



**REPORT**  
**Nova Scotia Freedom of Information**  
**and Protection of Privacy**  
**Report of Review Officer**  
**Dulcie McCallum**  
**FI-08 - 66**

**Report Release Date:** January 14, 2009

**Public Body:** Department of Energy

**Issues:**

1. Whether the Department of Energy [“Energy”] properly exercised its discretion in deciding not to grant a fee waiver on the grounds of public interest and/or personal information.
2. Whether a conflict of interest on the part of Energy’s Freedom of Information and Protection of Privacy [“FOIPOP”] Administrator:
  - a. affected the decision not to grant the fee waiver, and/or
  - b. lead to inappropriate inquiries being made by the FOIPOP Administrator.

**Record at Issue:** There is no Record at issue.

**Summary:** Two Applicants made an Application for Access to a Record to the Department of Energy for information about themselves and their companies and requested a fee waiver claiming the Record contained personal information and that it was in the public interest. The Applicants also claimed the FOIPOP Administrator who processed their Application for Access to a Record was in a conflict of interest as the Administrator had previous contact with the Applicants in meetings while he was acting in his role as an advisor to the Minister of Energy in several departmental functions. Energy issued a decision to the Applicants indicating that it did not believe the disclosure of the information found in the Record was of public interest and that the Record was not personal in nature and contained general records related to the Applicants’ businesses. The Review Officer found that it is within the jurisdiction of the Review Officer to make a finding with respect to an

allegation by an applicant that a public body was in a conflict of interest; and that there is no evidence that would indicate that Energy's FOIPOP Administrator was in a conflict of interest.

The Review Officer also found that a case for public interest has not been made out by the Applicants; that Energy had no basis on which to exercise its discretion to waive the fees because to do so would be fair to the Applicants; and if the Record contains the Applicants' personal information, it is reasonable to assume that it will be limited to contact information about the Applicants in their roles as businesspersons.

**Recommendations:**

The Review Officer recommended that Energy:

1. Reconfirm the fee estimate quoted to the Applicants, subject to the Applicants working with Energy constructively to try and narrow the scope of their Application for Access to a Record. Once the scope of the Application for Access to a Record is refined, Energy should eliminate any costs associated with personal information discovered in the Record and reconsider whether or not it is in the public interest to waive all or a portion of the fees once it is clear what information is contained in the Record; and
2. Ensure in the future that the delegated authority for FOIPOP responds to Applications for Access to a Record in a manner that clearly indicates the basis for how Energy exercises its discretion and makes the FOIPOP Administrator's delegated authority patently clear to applicants [for example using departmental letterhead for decision correspondence].

**Key Words:**

conflict of interest, contact information, delegation, discretion, fairness, fee estimate, fee waiver, inability to pay, personal information, public interest.

**Statutes Considered:**

*Freedom of Information and Protection of Privacy Act, ss. 2, 3(1)(i), 11; British Columbia Freedom of Information and Protection of Privacy Act, Schedule 1.*

**Case Authorities Cited:**

*NS Review Reports FI-06-79, FI-07-50(M), FI-00-91; ON Orders MO-222, MO-1283.*

## REVIEW REPORT FI-08-66

### BACKGROUND

In a letter dated July 22, 2008, the Applicants made an Application for Access to a Record to the Department of Energy ["Energy"], which stated:

*By way of this letter this is an application pursuant to the Freedom of Information and Protection of Privacy Act for access to all files and any information from 1999-2008 regarding:*

- 1) *myself – [The Applicant's Name]*
- 2) *[Name of Applicant's Company A] Limited, a company I wholly own, and am the President of,*
- 3) *[Name of the Applicant's Company B] Limited, a company I am the President of and [name of the Co-Applicant] is the Vice-President of,*
- 4) *[Name of the Co-Applicant].*

*We wish to examine these records, and then indicate which of them we wish to have copied.*

*The \$25.00 fee is enclosed with this application.*

In the same correspondence, the Applicants made a request to waive any additional fees. That request stated:

*We request a waiver of any additional fees, as this information is both to examine personal information, and also may be useful as public information and therefore in the public interest once being made available through this request.*

On August 26, 2008, Energy responded to the Applicants in a letter advising them of its decision with respect to the fee waiver request:

*Thank you for your \$25 application fee. I have begun processing your application, as per my telephone call of August 11, 2008. However, in the course of requesting records from staff, it has come to my attention that staff are required to search a large volume of records to complete your application. In a follow-up telephone call of August 12, 2008, I notified you of this fact and asked if you would consider revising your application request. You declined to do so.*

*Subsection 11(2) of FOIPOP allows us to charge fees for the cost of the services provided under the Act. We may charge fees for locating, retrieving, producing, preparing, and providing a copy of the record. Since you want to review the records in person, some of these charges do not apply. We can now provide you with a fee estimate for processing the request.*

*Since your request covers a number of important consultative periods for the Department (including: the 2001 Energy Strategy; the EMGC [Electricity Marketplace Governance Committee]; a number of electricity rate cases; the [Third Party] stakeholder session of 2006; and our Renewed Energy Strategy/Climate Change Action Plan stakeholder process), and since you participated in many if not all of these events, staff will need to search for records in a variety of electronic and hard copy locations.*

*We estimate that the amount of time required to provide the services prescribed under Section 11 is 28 hours at the rate of \$30 per hour, for a total of \$780 (with the first two hours at no-charge). This estimate includes:*

- 23 hours to search records*
- 5 hours to review records*

*If you would like to discuss ways to reduce the scope of the request and thereby reduce the fee estimate, please call me. If you still wish to proceed with the processing of your application, please confirm in writing that you agree to pay the fees for services once notified that the work has been completed. If the amount of work is less than the estimated time, the total fee would be revised accordingly.*

*With the provision of this fee estimate, your application has been placed on hold effective Aug. 26, 2008, and will be reactivated when you confirm in writing that you agree to pay the fees.*

*I know that in your request for information, you asked for a waiver of fees for the following reasons:*

*-“as this information is both to examine personal information, and also may be useful as public information and therefore in the public interest once being made available through this request.”*

*From a preliminary search of records and discussions with staff, it appears that our records are not of a “personal” nature, and that personal information contained in the general records is related to your role as a businessperson and renewable energy developer. If a search of records provides information that is contrary to this view, the fee estimate will be revised.*

*As for the issue of “public interest”, I do not find that there is some significant public benefit to be derived from its disclosure and dissemination.*

On September 2, 2008, the Applicants sent a letter to the Review Officer requesting an “appeal” of the decision by Energy to charge any fee regarding the preparation of files under their Application for Access to a Record.

## **RECORD AT ISSUE**

There is no Record at issue in this Review. The only issue is whether or not Energy appropriately exercised its discretion not to grant a fee waiver as requested by the Applicants. The Applicants have also made an allegation that the representative of Energy is in a conflict of interest, which affected the exercise of discretion in making the decision not to waive the fee.

## **APPLICANTS' SUBMISSION**

On September 2, 2008, the Applicants filed a letter with the Review Office seeking a Review of the decision by Energy to charge them any fee for processing their Application for Access to a Record. In addition in their Form 7 letter, the Applicants raised the following matters of concern, on which they requested the Review Officer to act or comment:

### Fees:

1. The Applicants reiterate that their request for a fee waiver is because the information is both personal and may be useful as public information. They indicate that they always ask for a fee waiver because they consider it to be personal information and not for Energy to judge. In all instances they are willing to share the information they access with the media and the public, which was clearly stated in their original application to Energy;
2. In addition, the Applicants cite previous Requests for Review wherein the Review Officer had agreed with their requests. Based on this and other rulings by the Review Officer, the Applicants query why Energy would be asking for this fee and in essence intentionally delaying access to the information which they have a right to access;
3. The Applicants query the inconsistencies between departments in charging fees. They indicate that their \$25.00 filing fee has been cashed by three departments while another has returned the cheque stating it is doing so under s. 11(4) of the *Act*. The Applicants ask the Review Officer to determine why there is this inconsistency in how their similar requests to various departments are being handled relative to being charged this fee.

### Inappropriate Freedom of Information and Protection of Privacy [“FOIPOP”] Administrator:

4. The Applicants considered the person who had been appointed as temporary FOIPOP Administrator when their Application for Access to a Record was received to be inappropriate. This was based on the fact that the Applicants had previous contact with that individual in meetings while he was acting in his role as an advisor to the Minister of Energy in several departmental functions. The Applicants submitted that their experience in over 20 years of making Applications for Access to a Record was that FOIPOP Administrators were professional civil servants who have no relationship to the issues or the files being requested and that was not the case for the person temporarily appointed by

Energy. The Applicants criticized the FOIPOP Administrator for making inquiries of them including a request to narrow the scope of their request and asking “what exactly are you looking for?”

5. The Applicants further criticized the FOIPOP Administrator for telling them that “It appears that our records are not of a ‘personal’ nature” and “as for the issue of ‘public interest’, I do not find that there is some significant public benefit to be derived from its disclosure and dissemination.” The Applicants indicate that they do not think it is appropriate for the FOIPOP Administrator to judge in advance whether a record contains personal information or whether or not it is in the public interest, especially given that in his other roles within the department he has provided advice to the Minister of Energy. Further, they are critical of the fact that the letter from the FOIPOP Administrator was not on government stationery.

The letter makes reference to other Requests for Review, which Reviews are not relevant to this case and are being handled separately as they relate to different public bodies.

As support for their position that fees should not be charged, on September 19, 2008, the Applicants sent the Review Office a copy of a decision by another public body indicating its intention to waive the locating fees for their Application for Access to a Record to that public body.

On September 24, 2008, the Applicants made a submission to the Review Office with respect to their request for a fee waiver. That submission provided:

1. The Applicants wish to be excused from fees as the subject matter of the request is in part about the environment as their companies are about promoting non-polluting renewable energy in Nova Scotia;
2. The fee estimate represents a financial burden on the Applicants both as individuals and companies;
3. The Application for Access to a Record is in the public interest because the Applicants consider themselves to be leaders in regards to public debate about renewable energy public policy and release of the information will aid the public debate;
4. The Applicants state they have an interest and an intention to release the information to the public to enhance public debate and therefore public policy development of renewable energy and policy in Nova Scotia;
5. The release of the information will assist in better understanding how Energy allocates resources or not in the development of renewable energy and renewable energy policy in Nova Scotia;
6. The Applicants indicate that their primary purpose for the release of the information is to disseminate it in a way that could benefit the public interest;
7. The Applicants state they are experienced in and capable of disseminating information to the public, both to the media and through other sources.

By letter dated October 10, 2008, the Applicants sent the Review Office a copy of a letter from another public body regarding their Application for Access to a Record to that department. The Applicants shared the enclosed correspondence to make the point

that it is only Energy that is charging fees as the above department is pulling, copying and mailing that record free of charge.

Similarly, on October 19, 2008, the Applicants corresponded with the Review Office to indicate that yet another public body was not charging a fee and that meant of all the Applications for Access to a Record made by the Applicants to five different departments, Energy was the only one charging a fee for providing access.

### **PUBLIC BODY'S SUBMISSION**

On October 3, 2008, Energy made a submission to the Review Office with respect to the Applicants' request for a fee waiver. That submission provided:

1. Citing s. 11(7)(a) of the *Act*, Energy stated that the Applicants were business persons and had provided no indication that they could not afford to pay the fees;
2. Energy indicated it had offered the Applicants the opportunity to discuss ways to reduce the fee estimate but that the Applicants did not want to discuss this option;
3. Again referring to s. 11(7)(a) of the *Act*, Energy indicated that the Applicants indicate that the Application for Access to a Record is for personal information but the information is about the Applicants and one corporation [*sic*] with which they are connected, thus making the scope not limited to personal information and extremely broad. Accordingly it was determined that there was no other reason that meant it would be fair to excuse payment;
4. Citing s. 11(7)(b) of the *Act*, Energy considered some of the factors that relate to whether or not a matter is of public interest. The Application for Access to a Record, Energy states, is very broad as it includes consultative processes that have taken place since 1999 and were part of a public debate at that time but were not matters of "recent public debate";
5. To try and reduce the scope, Energy was willing to provide the Applicants with information specifically contained in files relating to one company without charge. Energy further indicates that it has no personal information with respect to the Applicants as individuals;
6. Energy claims that if it does have to search its files for information regarding the two individual Applicants and one of their companies [*sic*], the information in the Record would not relate directly to the environment, health or safety. Energy indicates that because the information requested relates to the Applicants and their business interests, its dissemination would not assist the public in understanding an important policy. Further, Energy indicates that the Record would not show how it is allocating financial or other resources;
7. Energy submits that it is not in a position to determine whether or not the Applicants would be disseminating the information requested to the public;

8. The fee estimate is 4 days x 7 hours = 28 hours for locating, retrieving, producing and preparing the Record, minus the first 2 hours for a total of 26 hours x \$30 = \$780.

On December 11, 2008, Energy provided a submission to the Review Office to supplement the letter of October 3, 2008:

Fee Waiver:

1. With respect to the issue of fee waiver, Energy submits that it is difficult to separate the records related to the business activities of the companies and the request for records related to the Applicants;
2. Referencing s. 11 of the *Act*, Energy submits that where fees are required to be paid, they are mandatory. Citing s. 11(4) of the *Act* as the authority for the fact that while fees do not apply to personal information, where the application covers information that is not personal information, fees clearly apply;
3. Energy notes that the Applicants recognize that not all of the requested materials are personal information and have acknowledged this by stating “it is our opinion that some of these files may be of a personal nature”;
4. Fees may be waived under s. 11(7) of the *Act*, where in the opinion of the head of the public body, the records relate to a matter of public interest, including the environment or public health or safety;
5. Energy submits that while the Applicants made it clear in their Request for a Review that they were willing to share the information accessed with the media and the public, that was not made clear in their original Application for Access to a Record to Energy dated July 22, 2008;
6. Regardless, Energy submits that a willingness to share records with media and the public does not meet the definition of “public interest.”

Appropriateness of FOIPOP Administrator:

7. The FOIPOP Administrator submits that decisions that can be the subject of a Request for Review are limited to matters referred to in s. 32(1) of the *Act* which are issues concerning access to a record or for the correction of personal information. Questions about the appointment of the administrator by the head of a public body under s. 44 of the *Act* are not within the scope of a Review;
8. The Applicants have failed to identify how the role of FOIPOP Administrator conflicts with the decision-maker’s other role as Communications Director;
9. The Applicants did not raise the conflict of interest issue with the FOIPOP Administrator or with the department while the Application for Access to a Record was being processed;
10. In this case, the delegation was made by the Minister of Energy. Following the logic of the Applicants, Energy argues that any person who attended meetings that may be the subject of the information requested, the Minister and/or Deputy Minister would be unable to sign off on a decision under the *Act*;
11. Energy submits that many of the complaints by the Applicants appear to arise from a misapprehension of the way the statute and regulations work. The questions the Applicants allege point to the FOIPOP Administrator being inappropriate are questions routinely asked by administrators to narrow the scope



to reduce the time to produce the materials requested and the fees that may arise from the request. In addition, the *Act* contemplates that the head of the public body will determine if a record contains personal information and will consider a fee waiver request based on the factors listed in s. 11(7). Energy submits that it is not inappropriate for an administrator to address these issues but rather this is part of his/her responsibility.

Energy has indicated that if it is determined that there is in fact personal information about the Applicants in the Record, the fee estimate will be adjusted. There has been no charge added for photocopying the Record.

## **DISCUSSION:**

The Applicants' right to access information under the *Act* is stated in the purpose section, which provides:

*2 The purpose of this Act is*

*(a) to ensure that public bodies 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 . . .*

The Applicants indicated that their Application for Access to a Record may contain some personal information. Personal information is defined in s. 3 of the *Act* as follows:

*3 (1)(i) "personal information" means recorded information about **an identifiable individual**, including*

*(i) the individual's name, address or telephone number,*

*(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*

*(iii) the individual's age, sex, sexual orientation, marital status or family status,*

*(iv) an identifying number, symbol or other particular assigned to the individual,*

*(v) the individual's fingerprints, blood type or inheritable characteristics,*

*(vi) information about the individual's health-care history, including a physical or mental disability,*

*(vii) information about the individual's educational, financial, criminal or employment history,*

*(viii) anyone else's opinions about the individual, and*

*(ix) the individual's personal views or opinions, except if they are about someone else;*

**[Emphasis added]**

Energy submits that to its knowledge there would not be any personal information in the requested Record; however, if it was discovered otherwise once the Record was actually being processed for disclosure, the fee would be revised accordingly. Energy advised the Applicants of these facts at the time of processing their request. The Applicants considered it inappropriate for Energy to be making this statement, considering it not to be its role. There may be some recorded information about the

Applicants as identifiable individuals falling within the definition above but the information may be only be contact information. Schedule 1 of the British Columbia *Freedom of Information and Protection of Privacy Act* defines personal information as excluding “contact information” and defines “contact information” as:

*Information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.*

For our purposes with respect to the fee waiver, as the Record is not in issue in this Review, I find that it is unnecessary to deal with the issue of personal information. When the Applicants are given access to the Record, the fees, if any, will be adjusted to reflect that the Applicants cannot be charged for personal information. Energy has already indicated its intention to do so. Individuals seeking information about themselves in their role as executives of corporate interests cannot try to avoid the costs associated with an Application for Access to a Record by characterizing the information as “personal” as defined by the *Act*. The Applicants’ submission that there should be no fee charged based on it being personal information is set aside as not appropriate in this case.

The principal issue in this Review is whether or not Energy has properly exercised its discretion to refuse to waive the fees estimated to be \$780.00. Section 11 of the *Act* provides the following regarding fees:

*11(1) An applicant who makes a request pursuant to Section 6 shall pay to the public body the application fee prescribed by the regulations.*

*(2) The head of a public body **may require an applicant** who makes a request pursuant to Section 6 **to pay** to the public body 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.*

*(3) An applicant is not required pursuant to subsection (2) to pay a fee for the first two hours spent locating and retrieving a record.*

*(4) Subsections (1) and (2) do not apply to a request for the applicant's own personal information.*

*(5) 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.*

*(6) The head of a public body may require the applicant to pay the estimated fee prior to providing the services pursuant to subsection (2).*

***(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.***

*(8) The fees that applicants are required to pay for services pursuant to subsection (2) shall not exceed the actual costs of the services.*

***[Emphasis added]***

Energy argued that where fees apply (not personal information) they are mandatory. That is an inaccurate way to refer to fees. A public body has the discretion to charge fees and they should properly be referred to as discretionary. There are three general categories of when a FOIPOP Administrator may exercise his or her discretion to waive fees, which are:

1. where an applicant cannot afford the payment;
2. where an administrator considers it would be fair to excuse payment for any reason; or
3. where the record sought relates to a matter of public interest. The examples given in the statute, in a non-exhaustive list as to what may constitute “public interest”, are issues related to the environment, public health and safety.

The Applicants have requested the waiver on two of these categories; they cannot afford to pay and the information in the Record is a matter of public interest. In their representations to the Review Officer the Applicants stated:

*It represents a financial burden for us to pay these fees, both as individuals and as companies.*

The Applicants did not provide any evidence to support that statement regarding their inability to pay. Also, the Applicants did not give this as a reason to Energy at the time of requesting a fee waiver. During the Review process, once Energy was made aware of this new claim, it responded that “it was determined that the applicants are business persons and provided no indication that they cannot afford to pay the fees.”

Energy did not have any information at the time of the fee waiver request to exercise its discretion to waive based on the Applicants' inability to pay.

Though the Applicants only relied on two of the categories, as Energy addressed the issue of fairness, I will consider the two remaining grounds for fee waiver; fairness and public interest. In both cases the decision is a discretionary one. As the relevant section of the *Act* reads "may", it is up to a public body to exercise its discretion and to provide its rationale for doing so to the Applicants. In Review Report *FI-06-79*, I emphasized the importance of a public body explaining to an applicant in its decision **how** it exercised its discretion and not simply that it did. I repeat what was said in that case:

*In determining how to exercise its discretion, reference to a recent Review issued by this Review Officer, FI-06-77, with respect to the exercise of discretion bears repeating:*

*Any public body in exercising its discretion under one of the statutory exemptions listed in the statute beginning at s. 12 should be mindful of the following factors:*

- 1. The purposes of the Act including that **individuals have a right to access their own personal information;***
  - 2. Exemptions from the right to access **should be limited and specific** in order to*
  - 3. Honour the broad purposes of the Act; and*
  - 4. Privacy of individuals should be protected.*
- [Emphasis added]**

*BC Information and Privacy Commissioner's Order No. 325-1999 outlined a non-exhaustive list of factors for a public body to consider:*

*In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception....*

*In exercising discretion, the head considers all relevant factors affecting the particular case, including*

- the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
- the wording of the discretionary exception and the interests which the section attempts to balance;*

- *whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*
  - *the historical practice of the public body with respect to the release of similar types of documents;*
  - *the nature of the record and the extent to which the document is significant and/or sensitive to the public body;*
  - *whether the disclosure of the information will increase public confidence in the operation of the public body;*
  - *the age of the record;*
  - *whether there is a sympathetic or compelling need to release materials;*
  - *whether previous orders of the Commissioner [or Review Officer] have ruled that similar types of records or information should or should not be subject to disclosure; and*
  - *when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.*
- [FI-06-79]

***[Emphasis in the original]***

A public body can waive a fee because it considers doing so would be fair to an applicant. Regarding the concept of fairness, the Review Officer has stated:

*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]

[FI-07-50(M)]

***[Emphasis added]***

Considering these factors regarding fairness, what is the result when applied in this case? That discussion follows:

1. In accordance with its duty to assist, Energy offered to reduce the fee estimate by discussing with the Applicants ways to narrow the scope of the request;
2. Energy appropriately inquired of the Applicants what they were looking for;
3. Energy appropriately indicated to the Applicants that the records were not of a personal nature;
4. The Applicants indicated to Energy that they did not want to discuss the option of narrowing the scope when that offer was made;
5. Energy indicated the application involves a large volume of records;
6. No photocopying fee has been charged by Energy;
7. The Applicants plan to view the records before deciding of which they want copies;
8. The Applicants have several existing Applications for Access to a Record in other departments for which no fees are being charged; and
9. The Applicants indicate that they have had several previous Reviews from this Review Office always supporting their request for a fee waiver.

What other departments choose to do with respect to fee waivers is irrelevant to what Energy decides. The Applicants' claim to rely on former Reviews from the Review Officer as precedents is not appropriate as each decision by a public body must be decided based on how it exercised its discretion on the particular facts in any case. Given the lack of willingness on the part of the Applicants to respond to Energy's attempts to narrow the scope to reduce the fee estimate and the failure on the part of the Applicants to put forward a compromise, Energy had no basis on which to exercise its discretion to waive the fees because to do so would be fair to the Applicants.

The remaining question is how Energy exercised its discretion to decide not to waive the fees on the basis of it being in the public interest to do so. The Review Office in a previous Report stated:

*"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?*  
[FI-00-91]

Considering these factors regarding public interest, what is the result when applied in this case? That discussion follows:

1. The Application for Access to a Record is for all files and any information about two individuals and two of their corporations for a nine year period. The information from 2008 may be with respect to something involving recent public debate. The actual wording of the Application for Access to a Record [see above], however, is so broad and general that it is impossible to link it to any particular issue of public import that would generate debate;
2. The requested information is about companies that are involved in the energy sector and this request is to Energy. The Application for Access to a Record, however, is so broad and general that it is impossible to link the energy base of the company to the environment, health or safety. Had the Application for Access to a Record been redrafted and refined to make the information sought clearly linked to one of these issues, particularly the environment, that could have made a difference;
3. It is difficult to determine how a general Application for Access to a Record about two individuals and two companies over a nine year period could provide information that would yield a public benefit by assisting the public in understanding an important policy;
4. The Applicants failed to provide any evidence to substantiate the link between what information is in the Record about the work of their companies and the public interest test; and
5. It is impossible to know if the Record shows how Energy is allocating financial or other resources other than to the Applicants and their companies.

Energy could have provided a more in-depth analysis for the Applicants as to how it exercised its discretion in making its decision with respect to public interest.

Energy indicated it did not know if the Applicants had the intention or ability to disseminate the information contained in the Record. The Applicants indicated they are always prepared to share and disseminate any information they obtain under Applications for Access to a Record. The two remaining questions – whether it is the Applicants' primary purpose to disseminate the information to the public and whether they are able to do so – need not, however, be answered. These questions are only relevant when a public body has decided it is in the public interest to release the information or the Review Officer has made that determination.

The final matter to discuss is the issue of a conflict of interest raised by the Applicants. The issues are whether or not a conflict of interest on the part of Energy's FOIPOP Administrator affects the decision not to grant the fee waiver and/or has led to inappropriate inquiries being made by him.

The facts in this regard are as follows:

1. Who the head of a public body delegates to be the FOIPOP Administrator is solely within the jurisdiction of the head and is not within the jurisdiction of the Review Officer. The issue of the delegate having a bias that has affected his/her decision is, however, an issue that can be reviewed by the Review Officer;
2. The FOIPOP Administrator against whom a conflict of interest allegation has been made has a properly executed delegation from the Deputy Minister as the head of the public body, Energy;
3. The Acting FOIPOP Administrator who made the original submission to the Review Office on October 3, 2008 is not the person against whom the allegation of a conflict of interest is levied;
4. The FOIPOP Administrator who made the decision not to waive the fees is also the Director of Communications. In that role he has participated in many meetings involving the Applicants and other Energy officials;
5. The Administrator has knowledge of these particular Applicants and their business interests because of other roles assigned to him by Energy; and
6. The Applicants did not raise the conflict of interest issue with the FOIPOP Administrator until after the fee estimate was provided.

In this case, has a conflict of interest affected the handling and processing of the Applicants' Application for Access to a Record? The Applicants raised the issue of the FOIPOP Administrator being in a conflict of interest because of his involvement in meetings in which the Applicants were also involved.

Conflict of interest arises when a decision-maker's private or personal interests take precedence over or compete with the decision-maker's adjudicative responsibilities. Conflict of interest may be real, perceived or potential.

*Bias is a lack of neutrality or impartiality on the part of a decision-maker regarding an issue to be decided. A decision-maker must not be biased as "no one shall be a judge in his own cause." In other words, an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. A breach of this fundamental rule of fairness will cause a statutory delegate to lose jurisdiction. [Order M-1091]. Accordingly, there is a right to an unbiased adjudication in administrative decision-making.*

*It is not necessary to prove an "actual bias." The test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias." The test for a reasonable apprehension of bias enunciated by the Supreme Court of Canada is "What would an informed person, viewing the matter realistically and*



*practically - and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?”*

*[Order MO-2227]*

***[Emphasis added]***

In other words, the decision-maker in a fee waiver request must be free from any personal interest in whether or not the fee waiver is granted.

The Office of the Commissioner in Ontario issued an Order that provides guidance through a set of questions that can be asked to ascertain whether or not the issue of bias is a legitimate problem. The questions are:

- 1. Would a well informed bystander reasonably perceive bias on the part of the decision-maker?*
- 2. Would the decision-maker have a closed mind, in that no representations could have been made, which could have resulted in the decision-maker making a different decision?*
- 3. Would the decision-maker have a pecuniary interest in or relation to the records?*
- 4. Would the decision-maker have any other kind of personal or special interest in the records?*

*If any of the above questions are answered in the affirmative, please respond to the following:*

- 5. Would it have been possible for someone other than the decision-maker to have made the decision?*
- 6. Would the answer to any of questions 1-4, posed in regard to the alternate decision-maker(s), have been "yes"?*
- 7. Would the requester and any third parties/affected persons, with the full knowledge of the relevant facts and having had the opportunity to object, waived their rights to object to the decision-maker's participation?*

*[ON Order MO-1283]*

It is important to note that in this case the FOIPOP Administrator is responsible to exercise his discretion as to whether or not to permit a fee waiver. This heightens the importance of ensuring the decision-maker does not have a conflict of interest.

The Applicants have acknowledged the professionalism of the administrators that they have dealt with in the past, by stating they “have always found the administrators to be professional civil servants who have no relationship to the issues or files that have been requested.” They consider this FOIPOP Administrator’s previous involvement as a consultant or as the Director of Communications places him a conflict of interest that has influenced his decision not to waive the fees in this case. I do not agree.

In an ideal world, FOIPOP Administrators would be assigned access and privacy work solely, in which case there would be limited chance of being seen as in a potential conflict situation. But the reality is that most administrators, particularly in smaller public bodies, do a myriad of other tasks. Public bodies, large or small, are entitled to organize their administration in whatever manner they see fit. They should, however, recognize that, as in this case, where there is a blending of tasks, they run the risk of an allegation of bias being raised. That being said, I find that the Applicants in this case received a decision with respect to the fee waiver to which they were not accustomed. In the past and with their other present Applications for Access to a Record, the Applicants report the fees are always waived. When the decision-maker did not find in their favour, the Applicants impugned that decision with an allegation of the person being in a conflict of interest. They never raised this issue with the FOIPOP Administrator himself at any time and he indicated that he always had a cordial professional relationship with the Applicants.

In this case, the Applicants alleged that the FOIPOP Administrator had been specifically selected to process this Application for Access to a Record because of his previous involvement in the matter. The FOIPOP Administrator has, in fact, been processing Applications for Access to a Record for Energy for a considerable period of time prior to the Applicants' Application for Access to a Record being submitted.

There is no evidence to support the allegation that the FOIPOP Administrator had any personal interest, pecuniary or otherwise, in refusing to waive the fees. His failure to use letterhead to demonstrate his authority as the delegate was unfortunate but not a matter for this Review Officer and is not a FOIPOP matter. In addition, I find that a well-informed bystander would not reasonably perceive a bias on the part of the FOIPOP Administrator because he happens to also be the Director of Communications.

#### **FINDINGS:**

1. As part of the FOIPOP Administrator's role to make a decision, it is his/her duty to ask questions, to try to refine the scope of the request, to evaluate if information is personal in nature and to make a determination if a matter is one of public interest;
2. It is relevant to the issue of fee waiver whether or not the Applicants cooperated with Energy to try and refine their Application for Access to a Record;
3. It is not within the jurisdiction of the Freedom of Information and Protection of Privacy Review Officer to review the question of who is given a delegation by the head of a public body;
4. It is within the jurisdiction of the Review Officer to make a finding with respect to an allegation by an applicant that a public body was in a conflict of interest or was biased in the course of making a decision under the *Act*;
5. There is no evidence before the Review Officer that would indicate that the FOIPOP Administrator who happens to also be the Director of Communications was in a conflict of interest. In other words, a well-informed bystander would not reasonably perceive a bias on the part of the FOIPOP Administrator because he happens to also be the Director of Communications;

6. The person who processed the Application for Access to a Record – the FOIPOP Administrator – was the delegated employee tasked with responding to Applications for Access to a Record by the head of Energy;
7. Knowledge about a particular applicant and his/her interests does not automatically put a FOIPOP Administrator in a conflict of interest, nor does it affect an administrator's ability to be objective and impartial;
8. There is no evidence to support the allegation that the FOIPOP Administrator had any personal interest, pecuniary or otherwise, in refusing to waive the fees;
9. What other departments choose to do with respect to fee waivers is irrelevant to what Energy decides;
10. The Applicants' claim to rely on former Reviews from the Review Officer as precedents is not appropriate as each decision by a public body must be decided based on its particular facts, when exercising discretion. To argue that the Review Officer should always find that an applicant is entitled to a fee waiver when one is requested would put the impartiality of the Review Officer as an independent oversight body in question;
11. Given the lack of willingness on the part of the Applicants to respond to Energy's attempts to narrow the scope to reduce the fee estimate and the failure on the part of the Applicants to put forward a compromise, Energy had no basis on which to exercise its discretion to waive the fees because to do so would be fair to the Applicants;
12. The Application for Access to a Record is so broad and general that it is impossible to link it to any particular issue of import that would generate public debate;
13. Had the Application for Access to a Record been redrafted and refined to make the information sought clearly linked to one of these issues, particularly the environment, that could have made a difference as to whether or not release was in the public interest;
14. It is difficult to determine how a general Application for Access to a Record about two individuals and two companies over a nine year period could provide information that would yield a public benefit by assisting the public in understanding an important policy;
15. It is impossible to know if the Record shows how Energy is allocating financial or other resources other than to the Applicants and their companies;
16. Should there be personal information in the Record, it is reasonable to assume that it will be limited to contact information about the Applicants in their roles as businesspersons. Energy has already indicated the fee estimate will be adjusted if personal information is found to be in the Record;
17. The two questions, whether it is the Applicants' primary purpose to disseminate the information to the public and whether they are able to do so, need not be answered in this Review as a case for public interest has not been made out; and
18. Where the Applicants disagree with a decision based on inquiries made by a FOIPOP Administrator, the remedy is not to question his or her authority to make those inquiries but rather to have that decision reviewed by filing a Form 7 [Request for a Review] with the Review Officer.

## **RECOMMENDATIONS:**

I recommend the following to Energy:

1. Reconfirm the fee estimate quoted to the Applicants, subject to the Applicants working with Energy constructively to try and narrow the scope of their Application for Access to a Record. Once the scope of the Application for Access to a Record is refined, Energy should eliminate any costs associated with personal information discovered in the Record and reconsider whether or not it is in the public interest to waive all or a portion of the fees once it is clear what information is contained in the Record; and
2. Ensure in the future that the delegated authority for FOIPOP responds to Applications for Access to a Record in a manner that clearly indicates the basis for how Energy exercised its discretion and makes the FOIPOP Administrator's delegated authority patently clear to applicants [for example using departmental letterhead for decision correspondence].

Respectfully submitted,

Dulcie McCallum  
Freedom of Information and Protection of Privacy Review Officer