Public debate can be defined as a discussion that is recent or relating to a time not long past. Public debate must be put into context of the relevant facts. This case is about a sizeable development for the very small rural community in Nova Scotia. All people living in the area of Oakland may be affected and have demonstrated, through their attendance at meetings and letter writing, that they have an interest in the outcome. Minutes of the Committee of the Whole for the MODL in June 2007 do not discuss the issues outlined in the Applicant's Form 1. A meeting of the Municipal Council in September 2007 33 days after the request for the fee waiver was made and 22 days after the decision by the MODL dealt with the As of Right development submission by the developer. Clearly the subject matter of the development was not before the Municipal Council or its committees at the time of the request. Public debate for the purpose of making a determination about public interest cannot, however, be just about whether the matter has been debated before the municipal council. That gives a far too restrictive definition of public debate for our purpose;
2. Discussion in the local and provincial newspapers will increase over time as the matter catches the public's attention and its audience expands. At the time of the Request for Review of the decision not to waive the fees entirely, the press coverage was restricted to the local paper. Evidence submitted consisted of only one article dated March 21, 2007. Since that time, local and provincial media have shown some interest. Many articles have been written since the fall of 2007 after the Request for Review was filed. Clearly interest in the development issue has increased since the Request for the Review was filed;
3. In the provincial access legislation, environment is one of the considerations for a public body to consider when faced with a fee waiver request. The rule under the *MGA* is more general; fairness which can include environmental issues as a factor. In this case, the Record relates to a development. While the development may have implications for the environment and environmental

- issues may be contained within a portion of the Record, the Record as a whole does not relate to the environment. The Form 1 is focussed on access to information with respect to the development proposal itself;
4. The next consideration is whether or not the information sought is about how the MODL is allocating financial or other resources. Given a broad interpretation, “resources” can include what enhances the quality of human life. In small communities in rural Nova Scotia, the introduction of a development considered by some to be major for this community, may indeed impact on the quality of life. The Form 1 is clear that the Applicant is seeking access to information about the development proposal and the process around that proposal. Therefore, information sought does relate to how resources in the community are being allocated or treated;
 5. The Applicant did not address the issue of whether the primary purpose for the access request is to disseminate the information in order to benefit the public or serve a private interest. It appears, however, that the goal of getting access was to disseminate the information to the local residents’ association and the local area advisory committee;
 6. The Applicant has the means to disseminate the information; and
 7. An option is for the MODL to consider a reduction in fees.

The MODL has conceded that this matter is of some public interest in its submission to the Review Officer [though not a matter of public debate, which it argues is about whether or not it has come before the municipal council]. On the basis of being a matter of public interest, the MODL exercised its discretion to waive the bulk of the fees associated with the Applicant’s access request. The Applicant was not charged for locating, retrieving and preparing the Record, which the MODL claims was a total of 54.5 hours staff time. That equates with the amount of \$1,620.00, which has already been waived (54.5 hrs x \$30 per hour = \$1,620.00). What the Applicant was charged for were the actual costs of copying the Record including the reproduction of maps totalling in the amount of \$236.10.

Section 471(2) of the *MGA* provides:

A responsible officer may require an applicant who makes a request to pay fees for the following services:

- (a) locating, retrieving and producing the record;*
- (b) preparing the record for disclosure;*
- (c) shipping and handling the record;*
- (d) providing a copy of the record.*

The MODL waived the fees associated with (a) and (b), and (c) had no application. The only charge was for (d) – providing a copy of the record.

The *Freedom of Information and Protection of Privacy Regulations*, which are shared by both *Acts*, provide as follows:

6(2) *When no search fee or reproduction fee is determined by an enactment other than the Act, the fees payable for services under the Act shall be the actual costs to the public body of providing the following services:*

(a) locating, retrieving and producing the record;

(b) preparing the record for disclosure;

(c) shipping and handling the record;

(d) providing a copy of the record.

(3) Despite subsection (2), the fees for services mentioned in subsection (2) shall not exceed the following amounts: ...

(f) where the record is stored or recorded in printed form and can be copied on conventional photocopying equipment, twenty cents a page for providing a copy of the record;

(g) where the record is stored or recorded in a manner other than that referred to in clause (f) or cannot be reproduced on conventional photocopying equipment, the actual cost of reproduction for providing a copy of the record.

[Emphasis added]

Reading Regulation subsection 6(3) and paragraphs 6(3)(f)&(g) together, it is clear that it is open to a public body to charge up to twenty cents per page but it is open to its charging less than that amount given the wording – **shall not exceed** - and that they can charge the Applicant the cost to them to have the maps reproduced by an external source.

The central question in this Review is whether the MODL has exercised its discretion in accordance with *s. 471(7)* of the *MGA* and met the test of either *the applicant cannot afford the payment or for any other reason it is fair to excuse payment*. At no time did the Applicant indicate that s/he could not afford to pay the copying fees. Is there any reason why the MODL ought to have made a decision that it would be fair to excuse payment for the copying in addition to the amount already waived?

The Review Officer has had the opportunity to consider the concept of fairness in Review Report *FI-98-34*. That case relied on analysis from the Ontario Commissioner who in *Order P-760* set out factors to be considered to determine whether it would be *fair* for fees to be waived. Review Report *FI-98-34* summarized those “fairness” factors as follows:

- 1. the manner in which the Department attempted to respond to the Applicant.*
- 2. whether the Department worked with the Applicant to narrow or clarify the request.*
- 3. whether the Department provided any documents to the Applicant free of charge.*
- 4. whether the Applicant worked constructively with the Department to narrow the scope of his [or her] request.*
- 5. whether the application involves a large number of records.*
- 6. whether or not the Applicant has advanced a compromise solution which would reduce costs.*

[NS Report FI-98-34]

These criteria have been applied in previous Reviews. In *FI-06-12* they were applied in a situation where four out of the six criteria were found to apply. That case was decided under *s.*

11(7) of the *FOIPOP Act* which includes environment and public safety in its provision related to waiver of fees.

In a recent case, *FI-07-69(M)*, I applied the fairness criteria. In that case, it was found that the fees should not be waived. The Applicant had not attempted to narrow the scope of the access request to lower the costs, was not open to Mediation and it was clear from the history that the Public Body had taken great strides to cooperate and provide access to the Applicant.

I will now apply the fairness criteria to the case at hand:

1. The MODL did respond to the Applicant by providing access to the information within 60 days. Even though the fee was paid in advance by the Applicant, the MODL did not resist the Applicant's Request for Review of the decision to refuse a fee waiver;
2. There was no attempt to narrow the scope of the request for access;
3. The MODL provided the Record to the Applicant free of charge with the exception of the costs associated with making a copy;
4. The application for access involved a large volume of information including 939 pages and 13 maps;
5. The Applicant did not offer any compromise solution with respect to the Record that would reduce the costs.

FINDINGS

1. The Applicant's Request for Review of the MODL's decision not to waive the fees in their entirety was filed as an individual citizen and not as a member of an advocacy group;
2. The Applicant was critical of the FOIPOP Administrator for indicating at the outset that she would require the additional 30 days she is entitled to in order to process the access request. The Applicant thought the Administrator should try to respond within the initial 30 days. The Applicant is completely mistaken that an administrator should not give notice in this fashion at the outset. What this FOIPOP Administrator did is the prudent and correct course; conduct an early evaluation as to what is involved in the access request and to provide the Applicant with an estimate as to the time that will be required to respond. This practice is consistent with the duty to assist;
3. The Applicant did make the request for a fee waiver at the time of filing the initial access request based on public interest, which is the preferred time for an Applicant to request a fee waiver, although it is open to an applicant to make a request at any time;
4. The Applicant alleged the FOIPOP Administrator was in a conflict of interest because she had been in the position of Senior Planner with the MODL prior to becoming Chief Administrative Officer. While there was no evidence of an actual conflict of interest, any hint of appearance of bias must be taken seriously. The FOIPOP Administrator in this case chose the sensible course of action; once the access request

- had been processed, she had the matter reviewed by her counterpart in another municipality. I find that the process followed by the FOIPOP Administrator would have identified any bias on her part. I find that the claim of conflict of interest did not impact in any way as to how the FOIPOP Administrator exercised her discretion and made the decision with respect to the fee waiver;
5. The Applicant disseminated the information from the original access request to the local advisory committee and the local residents' association;
 6. Valuable information about the how the development proposal was being processed and the intentions of the developer became known only because of the access request;
 7. Not all of the elements referred to in prior decisions have to be met in order to meet the test of public interest. In other words, the list of factors to consider in exercising discretion is not conjunctive. The wording of the MODL's submission seems to be based on its conclusion that all the criterion must be met, which is not necessary;
 8. The Applicant's submission addressed the issue of public interest extensively by outlining meeting attendance, written interest, press coverage and fundraising.
 9. Despite having been given a copy of the Investigative Findings and prior Review Reports, the Applicant did not address the other criterion including environment, health and safety, dissemination of the information to yield a public benefit by improving a better understanding of a policy, whether the issue is about how a public body is allocating financial or other resources, whether the Applicant's purpose is to disseminate the information to benefit the public or serve a public interest, and whether the Applicant is able to disseminate the information. It is incumbent on applicants to take advantage of the information provided by the Review Office during the Intake and Investigation stages and address the identified issues in their submissions;
 10. The Applicant has made the case that it is in the public interest that the MODL make a decision to waive some or all of the fees associated with the access request;
 11. Given that the MODL chose to waive all of the fees associated with staff time to locate, retrieve, and prepare the Record and elected to only charge for the cost of copying, I find the MODL exercised its discretion appropriately and fairly and in accordance with s. 471(7) of the *MGA*. While it is open to charge a copying fee less than twenty cents per page [maximum set by Regulation], the rate charged by the MODL is acceptable in the circumstances. In this case, the fact that some of the pages are severed is irrelevant in calculating copying costs.
 12. It is not appropriate for the Review Officer to replace her exercise of discretion in place of a public body's. The role of the Review Officer is to review the exercise of discretion under the statute to determine if it is appropriate and fair. I find no evidence that inappropriate factors were considered or that relevant factors were not considered in the exercise of discretion.

RECOMMENDATION:

It is recommended that the MODL confirm its decision with the Applicant as to its exercise of discretion of this fee waiver request and not return any monies paid by the Applicant for copying the Record.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia