



REPORT
Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-69(M)

Report Release Date: May 9, 2008

Public Body: Town of Kentville

Issues: Whether the Town of Kentville properly exercised its discretion to not grant a total fee waiver as requested by the Applicant.

Summary: An Applicant requested a Review of a fee estimate for an Application for Access to a Record made to the Town of Kentville including, but not limited to, the costs associated with sales of land and buildings from 2004-2007, amounts paid to purchase property and monies expended for the betterment of buildings and land within the Town.

The Applicant requested that the Town apply the base fee as set out in the *Act* of \$25.00 and waive the remainder of the fee claiming the information is of public interest. The Town refused to waive the fees stating it had already been cooperative in supplying some information and the cost of the time involved in this request needed to be recovered. The Applicant requested a Review of the Town's decision.

The Review Officer found that since there is no evidence to support that the information sought is of public interest and the Applicant never stated s/he could not afford to pay the fees, the fee estimate shall apply. However, it appears the Town may have charged for explaining the Record to the Applicant, which it cannot do and this should be deducted. Also, the Review Officer found that it is reasonable for the Town to request a 25% deposit before proceeding with this request.

- Recommendations:**
1. It is recommended that the Town not waive the fee for this Application for Access to a Record.
 2. The Town should revisit the fee estimate, but only with respect to the possibility that it has included in the fee estimate a charge for explaining the Record to the Applicant, for which it cannot charge.
 3. The Town should advise the Applicant of the final revised fee estimate [in accordance with the fee change referred to in para. 2] and of the need for him or her to pay a percentage upfront. Subsection 471(6) of the *MGA* allows a public body to receive the full fee in advance. The 25% requested by the Town as an advance payment is reasonable and is in accordance with the *MGA*. The Town should process this matter promptly.
 4. I recommend that the Town review its policy regarding how it calculates a fee estimate and consider seeking advice from the FOIPOP Administrator at Service Nova Scotia and Municipal Relations as to best practice.
 5. In addition, I would advise the Town to ensure that when it is gathering information internally from its employees that is responsive to the access request the identity of the Applicant remain absolutely confidential other than to the responsible officer.

Key Words: best practice, cannot afford the payment, discretion, duty to assist, fee estimate, fee waiver, for any other reason it is fair to excuse payment, media, public interest, work constructively

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 11(7); Municipal Government Act, Part XX s. 461(h), s. 462(a)(b)(c), s.465, s. 468(3)(a)(b), s. 471(7).*

Case Authorities Cited: *NS Report FI-00-91; NS Report FI-98-34.*

Other Cited: *Justice FOIPOP Procedures Manual (2005)*

REVIEW REPORT FI-07-69(M)

It is important to state at the outset that this Review is not about the merits of the access request or any possible exemptions that could be claimed by the Town of Kentville [“the Town”]. This Review is solely about the issue of whether or not the Town has properly refused a request by the Applicant to waive the fee for services related to an Application for Access to a Record [“access request”]. There seems to be some lack of clarity on the part of the Applicant as to the role of the Review Officer, even after clarification was provided. Clarification of exactly what was at issue in this Review was made patently clear in an email to the Applicant on February 19, 2008. Once the issue of the fee waiver has been dealt with and the Town responds to the access request, if the Applicant is dissatisfied by the Record produced at that time, s/he will be advised of his or her right to Request a Review on the merits of the case to the Review Officer. At this time, however, there is no Form 7 before me with respect to the Record itself and thus I have no jurisdiction to consider what information the Town should or should not provide to the Applicant.

It should also be noted that both parties were referring to the *Freedom of Information and Protection of Privacy Act* [“the Act”], which is not applicable to municipalities or towns. While the provisions in both statutes are similar, in this case it is *Part XX of the Municipal Government Act* [“the MGA”] that is the appropriate and applicable legislation.

BACKGROUND

On September 18, 2007, the Applicant requested access to information regarding the Town of Kentville. The Applicant originally sent it, in error, to the provincial department of Service Nova Scotia and Municipal Relations, who incorrectly transferred it to the County of Kings. The Town received the Form 1 on October 1, 2007. Attached to the Form 1 was a document outlining the access request, which reads as follows:

TO: CHIEF ADMINISTRATIVE OFFICER
TOWN OF KENTVILLE
KENTVILLE, NOVA SCOTIA

FOR EACH FISCAL YEAR ENDING MARCH 2004
MARCH 2005
MARCH 2006
MARCH 2007

- (i) All amounts received from the sale of lands and buildings:
- (1) Who the land or building was sold to
 - (2) The amount paid for the land or building by the purchaser

- (3) *In what form was the town compensated for the land or building*
- (ii) *The particulars of the advertisement or other public notice of sale for each individual sale under (i.)*
- (iii) *A copy of the deed of transfer for any property received by the town free of charge as part of any municipal development agreement.*
- (iv) *All amounts expended by the town for the procurement and betterment of any lands or buildings including amounts that may not be readily discernible from the audited statements of the town.*
- (1) *The amount paid for the land or property*
- (2) *The name of the vendor or seller of the property*
- (3) *The amounts paid in real estate commissions or fees*
- (4) *The total amounts charged to the betterment or futures or capital acquisition accounts for each of the properties including:*
- *Amounts paid to outside contractors*
 - *The amounts paid for legal fees*
 - *The amounts paid for insurance*
 - *Consultants and surveyors fees and the names of the firms or individuals*
 - *The reimbursement of any travel or personal expenditures by town officials or council members*
- (vi) *[sic] With respect to “(iv)” the names of council members, if any, who had a financial interest in a firm, or is employed by a firm or sole proprietor undertaking the service or work.*

The Applicant did not request a fee waiver in his/her Form 1 or in the attached letter.

- On October 3, 2007, the Town emailed the Applicant acknowledging receipt of the Form 1. That email provided as follows:

*...Staff have reviewed your request and have estimated it will take approximately four work days or approximately 30 hours to gather the information outlined in your request. The estimated cost will be approximately \$800 plus HST. This estimate is based on 30 hours @ \$30 per hour or \$15 for each half hour, less the two free hours as outlined in the regulations [sic] Fees – 6(3)(a). It may take longer or less time. However, under section 11(5) of the Act “**where an applicant is required to pay fees for services pursuant to subsection (2), the head of the public body shall give the applicant an estimate of the total fee before providing the services**”.*

*Before we can begin, we will require an application fee of \$25 made out to the Town of Kentville as well as 25% deposit of \$200 of the estimated cost.
[Emphasis in the original]*

On October 15, 2007, the Applicant responded to the Town citing s. 11(7) of the *FOIPOP Act* and stating:

I am requesting that the Town waive all fees as the record relates to a matter of public interest.

The Applicant outlined why s/he considered the access request to be a matter of public interest, details of which will be provided in the Applicant's Submission below.

On November 5, 2007, the Town responded to the Applicant advising him/her that they did not agree with the reasoning and would not waive the fee as requested. Further in that email string, on November 6, 2007, the Town provided:

For the record, I will provide the information requested in your letter dated September 24 (attached to your FOIPOP) for the fee I quoted. Your request will take a considerable amount of staff time and I am not prepared to waive the fee. May I remind you that the town has already provided (sic) you with a fair amount of information at no cost. If you would like for us to proceed, please confirm with the deposit of \$200.

On November 9, 2007, the Applicant shared the decision from the Town with a provincial public body as to whether or not a formal complaint could be made about the decision. That office informed the Applicant that it was incumbent on the Town in their decision letter to advise him/her of their right to have the decision about the fees reviewed by the FOIPOP Review Office and provided him/her with a Form 7. The Town had not provided this information to the Applicant.

By letter and Form 7 dated November 22, 2007, the Applicant filed a Review Request asking the Review Officer to review a:

*... decision dated or made on the 5th day of November, 2007
...waive the fee as per attached [referring to the accompanying letter]
I have completed and attached the appropriate form requesting that you review a recent decision by the Town of Kentville to charge a substantial fee to provide information that in my view is a matter of public interest.*

The remainder of the Submission by the Applicant contained in the cover letter dated November 22, 2007 will be discussed in the Applicant's Submission below.

On December 4, 2007, the Review Office requested that the Town outline their rationale for refusing to waive the fee and to outline how they calculated the fee estimate. The letter outlined the relevant factors to be considered, the applicable sections of the *MGA* and cited the ss. 6(1), 6(2) and 6(3) of the Regulations for the Town to consider in preparing their response to the Review Office. The relevant factors in the *MGA* provide as follows:

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.

In previous Review Reports, the Review Officer has suggested factors which the public body should consider in order to properly exercise its discretion when considering whether or not to grant a 'public interest' fee waiver. In NS Report FI-00-91, the Review Officer wrote:

"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 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

[Emphasis in the original]

[NS Report FI-00-91]

The letter then outlines ss. 6(1), 6(2) and 6(3) of the Regulations regarding what fees can be charged and at what rate.

The Town responded to the Review Office's request on December 17, 2007 detailing its response to the questions of both the refusal to waive the fee and how the fee estimate was arrived at, which will be discussed in the Public Body's Submission below.

A similar letter was sent to the Applicant on January 14, 2008 outlining the questions that should be addressed in his/her Submission to the Review Office as to why the fee should be waived. The Applicant responded to the Review Office on January 23, 2008, which details of the letter will be included in the Applicant's Submission below.

In February, the Review Office explored the possibility of a fee reduction. The Applicant indicated, in writing, that s/he had no interest in pursuing a fee reduction. The Applicant was only interested in a complete waiver and as such, mediation was not attempted.

On February 7, 2008, the Applicant was advised by letter that the matter had been referred to formal Review and was asked to provide written representation to the Review Officer. The relevant questions contained in the January 14, 2008 correspondence to the Applicant were repeated and s/he was encouraged to respond to them in as much detail as possible.

As the Applicant had not addressed the relevant criteria in his or her correspondence, the request to do so was repeated to the Applicant by email dated February 18, 2008, again listing the relevant questions to be considered in his or her Submission. There appeared to be some lack of clarity about the role of the Review Officer vis a vis this Review. The Review Office responded to that misunderstanding in an email dated February 19, 2008, which stated:

In your case, you have requested a review of the fees being charged by the public body with respect to your request for information. The Review Office does not make comment on the records themselves, and therefore we do not, and will not be having an accountant review the records provided by yourself or the town. The Review Officer, in this case, will examine the facts surrounding the calculation of the fee and determine if your request for a fee waiver is warranted based on the information provided by yourself and the Public Body.

A further brief was submitted by the Applicant to the Review Office dated February 25, 2008 which will be discussed in the Applicant's Submission below.

RECORD AT ISSUE

There is no Record at issue as it has yet to be produced. The only issue at hand is the fee being charged by the Town for producing the requested Record.

APPLICANT'S SUBMISSION

On February 25, 2008, the Applicant provided a lengthy brief to the Review Officer that included much of the correspondence between the Applicant and the Town and case law s/he believes applies to this case. In addition, the Municipal Accounting and Reporting Manual was provided, which has no applicability to this Review. The relevant portions of the Applicant's Submission can be summarized as follows:

1. The Town has not provided any alternatives or cost reduction recommendations nor has the Town explained how the determination was made. The Applicant goes on to give examples of alternate ways the Town could respond to his or her access request.
2. The Applicant does not believe that there should be a cost to process the access request as s/he feels the work involved in preparing a response is part of the normal procedure and a cost should only occur if there were a need for overtime. S/he argues that other than an estimate of hours, the Town has not demonstrated that there is a cost in processing the request.

3. The Applicant responds to the specific questions pertaining to public interest that were provided to him/her by the Review Office. The Applicant's response can be summarized as follows:
 - i. Has the matter been a subject of recent public debate?
The Applicant responds that the public is not aware.
 - ii. Does the subject matter relate directly to the environment, health or safety?
The Applicant responds "No".
 - iii. Would the dissemination of the information yield a public benefit by assisting public understanding of an important policy?
Here the Applicant makes the argument that a municipal government should present financial data and narrative explanations that go beyond the minimum requirement of generally accepted accounting principles. This is the principal argument for wanting the information. The Applicant does not believe the Town provides enough information regarding its financial management.
 - iv. Do the records show how the public body is allocating financial or other resources?
The Applicant's access request is about use of financial resources, how they are allocated and how they are reported by the Town.
 - v. Is the Applicant's primary purpose to disseminate the information in a way that could reasonably be expected to benefit the public or to serve a private interest?
The Applicant does not provide a response to this criterion. The request appears to be solely out of his or her personal interest. The Applicant also appears to take the position that it would be for the Town to disseminate the information, not him or her.
 - vi. Is the applicant able to disseminate the information?
The Applicant identifies that s/he is not a member of the media nor is s/he using the information for commercial purposes. The Applicant appears to not have a means to make the information available to the public.
[Emphasis added]
4. In conclusion, the Applicant argues that the Town has said they will release the information knowing at the same time that the substantial fee is an effective barrier from having to do so. S/he argues that the Town cannot simply pull a number out of the air and submits that most of the information is already on file or easily available. S/he requests that the fee be reduced to \$25.00.
5. While the bulk of the Submission to the Review Officer tried to focus on fee reduction, all prior briefs to the Review Office focussed on topics such as: whether the information sought should be included as a matter of course in financial statements from the Town, whether there are Council members in a position of conflict and whether the Town Council is open, transparent and accountable. There is no submission made by the Applicant detailing how his or her access request falls within the parameters of public interest.
6. The Applicant's last Submission to the Review Officer indicated that no offer had been made to him or her by the Town to reduce fees as one of the courses of action appropriate for them.

PUBLIC BODY'S SUBMISSION

On December 17, 2007, the Town provided a response to correspondence from the Review Office submitting the following:

1. There was a delay in processing the original application because the request was originally sent to the wrong location and the application fee was made out to the wrong body.
2. The Request for Review was reviewed carefully by the Town. Factors considered were that: the information went back almost four years, many of the records were in storage and would need to be retrieved, the storage of the records was in different locations and the records would need to be put into a report with an explanation of the information.
3. In the past few months, the Town has spent considerable time and energy in responding to the Applicant providing him/her with most of the information requested outside of the *Act* under routine disclosure, as they would do for any citizen. Notwithstanding these efforts, the Applicant felt there was more s/he needed and this must have led to the application under the *Act*.
4. In considering the request to waive the fee, the Town considered the information already provided a number of times to the Applicant and the amount of staff time involved.
5. The financial statements for the Town that are audited each year had already been provided to the Applicant.
6. The fee estimate was based on one employee working two days to research and to photocopy, a Director of Finance to supervise and assemble the information and four hours for the FOIPOP Administrator to put the report to the Applicant together. The details were more particular, but consistent with the estimate given to the Applicant.
7. The Town had been more than cooperative with the Applicant and despite this, a formal access request was made under the *Act* and simply involved more work than is reasonable to be expected by staff without compensation.

No additional submissions were received from the Town after it was referred to formal Review. The Town was not approached by the Review Office about whether it was prepared to reduce the fee because the Applicant took a strong position that s/he would only consider a total waiver. As previously mentioned, in the Applicant's final Submission, s/he indicated that the offer to him or her had not been made by the Town to reduce fees as one of the courses of action appropriate for them to do, but this position came after the matter was at the formal Review stage.

DISCUSSION

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

462 The purpose of this Part is to

- (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,...
- (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;

The Town is under a duty under s. 468(3) of the *MGA* to create a Record, which provides:

A responsible officer shall create a record for an applicant if

- (a) *the record can be created from a machine-readable record in the custody or under the control of the municipality using its normal computer hardware and software and technical expertise; and*
- (b) *creating the record would not unreasonably interfere with the operations of the municipality.*

Both statutes governing access to information in Nova Scotia make provisions for waiving the fees which a public body can, by Regulation, charge an applicant. In the case of municipal public bodies, s. 471(7) of the *MGA* states that:

*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]

In a former Review, the Nova Scotia Review Officer outlined the relevant considerations in addressing the public interest (reproduced in our letters to the parties, above). In *FI-00-91*, that Applicant was a not-for-profit environmental group seeking access to information that relates to the environment and the Record of the Department of Environment and Labour in protecting natural ecosystems. That Applicant 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 to the Applicant and the Public Body, provided specifically 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.

[Emphasis in the original]

[NS Report FI-00-91]

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 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.

At the core of the statutory provision for waiving a fee is an inability to pay on the part of the Applicant or it would be otherwise fair to do so. Section 471(7) states:

*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]

First, the Applicant made no claim of not being able to pay the fee. Second, 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 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 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 of this Review Office. In *FI-06-12* they were applied in a situation where four out of the six criteria were found to apply and also was decided under the *Act* which includes environment and public safety in its provision related to waiver of fees.

What is the analysis if these fairness criteria are applied to the case at hand? Up until the time the Applicant formalized his or her request, the Town had been working and cooperating with the Applicant providing him or her with much information without cost under routine disclosure. The Applicant has provided the Review Officer with a copy of the information already provided to him or her by the Town. The Applicant provided this documentation to try to persuade the Review Officer of the validity of his or her claim that the Town did not issue sufficient financial information routinely. Any argument about what the Town does or does not release by way of financial information as a matter of course is irrelevant for the purpose of the mandate of this Office. However, by sharing the documentation provided to him/her by the Town, the Applicant has provided me with sufficient evidence to convince me as to the validity of the Town's position that they had been cooperative, attempted to respond to his or her

requests and had already provided the Applicant with a considerable amount of information, at no cost.

On the other hand, in considering the fairness criteria, I find that after s/he filed the Request for Review, the Applicant did not work constructively with the Town to narrow the scope of the request and made no effort to compromise. The Applicant did not advance any proposal with the Town to reduce the costs and throughout the process remained adamant s/he would not pay any fee except the \$25.00 filing fee. As a result, the Review Office did not try to negotiate with the Town for a smaller fee nor were they able to mediate.

In essence, the Applicant seeks to have questions regarding the Town's financial matters answered through this process. While answers may be deduced from a record, the Reviews conducted by this Office are about records only. A public body may choose to provide answers to an applicant's questions, in some circumstance out of courtesy, but is not obliged to do so. The Review Officer, by recommending the release of a record, may allow an applicant to find answers to his/her questions, but actually finding the answers is not within the mandate of the Review Officer. As part of our intake, where other avenues of redress are appropriate, we will make an effort to refer an applicant to those remedies such as the Ombudsman Office. Public bodies are encouraged to explain access requests and the role of the Review Officer under their duty to assist in order to clarify for an applicant, particularly where, as here, s/he was not clear on the process under the *MGA*.

Given that I recommend the fee not be waived, the only other remaining issue is regarding the fee estimate itself. Every effort must be made by the public body to provide an accurate estimate at the outset. If as here, some of what the Town had calculated into its estimate was unclear, clarification should be sought by the Applicant or the Review Office at the earliest stage. It is an established practice that:

*Once a fee estimate has been agreed upon, it will be difficult to issue a fee estimate for a larger sum of money if some services were inadvertently missed or not properly estimated. In those circumstances, a public body may choose to waive these additional costs and strive to improve estimates for future requests.
[Justice FOIPOP Procedures Manual (2005), at p. 3-19]*

Having said the estimate should be accurate, it is in fact just that, an estimate. It should be comprehensive, but at the end of the day, an estimate that is higher after the search for the records would be an unhappy result in any case.

Part of the estimate provided to the Applicant by the Town made reference to assembling information into a report. The legislation contemplates being able to base the estimate on certain and specific activities including:

471(2) 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 Town responded to a query from the Review Officer regarding the fee estimate in which it stated:

The applicant has requested information for a number of years. The information is contained in a number of files (both operating files and capital files)...Therefore it will take staff time to identify and locate the files from our storage records. Then the Director of Finance will have to assemble the information into an understandable report.

If the Town means by “understandable report” that the Director of Finance will be taking time to explain the information in the Record to the Applicant, this is consistent with the duty to assist, but is not time for which a public body can charge under s. 471(2) the *MGA*.

If the Town is referring to the creation of a Record by the use of a computer program when it uses the word “understandable report”, this would be permitted by s. 468(3) of the *MGA*. That subsection reads:

A responsible officer shall create a record for an applicant if
(a) the record can be created from a machine-readable record in the custody or under the control of the municipality using its normal computer hardware and software and technical expertise; and
(b) creating the record would not unreasonably interfere with the operations of the municipality.

If the Town is creating a Record as contemplated by s. 468(3), this is time that can be included in a fee estimate as a service to “produce the record” under s. 471(2) of the *MGA*.

If it is the former, the Town cannot charge for the explanation of the report. If it is the latter, the Town can include in its fee estimate the time to correlate information and to prepare the Record from a computer program in accordance with s. 468(3)(a) of the *MGA*.

FINDINGS

1. It is important to repeat that this Review is not about the merits of the access request or any possible exemptions that could be claimed by the Town. This Review is solely about the issue of whether or not the Town has properly refused a request by the Applicant to waive the fee related to a request for access. There is no Form 7 before me at this time with respect to the Record itself and thus I have no jurisdiction to consider what information the Town should or should not provide to the Applicant.
2. The Applicant did not, at any time, claim that s/he could not afford to pay the fee calculated by the Town and therefore cannot meet the statutory test – cannot afford the payment.
3. The Applicant did not request a fee waiver at the time s/he filed the access request.

4. The Applicant's only contention is that the information sought should be available to all citizens automatically and, given there is staff at the Town office who could prepare the information, there should be no cost to the person requesting access.
5. There is a difference in receiving information through routine disclosure and under the *MGA*. Once an access request is made under the *MGA*, the fee schedule automatically becomes engaged and, unless the fee is waived, is applicable.
6. The primary focus of all of the Applicant's prior briefs to the Review Office was on topics such as whether the information sought should be included as a matter of course in financial statements from the Town, whether there are Council members in a position of conflict and whether the Town Council is open, transparent and accountable. None of these issues are within the jurisdiction of the Review Officer during this Review.
7. I can find no evidence to support a finding that this access request is being made in the public interest. This access request appears to be one very personal to the Applicant.
8. In keeping with the duty to assist and in applying the fairness criteria to a public body, the Town attempted to respond to the Applicant, worked with the Applicant over an extended period of time and had supplied him or her with information prior to the access request.
9. The Applicant attempted, in its Submission to the Review Officer, to criticize the Town for not making an offer to reduce the fee. I find this late change in position on the part of the Applicant comes only as a result of research s/he did in preparation for making a Submission to give the impression s/he was flexible as s/he learned what was contemplated by the statute. Up until that time throughout the Review process, the Applicant took the position that it was "all or nothing" with respect to the waiver.
10. In applying the fairness criteria to the Applicant, s/he did not work constructively with the Town to narrow the scope of the request and was uncompromising about any suggestion to reduce the costs.
11. I find that the balance of interests with respect to the fairness criterion is in favour of the Town.
12. I can find no evidence to support a finding that it would be fair to excuse payment.

RECOMMENDATIONS:

1. It is recommended that the Town not waive the fee for this Application for Access to a Record.
2. The Town should revisit the fee estimate, but only with respect to the possibility that it has included in the fee estimate a charge for explaining the Record to the Applicant for which it cannot charge.
3. The Town should advise the Applicant of the final revised fee estimate [in accordance with the fee change referred to in para. 2] and of the need for him or her to pay a percentage upfront. Subsection 471(6) of the *MGA* allows a public body to receive the full fee in advance. The 25% requested by the Town as an advance payment is reasonable and is in accordance with the *MGA*. The Town should process this matter promptly.
4. I recommend that the Town review its policy regarding how it calculates a fee estimate and consider seeking advice from the FOIPOP Administrator at Service Nova Scotia and Municipal Relations as to best practice.
5. In addition, I would advise the Town to ensure that when it is gathering information internally from its employees that is responsive to the access request that the identity of the Applicant remain absolutely confidential other than to the responsible officer.

Respectfully,

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