



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy**
Report of the Review Officer
Dulcie McCallum
FI-11-23(M)

- Report Release Date:** December 1, 2011
- Public Body:** Municipality of the County of Kings
- Issues:** Whether the Municipality of the County of Kings [“Kings County”] is in contravention of *Part XX* of the *Municipal Government Act* [“*MGA*”] and, in particular:
1. Whether Kings County’s fee calculation is fair and accurate?
 2. Whether Kings County’s decision not to waive all or part of the fees is fair in the circumstances?
- Record at Issue:** No Record has been provided to the Review Officer by Kings County as the only issue is with respect to fee estimate.
- Findings:** The Review Officer made the following findings with respect to the fee estimate provided to the Applicant by Kings County:
1. I find that Kings County had the statutory authority to make a decision as to what fees it could charge and to exercise its discretion to waive all or part of the fees to the Applicant.
 2. I find Kings County is entitled to require the Applicant to pay fees for locating the Record, preparing the Record for disclosure and for making a copy of the Record if the Applicant asks for a copy, but the fees allowable under the *MGA* are limited to the actual costs to the public body.
 3. I find the Applicant cannot be charged for work already done vis-à-vis the Record.
 4. I find the nearly 2,600 pages of information already posted to the Kings County website does not fall under the *MGA* and should not form part of the public body’s response to the access request.
 5. I find Kings County has conflated search and severing because it has charged twice for one step in the process [\$1,200 and \$6,960], a kind of double-dipping which is not

permitted under the *Regulations*: Kings County has charged once for locating all the emails [search] and then charged a second time to review what it has located to determine if the emails are responsive [search] and then again to determine if any exemptions apply [severing]. While search and severing are two allowable and distinct steps under the *Regulations*, two separate charges for search are not permissible.

6. I find public bodies cannot charge legal or consultation fees as they are not a permissible factor to be considered under the *Regulations*. Only what is included in the *Regulations* can form part of a fee estimate.
7. In exercising its discretion, I find Kings County failed to take into account the Applicant's Representations that include:
 - The Applicant's Form 1 did not request a copy of the Record but only asked to "examine the record."
 - The Applicant's letter of February 9, 2011 indicated that the Record was likely to be only 100 pages and did not want a reprint of the complete file, to which the Applicant already had access.
 - The Applicant was familiar with the Record and while s/he was not able to provide keywords for the search s/he was willing to sit down with Kings County to narrow the scope of the search.
 - Approximately 2,600 pages of records related to the named planning application were publicly available on Kings County's website as of August 30, 2011.
 - The *Request for Proposals Terms of Reference* document (date issued) produced by Kings County for "planning application support services" states, at Section 8.1: *Municipal staff will also perform the following, as part of the application process:*
... *File maintenance. All correspondence, including email correspondence, regarding the file shall be provided to the Planner.*
8. In the current Review, Kings County has the burden to prove that the fee estimate is fair and accurate. The onus entails asking whether the fee estimate is authorized, reasonable and equitable. I find Kings County has failed to meet that onus for all three parts of the test.
9. I find that some of the charges calculated into the fees were not authorized. Kings County's estimate included a double claim for search – once to compile all the e-mails, and a second time to pull out which e-mails were relevant – thus

trying to claim double the hours involved. Kings County also tried to claim for legal services, which is not authorized under the legislation. Kings County removed legal fees, but did so reluctantly after being advised legal services were not authorized.

10. I find Kings County has not provided an estimate proportionate to the work required, has not worked with the Applicant efficiently and effectively to narrow the scope of the request and has failed to respond accurately to what the Applicant had requested.
11. Because the public body misconstrued or failed to focus on what the Applicant was actually seeking access to, I find King County inflated its fee estimate and, therefore, the calculation was not fair or equitable.
12. I find the fee estimate to be so inflated that it amounts to shifting an unreasonable burden of the cost from the public body to the Applicant thus setting up a barrier to the Applicant's statutory right to access information.
13. I find the Applicant made it clear on the Form 1 and the accompanying letter that s/he sought to have access to examine the Record and not to receive copies of any part of the Record to which s/he had already had access.
14. I find Kings County failed to make a concerted effort to work with the Applicant, despite the fact that it had required the Applicant to make the Application for Access to a Record in order to locate the Records the Applicant felt were missing from their records.
15. I find Kings County did not respond to the Applicant in an appropriate manner, it did not work with the Applicant to narrow or clarify the request, it did not provide anything to the Applicant free of charge and the request likely does not involve a large volume.
16. I find that the Applicant could have made a greater effort to narrow the scope (though s/he did try to some extent), stick to his/her original request to view the Record rather than obtaining a copy and propose a compromise given the circumstances.
17. I find, considering all of the factors, on balance, the decision not to waive part or all of the fees, in these circumstances, not to be unfair or unreasonable.

Recommendations:

The Review Officer made the following Recommendations:

1. Kings County provide the Applicant with the opportunity to view the Record already compiled and thereafter conduct a search of what may be missing from the compiled Record.
2. In order to comply with Recommendation #1, Kings County will meet with the Applicant and together conduct an electronic search for the Record.
3. After conducting the electronic search together, Kings County will provide the Applicant with the opportunity to view the Record in an electronic form identified during the electronic search.
4. Kings County may charge the Applicant for its actual time to conduct the electronic search and for photocopying should the Applicant want paper copies, *after the search done together is completed.*

Key Words:

accurate, apology, authorized, contract, delay, double-dipping, electronic, estimate, equitable, fair, fees, inflated, keywords, legal advice, locating, professional obligations, public interest, reasonable, records management, representative sample, search, severing.

Statutes Considered:

Part XX of the Municipal Government Act [MGA], s. 462, 463(2)(b), s. 466, 467, 471, 491, 501(2); Freedom of Information and Protection of Privacy Regulations s. 6.

Case Authorities Cited:

NS Review Reports, FI-07-50(M), FI-07-69(M); Ontario Order MO-2617-I.

Other Cited:

Nova Scotia Department of Justice Procedures Manual – FOIPOP (2005).

REVIEW REPORT FI-11-23(M)

BACKGROUND

On December 8, 2010 the Applicant made an Application for Access to a Record under the custody and control of Kings County that read as follows:

- Planning department – file [number] – [file name].*
- *All correspondence submitted by members of public to members of council and staff;*
 - *All correspondence between planning staff, and between council and staff;*
 - *All correspondence between planning staff, council and members of the public.*

On the Application for Access to a Record the Applicant requested that Kings County to waive fees on the basis that:

Under contract and terms of reference, Municipality of the County of Kings is obligated to provide [Applicant's firm] all correspondence related to the requested record.

The Applicant had, prior to filing the Form 1, asked Kings County to provide him/her with information to which s/he felt entitled and was advised s/he would have to make an Application for Access to a Record.

On the Form 1 the Applicant ticked the box on the form requesting to “examine the record” not the box which an applicant ticks if s/he wishes to receive a copy of the Record.

As of January 27, 2011 (50 days after the Application for Access to a Record), the Applicant had received no access decision and filed a Form 7 Request for Review of the “deemed refusal” with the Review Officer [File FI-11-12(M)]. During the course of that Review, which is now closed, the Applicant modified the scope of the access request, by letter dated February 9, 2011, as follows:

To clarify our December 8, 2010 request: [the Applicant's firm] wishes to review any correspondence that refers to the [file name] that was not directly sent to [the Applicant's firm] or where an [Applicant's firm] staff member was not copied (cc'd) in the email for information purposes. While we wish to have records not previously circulated for the entire duration of the file, we anticipate that the majority maybe from July 1, 2010 onward. After speaking with [the Review Office], it is my understanding that the Municipality of the County of Kings is not obligated to provide correspondence subsequent to December 8, 2010 application date of the request. That being said, we wish to be provided with any records that are not currently part of our file – up to, and including, Second Reading. If necessary for procedural purposes, we ask that our FOIPOP application be amended to include the entire record up to Second Reading (February 1, 2011) to ensure that our file is complete.

On February 7, 2011, Kings County provided the Applicant with a decision in response to his/her Application for Access to a Record by issuing a fee estimate:

As an employee of [the Applicant's firm] who has been closely involved in the [file name] planning matter, you have access to any additional information that may be in [the Applicant's firm's] own files. This being the case and since it seems reasonable to believe that you know the nature of the additional information being sought from the Municipality, I request that you provide me with a listing of the word searches you or [other member of Applicant's firm's staff] would have expected to use had you been reviewing server files with one of the Municipality's IT technicians. Receipt of that word list will make my review an easier task and may well result in less cost to you as

applicant. The listing may be provided by e-mail but should also be sent formally by signed letter.

Depending on the extent of the file search that is required to meet the information request set out in your December 8, 2010 application, I am estimating the allowable cost of staff time for:

- a) Locating, retrieving and producing the record; and*
- b) Preparing the record for disclosure*

to be between \$1,000 and \$6,000. In view of the cost I ask that you let me know in writing if you wish my review to go forward. If you wish for the search to proceed I also ask that the lower end of the estimate - \$1,000 be paid to the Municipality before a detailed search of the records begins. You will be invoiced for additional costs that exceed \$1,000. If the cost to the Municipality proves to be less than \$1,000, you will be reimbursed for the difference. I await your reply. In the meantime, I am writing to the Nova Scotia FOIPOP Review Officer requesting an extension of time to review the material that is the subject of your application.

For the deemed refusal Review [FI-11-12(M)], on Feb. 9, 2011, the Applicant wrote to Kings County as follows:

[The Applicant's firm] does not wish for a reprint of the entire file and is not asking for any record that has already been provided. [The Applicant's firm] is only requesting any additional records that should have been provided based on our role in the [named planning file] application process. For this reason, there are no specific keywords, except those which may be used by staff to properly manage the [named planning file]. I would suggest that an email search can be completed in a timely manner using appropriate filters on 'sent to', 'sent from', and 'cc'd' fields. I would be happy to discuss possible approaches to this search with a staff member from your IT department.

Kings County made it clear that it would not allow the Applicant access to their electronic system.

On February 10, 2011, the Review Office advised Kings County that fee estimates under *Part XX of the Municipal Government Act* ["MGA"] are required to be as accurate as possible, and provided the Municipality with documents outlining steps to take in properly calculating the estimate. The Review Office also indicated that the delay in producing a response to the Applicant's original Application for Access to a Record could be a factor for the Municipality to consider in determining to waive fees.

On February 16, 2011, the Municipality clarified its fee estimate as follows:

To be clear, I understand [the Applicant's firm] application to be for a copy of correspondence to or from the public, staff, Council or Councillors relating to the [file name] where [the Applicant's firm] was not the recipient or does not appear to be copied with the correspondence, for the period of July 1, 2010 to February 1, 2011.

Based on my current understanding of [the Applicant's firm's] application for information, I am now able to provide the following revised estimate of fees to be paid by [the Applicant's firm]:

<i>Locating and retrieving correspondence, including searching paper files and electronic files (not including two free hours).</i>	
<i>40 hours at \$30.00 per hour</i>	<i>\$1,200</i>
<i>Prepare correspondence for disclosure and handling it, including review by Responsible Officer (232 hours).</i>	
	<i>\$6,960</i>
<i>Copying paper files and printing electronic file @ \$0.20/page</i>	<i>\$400</i>
<i>Total</i>	<i>\$8,560</i>

Dealing with emails accounts for a significant amount of time for locating and retrieving correspondence (Assuming 30 mail boxes need to be searched and each contains 400 e-mails from July 1, 2010 to February 2, 2011 with one or more of the following words – [search terms], this will amount to 12,000 e-mails that require human review. Projecting on average 60 seconds for a review of each e-mail (and any attachments), this amounts to 200 hours. At the allowable \$30 an hour, this alone comes to \$6,000. IT staff estimate 30 hours of staff time is required to assemble the e-mails for my review.

[The Applicant's firm] has requested that these fees be waived. This decision is in my discretion. [The Applicant's firm] has not suggested that it cannot afford to pay the fees and I am not satisfied that there is any other reasonable basis upon which to waive the fees. This is not a situation where waiving the fees is in the public interest. [The Applicant's firm] seeks the correspondence for its own private purposes. Furthermore, the failure to abide by timelines was a direct result of communications with [another member of the Applicant's firm's staff] and [the Applicant's firm's lawyer], which led the Municipality to believe that the matter had been resolved and that it was not necessary to respond to [the Applicant's] original application. There were many opportunities for [the other member of the Applicant's staff] to raise the matter with me and s/he did not do so. The Municipality apologizes for the delay in responding to [the Applicant's firm's] initial request for information, but it is my decision that this delay is insufficient to justify reducing or waiving the fees. The suggestion that a fee was waived for a prior Part XX applicant is information that [the Applicant's firm] possesses as a result of its contractual role with the Municipality, and is confidential information. In any event, the

personal circumstances associated with that other applicant are private and irrelevant to [the Applicant's firm's] request for waiver of the fees.

Based on this new fee estimate, [the Applicant's firm] must pay \$4,280 in advance. It is important for [the Applicant's firm] to understand that this is only an estimate and actual fees may be more or less. I will provide you with a revised estimate if it becomes apparent that there is more time required than originally estimated. [The Applicant's firm] will receive a refund of any overpayment.

By letter dated February 16, 2011, the Municipality responded to the Applicant's request for the scope of the request to be expanded to records "up to, and including, Second Reading" (February 1, 2011) as follows:

I am prepared to deal with this entire timeframe as one request.

On March 4, 2011 (received March 5, 2011) the Applicant filed a Request for Review which read as follows:

The applicant requests that the review officer recommend that the fee estimate issued by the Municipality of Kings be reassessed based on information submitted by the applicant prior to the estimate [File # FI-11-12(M)].

The Applicant attached a letter of explanation with his/her Form 7, which read in part as follows:

[Kings County's] statement – 'whether [the Applicant's firm] was contractually obligated to all of the information that [they] seek is now irrelevant, since Council has adopted the plan amendments' – is incorrect. As the work completed on behalf of the Municipality of Kings involved engineering and planning work, [the Applicant's firm] is required, as [business designation] professionals, to maintain a complete file for a specified period of time. As the records requested: [1] are relevant to the file; [2] required due to [the Applicant's firm's] obligations as [business designation]; [3] and should have been previously provided to [the Applicant's firm] based on our role in the processing of the [named file] application, [the Applicant's firm] requests that the Fee Estimate be waived completely.

Correspondence that was not provided to [the Applicant's firm] during the [named file] application process, was subsequently released to a member of the public through a FOIPOP request. The fact that some correspondence was considered relevant enough to the [named file] application process to require release to a member of the public, but not delivered to [the Applicant's firm] at the time of transmittal or thereafter, is of concern and is the basis for our initial FOIPOP request. The actions of the Municipality suggest that there are additional records that are relevant to the [named file] application that we

do not currently have in our file. For this reason, any fees related to our requested should be waived, as the information should have already been provided to us.

[Kings County's] rationale for the portion of the Fee Estimate related to staff time (272 hours in total) significantly overestimates the amount of effort involved in the process. [Kings County] states that there are '12,000 e-mails that require human review'. This is incorrect, as this number does not reflect the use of simple and efficient practices for digital (email) searches, including the use of keywords, labels and filters. A 'smart' search could reduce this number to a few hundred at most. As the search approach best suited for this task is dependent upon the filing system used by the Municipality, we are unable to provide exact keywords as requested by [Kings County]. For this reason, if the Municipality of Kings is unwilling to waive the fees, we request an updated fee estimate based on more efficient search methods and a more reasonable and precise calculation of staff time required. As [the Applicant's firm] was required to respond to a much larger FOIPOP request in cooperation with the Municipality, we are aware of the steps involved and level of effort required and have offered some suggestions in previous correspondence.

On March 10, 2011, the Review Office responded to a number of questions from the public body after Kings County had indicated that part of the fees charged in the estimate, though not specifically identified in the estimate as such, was for legal services. The Review Office wrote:

all public bodies are free to seek legal advice in the course of processing an Application for Access to a Record but there is no provision for charging an Applicant for the costs associated with obtaining that advice.

In its March 16, 2011 letter to the Review Office responding to the notice of the Review, Kings County modified its fee estimate as follows:

I note the Review Office's comments about charging for time spent by a lawyer to prepare records for disclosure. It is my opinion that the Municipality can recover fees for the lawyer's time for assisting in the preparation of records, so long as there is not a duplication of effort, and a formal delegation of a power or duty is not required so long as the lawyer is not making decisions for me. However, I am prepared to waive fees for any review by the Municipality's lawyer up to \$240.00, which is the extent of the time estimated for this. The result is an adjustment from \$6,960.00 to \$6720.00 for preparing the record for disclosure, and a total estimate of fees of \$8,320.00.

ISSUES

1. Whether Kings County's fee calculation is fair and accurate?
2. Whether Kings County decision not to waive all or part of the fees was fair in the circumstances?

REPRESENTATIONS

All of the Representations received from both the Applicant and Kings County have been reviewed in detail and given due consideration. Where appropriate, the Representations will be referred to in Discussion below.

DISCUSSION

There are only two issues in this Review: fairness and accuracy of the fee estimate and the decision not to waive all or part of the fees.

The relevant sections of the *MGA* are as follows:

Procedure for obtaining access

466 (1) *A person may obtain access to a record by*

- (a) making a request in writing to the municipality that has the custody or control of the record;*
- (b) specifying the subject matter of the record requested with sufficient particulars to enable an individual familiar with the subject matter to identify the record; and*
- (c) paying any fees required pursuant to this Part.*

(2) The applicant may ask to examine the record or ask for a copy of the record.

Duty of responsible officer

467 (1) *Where a request is made pursuant to this Part for access to a record, the responsible officer shall*

- (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;*

Fees

471 (1) *An applicant who makes a request pursuant to this Part shall pay to the municipality the prescribed application fee.*

(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.*

(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) No fee shall be charged for a request for the applicant's own personal information.

(5) Where an applicant is required to pay fees for services, the responsible officer shall give the applicant an estimate of the total fee before providing the services.

(6) *The responsible officer may require the applicant to pay the estimated fee prior to providing the services.*

(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.*

(8) *The fees that applicants are required to pay for services shall not exceed the actual costs of the services. 1998, c. 18, s. 471; 2003, c. 9, s. 88; 2007, c. 9, s. 31.*

Regulations

501 (1) *The Governor in Council may make regulations*

(b) prescribing or limiting fees to be paid pursuant to this Part;

(j) prescribing any other matter or thing required or authorized by this Part or the Freedom of Information and Protection of Privacy Act to be prescribed in regulations.

The Regulations promulgated under the *Freedom of Information and Protection of Privacy Act* [“Regulations”] provide the details with respect to fee estimates and will be discussed below.

ISSUE #1: Whether Kings County’s fee calculation is fair and accurate?

In Nova Scotia the decision to levy fees associated with an Application for Access to a Record rests with the head of the public body and is a discretionary decision. This is unlike some other jurisdictions such as Ontario where fees are mandatory unless waiver is in the public interest. I find, therefore, Kings County has the statutory authority to make a decision as to what fees it can charge and to exercise its discretion to waive all or part of the fees to the Applicant.

I find Kings County is entitled to require the Applicant to pay fees for locating the Record, preparing the Record for disclosure and for making a copy of the Record if the Applicant asks for a copy, but the fees allowable under the *MGA* are limited to the actual costs to the public body. Under the *MGA*, in a Review the Review Officer can replace a public body’s exercise of discretion if that decision does not meet the test of reasonableness.

Most Review Reports in Nova Scotia on the subject of fees have focused primarily on the question of whether or not it is fair to waive fees, rather than exploring whether or not the fees have been accurately estimated. The fees are prescribed by the *Freedom of Information and Protection of Privacy Regulations*. The *Regulations* apply for the purpose of the *MGA*. [Refer to s. 501 of the *MGA*]. Subsections 6(2) and 6(3) of the *Regulations* prescribe the following amounts for fees:

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:

- (a) *for locating and retrieving a record, \$15.00 for each half-hour of person time after the first 2 hours, rounded down to the nearest half-hour;*
- (b) *for producing a record manually, \$15.00 for each half-hour of person time, rounded down to the nearest half-hour;*
- (c) *for producing a record from a machine readable record, the actual cost incurred for computer usage and for developing a computer program to produce the record;*
- (d) *for preparing a record for disclosure and handling a record, \$15.00 for each half-hour of person time, rounded down to the nearest half-hour;*
- (e) *for shipping a record, the actual costs of shipping method chosen by applicant;*
- (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.*

- (4) *Subsections (1) and (2) do not apply to a request for the applicant's own personal information.*
- (5) *Where an enactment other than the Act determines that a search fee or reproduction fee must be charged respecting access to a record, the head of the public body to whom an application is made must charge the applicant the search fee or reproduction fee under the enactment.*
- (6) *Where an applicant is not required to pay and has not paid an estimated fee in advance pursuant to subsection 11(6) of the Act and the head of the public body has not waived the payment of the fee, the applicant must pay the fee for services when access to a record is given or refused.*
- (7) *A head of a public body shall refund to an applicant any fee paid for services pursuant to subsection 6(2) of the Act that is subsequently waived.*
- (8) *Where the actual cost of responding to an application is less than the estimated fee paid by an applicant pursuant to subsection 11(6) of the Act, the head of*

the public body that responds to the application must refund the difference to the applicant.

- (9) *The following are prescribed as additional circumstances in which a head of a public body may waive the payment of all or any part of a prescribed fee:*
- (a) *whether the applicant is given access to the record;*
 - (b) *if the amount of the payment would be five dollars or less, whether the amount of the payment is too small to justify requiring payment.*

Further criteria for determining if a fee estimate has been fairly and accurately calculated are found in the Nova Scotia Department of Justice's *Procedures Manual – FOIPOP (2005)* [*“Manual”*]. The Review Officer has relied on this *Manual* frequently, including in fee waiver Review Reports *FI-07-50(M)* and *FI-07-69(M)*.

Section 3.16 of the *Manual* describes fee estimates in general:

Administrators should consider the following principles to guide them in the preparation of fee estimates.

- ***Authorized:*** *The estimate is prepared in accordance with the FOIPOP Act and Regulations. It includes only those services for which a fee may be charged and is based on rates allowable under the Act;*
- ***Reasonable:*** *The estimate is proportionate to the work required to respond to the request in an efficient and effective manner; and*
- ***Equitable:*** *The estimate is fair, balanced, developed without prejudice and is consistent with similar estimates given the same facts and circumstances.*

Fee estimates should be comprehensive and prepared in good faith so that the costs take into account the full response to the application. This can entail a review of file indexes and contact with those individuals who hold the records so that the full volume of records can be determined.

The fee estimate should be complete and include each of the relevant services that will be involved in responding to the request.

Administrators should document the underlying processes that were used to derive each component of the fee estimate. This will help explain to the applicant how the fee estimate was prepared and will provide supporting evidence for the Review Officer should the fee estimate become the subject of a review.

[Emphasis in original]

Section 3.17 of the *Manual* reiterates the authorized fees as described in the *Regulations*. It defines the authorized portions of a fee estimate as follows:

Locating, retrieving and producing the record (\$15 per half hour). It can involve time and costs spent for:

- *searching appropriate file indexes and other sources to locate the record;*
- *contacting persons who either have the record or know where the record is located;*
- *generating a list of files to be searched;*
- *retrieving files that may contain the record;*
- *searching through retrieved files to locate the record. Time to search files equals approximately 15 minutes for each 1" of file thickness; one inch thickness equals approximately 150 pages of records; one cubic foot of records (one records box) equals approximately 2000 pages;*
- *removing the record from a file and reinserting the record back into the file once a copy has been made of the record;*
- *creating a record for an applicant when the record can be created from a machine-readable record using the public body's normal computer hardware and software and technical expertise, and provided doing so would not unreasonably interfere with the operations of the public body;*
- *querying an electronic database to create a record that includes the requested fields of information;*
- *computer programming and computer usage to develop the software so the information can be extracted and recorded;*
- *organizing responsive records in a coherent order; and*
- *consulting with another public body about disclosure of the record.*

There can be no charge for:

- *traveling to an off-site storage facility to locate or retrieve records, or transporting records between offices;*
- *discussing the application with, or preparing correspondence for, the applicant and third parties;*
- *sorting through poorly organized records or filing systems;*
- *the time involved in photocopying the record that is to be provided to the applicant;*
- *making a working copy or additional duplicate copies of the record for administrative purposes;*
- *supervising and reviewing the work of junior staff; and*
- *computer "down time".*

2. Preparing the record for disclosure (\$15 per half hour). It can involve time and costs spent for:

- *reviewing the record to identify information exempted from disclosure and severing the exempted information. Note: preparing the record can be estimated at 2-3 minutes per page; and*
- *actual severing, such as applying tape, blacking out, etc.*

A recent Order from the Information and Privacy Commissioner of Ontario [*Refer to MO-2617-I*] has considered the establishment of a fee estimate in greater detail. An important distinction is that fees are mandatory in Ontario, unless the “public interest override” applies. In Nova Scotia, fees are discretionary. However, the principles discussed in that Order apply equally here.

Broadly, the Adjudicator determined that the burden of proving that a fee estimate was reasonable lies with the public body, which *needed to provide detailed evidence* explaining how the fee estimate was calculated to carry out that burden. The level of detail required includes separate estimates for severing and search time, and an estimate, based on a representative sample of the record, of what proportion of the records would actually require severing.

In addition, in that case the public body based its search time estimate on what it claimed was a representative sample of the records, but it provided no information as to how it established this sample, nor did it indicate the number of hours spent already searching for records. The Review Office’s request for Kings County to provide a representative sample of the records was ignored. This absence of detailed information about the underlying process explaining how the search parameters were determined led the Adjudicator to reject search fees entirely:

*[42] In the absence of information that provides a breakdown of the specific elements of the search, I find that the City has not provided sufficient information for me to assess whether the amount of the fee estimate is reasonable in the circumstances and whether it was calculated in accordance with the fee provisions of MFIPPA. Accordingly, I do not uphold any portion of the City’s fee estimate that deals with fees charged for the time already spent searching for responsive records.
[MO-2617-I]*

The facts relevant to the findings as to whether or not Kings County has erred in its estimate of fees are as follows:

- a. In its initial decision letter dated February 7, 2011, Kings County confirmed that the bulk of the Record had been compiled for another purpose, which would confirm that locating the bulk of the Record has already been done. I find the Applicant cannot be charged for work already done vis-à-vis the Record.
- b. Kings County has confirmed that a lot of the information in the Record has been posted to its website and is publicly available. I find this information does not fall under the *MGA* and should not form part of the public body’s response to the access request.
- c. In addition to inflating what constitutes the Record to which the Applicant sought access, the estimate to locate the Record [search] with respect to electronic records [emails] is inflated. Kings County has charged once for locating all the emails [search] and then charged a second time to review what it has located to determine if the emails are responsive [search] and then again to determine if any exemptions apply [severing]. I find Kings County has conflated search and

severing because it has charged twice for one step in the process [\$1,200 and \$6,960], a kind of double-dipping which is not permitted under the *Regulations*. While search and severing are two allowable distinct steps under the *Regulations*, two separate charges for search are not permissible.

- d. Initially Kings County included a charge for legal advice from its solicitor, which it later withdrew and decreased the fee estimate accordingly. I find public bodies cannot charge legal or consultation fees as they are not a permissible factor to be considered under the *Regulations*. Only what is included in the *Regulations* can form part of a fee estimate.
- e. In exercising its discretion, I find Kings County failed to take into account the Applicant's Representations that include:
 - i. The Applicant's Form 1 did not request a copy of the Record but only asked to "examine the record."
 - ii. The Applicant's letter of February 9, 2011 indicated that the Record was likely to be only 100 pages and did not want a reprint of the complete file, to which s/he already had access.
 - iii. The Applicant was familiar with the Record and while s/he was not able to provide keywords for the search s/he was willing to sit down with Kings County to narrow the scope of the search.
 - iv. Approximately 2,600 pages of records related to the named planning application were publicly available on Kings County's website as of August 30, 2011.
 - v. The *Request for Proposals Terms of Reference* document (date issued) produced by Kings County for "planning application support services" states, at Section 8.1:

Municipal staff will also perform the following, as part of the application process:

... File maintenance. All correspondence, including email correspondence, regarding the file shall be provided to the Planner.

In the current Review, Kings County has the burden to prove that the fee estimate is fair and accurate. The onus entails asking whether the fee estimate is authorized, reasonable and equitable. I find Kings County has failed to meet that onus for all three parts of the test.

Authorized: The estimate is prepared in accordance with the FOIPOP Act and Regulations. It includes only those services for which a fee may be charged and is based on rates allowable under the Act.

[Procedures Manual – FOIPOP (2005)]

1. I find that some of the charges calculated into the fees were not authorized. Kings County's estimate included a double claim for search – once to compile all the e-mails, and a second time to pull out which e-mails were relevant – thus trying to claim double the hours involved. Kings County also tried to claim for legal services, which is not

authorized under the legislation. Kings County removed legal fees, but did so reluctantly after being advised legal services were not authorized.

*Reasonable: The estimate is proportionate to the work required to respond to the request in an efficient and effective manner; and
[Procedures Manual – FOIPOP (2005)]*

I find Kings County has not provided an estimate proportionate to the work required, has not worked with the Applicant efficiently and effectively to narrow the scope of the request and has failed to respond accurately to what the Applicant had requested. The way in which the Applicant framed the request was not helpful, asking essentially to be provided with everything s/he had not been provided with previously, amounting to asking Kings County a question, which is not appropriate under the *Act*, rather than asking for a Record. This may have affected the way with which Kings County approached the request. However, for the purpose of this Review, the onus is on Kings County to demonstrate the accuracy of the fee calculation and it has failed to do so.

*Equitable: The estimate is fair, balanced, developed without prejudice and is consistent with similar estimates given the same facts and circumstances.
[Procedures Manual – FOIPOP (2005)]*

Because the public body misconstrued or failed to focus on what the Applicant was actually seeking access to, I find King County inflated its fee estimate and, therefore, the calculation was not fair or equitable. In that regard, I find the fee estimate to be so inflated that it amounts to shifting an unreasonable burden of the cost from the public body to the Applicant thus setting up a barrier to the Applicant's statutory right to access information.

From the outset, Kings County appears to have treated the Applicant's Application for Access to a Record as an annoyance and whether intentionally or unintentionally inflated the amount of work required to process the Record and ignored what the Applicant was actually seeking. I find the Applicant made it clear on the Form 1 and the accompanying letter that s/he sought to have access to examine the Record and not to receive copies of any part of the Record to which s/he had already had access. Kings County appears to have been overwhelmed by this Application for Access to a Record and responded by over-formalizing the process and its relationship with the Applicant. Despite the fact that the Applicant and Kings County already had a working relationship, Kings County did not meet the test of making every reasonable effort to assist the Applicant and to respond without delay to the Applicant openly, accurately and completely.

Having found the fee was not fair or equitable, it is unnecessary to go on to the second issue. However, since the Applicant specifically requested a fee waiver at the outset of its Application for Access to a Record, I will conclude by briefly discussing the issue of fee waiver.

ISSUE #2: Whether Kings County decision not to waive all or part of the fees was fair in the circumstances?

The second issue is whether Kings County's decision not to waive all or part of the fees was fair in these circumstances. As mentioned above, on the Application for Access to a Record the Applicant requested that the Municipality waive fees on the basis that:

Under contract and terms of reference, Municipality of the County of Kings is obligated to provide [Applicant's firm] all correspondence related to the requested record.

In Review Reports *FI-07-50(M)* and *FI-07-69(M)*, I used the following criteria to assess whether a decision *not* to waive fees was fair:

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.*

The facts relevant to the findings as to whether Kings County's decision not to waive the fees was fair are as follows:

- a. Based on the Representations from the Applicant and Kings County, it is clear that the Applicant was forced to use the access to information process for an unintended purpose. The Applicant seeks to fill in the gaps of information s/he believes was not provided by Kings County during a contract between him/herself and Kings County. If, as the Applicant asserts, Kings County failed in its contractual obligations by not providing some information that it ought to have, the Applicant's more appropriate remedy rests elsewhere such as with the Courts, not the Review Office. Access to information is for Records, not to attempt to have a public body answer a question – what records exist that should have been provided to me that have not been? However, Kings County advised the Applicant if s/he wanted the Record they would have to apply under the *MGA*.
- b. There is no discretion under the *MGA* for a public body to refuse to process an Application for Access to a Record. Therefore, Kings County is required by the *MGA* to process the access request from the Applicant, regardless of the reasons behind its request and whether those reasons are appropriate or not.
- c. The Applicant provided a reasonable explanation as to why s/he requires the Records to complete his/her own records for professional records management requirements. That Representation included that the Applicant is required to maintain a complete file for a specified period of time if the Record is relevant,

- required as part of his/her professional obligations and ought to have been provided previously as part of his/her professional work for the public body.
- d. The Applicant had been involved in the compilation of the Record and largely knows its contents. The Applicant seeks to receive a copy of a Record which s/he largely has already had access to either through his/her contract, his/her assistance in compiling the Record for another purpose, or through the information being made available to the public on Kings County's website.

It is unnecessary to make findings given the earlier findings with respect to the accuracy and fairness of the fee estimate. Had I found otherwise and was required to address the second issue, I would have made the following findings.

I find Kings County failed to make a concerted effort to work with the Applicant, despite the fact that it had required the Applicant to make the Application for Access to a Record in order to locate the Records the Applicant felt were missing from his/her records. As I found above, the fee estimate was neither fair nor accurate.

I find Kings County did not respond to the Applicant in an appropriate manner, it did not work with the Applicant to narrow or clarify the request, it did not provide anything to the Applicant free of charge and the request likely does not involve a large volume. While the Applicant's arguments to obtain the Record for professional records management reasons is important, I find that the Applicant could have made a greater effort to narrow the scope (though s/he did try to some extent), stick to his/her original request to view the Record rather than obtaining a copy and propose a compromise given the circumstances. I find, therefore, considering all of the factors, on balance, the decision not to waive part or all of the fees, in these circumstances, not to be unfair or unreasonable.

I want to make one final observation for the purpose of clarification. Kings County stated in its decision respecting fee waiver that it was in its discretion to decide. That is true. But to be clear to Kings County, in a Review, I can replace that exercise of discretion with my own if the public body failed to demonstrate the exercise of its discretion was reasonable. Public bodies need to remain cognizant of the fact that their exercise of discretion is reviewable by the statutory independent oversight body.

FINDINGS

I make the following findings with respect to the issue of the fee estimate provided by Kings County to the Applicant:

1. I find that Kings County had the statutory authority to make a decision as to what fees it could charge and to exercise its discretion to waive all or part of the fees to the Applicant.
2. I find Kings County is entitled to require the Applicant to pay fees for locating the Record, preparing the Record for disclosure and for making a copy of the Record if the Applicant asks for a copy, but the fees allowable under the *MGA* are limited to the actual costs to the public body.

3. I find the Applicant cannot be charged for work already done vis-à-vis the Record.
4. I find the nearly 2,600 pages of information already posted to the Kings County website does not fall under the *MGA* and should not form part of the public body's response to the access request.
5. I find Kings County has conflated search and severing because it has charged twice for one step in the process [\$1,200 and \$6,960], a kind of double-dipping which is not permitted under the *Regulations*: Kings County has charged once for locating all the emails [search] and then charged a second time to review what it has located to determine if the emails are responsive [search] and then again to determine if any exemptions apply [severing]. While search and severing are two allowable and distinct steps under the *Regulations*, two separate charges for search are not permissible.
6. I find public bodies cannot charge legal or consultation fees as they are not a permissible factor to be considered under the *Regulations*. Only what is included in the *Regulations* can form part of a fee estimate.
7. In exercising its discretion, I find Kings County failed to take into account the Applicant's Representations that include:
 - i. The Applicant's Form 1 did not request a copy of the Record but only asked to "examine the record."
 - ii. The Applicant's letter of February 9, 2011 indicated that the Record was likely to be only 100 pages and did not want a reprint of the complete file, to which s/he already had access.
 - iii. The Applicant was familiar with the Record and while s/he was not able to provide keywords for the search s/he was willing to sit down with Kings County to narrow the scope of the search.
 - iv. Approximately 2,600 pages of records related to the named planning application were publicly available on Kings County's website as of August 30, 2011.
 - v. The *Request for Proposals Terms of Reference* document (date issued) produced by Kings County for "planning application support services" states, at Section 8.1:
 - a. *Municipal staff will also perform the following, as part of the application process:*
 - b. *... File maintenance. All correspondence, including email correspondence, regarding the file shall be provided to the Planner.*
8. In the current Review, Kings County has the burden to prove that the fee estimate is fair and accurate. The onus entails asking whether the fee estimate is authorized, reasonable and equitable. I find Kings County has failed to meet that onus for all three parts of the test.
9. I find that some of the charges calculated into the fees were not authorized. Kings County's estimate included a double claim for search – once to compile all the e-mails, and a second time to pull out which e-mails were relevant – thus trying to claim double the hours involved. Also Kings County tried to claim for legal services, which are not authorized under the legislation. Kings County removed legal fees, but did so reluctantly after being advised legal services were not authorized.

10. I find Kings County has not provided an estimate proportionate to the work required, has not worked with the Applicant efficiently and effectively to narrow the scope of the request and has failed to respond accurately to what the Applicant had requested.
11. Because the public body misconstrued or failed to focus on what the Applicant was actually seeking access to, I find King County inflated its fee estimate and, therefore, the calculation was not fair or equitable.
12. I find the fee estimate to be so inflated that it amounts to shifting an unreasonable burden of the cost from the public body to the Applicant thus setting up a barrier to the Applicant's statutory right to access information.
13. I find the Applicant made it clear on the Form 1 and the accompanying letter that s/he sought to have access to examine the Record and not to receive copies of any part of the Record to which s/he had already had access.
14. I find Kings County failed to make a concerted effort to work with the Applicant, despite the fact that it had required the Applicant to make the Application for Access to a Record in order to locate the Records the Applicant felt were missing from their records.
15. I find Kings County did not respond to the Applicant in an appropriate manner, it did not work with the Applicant to narrow or clarify the request, it did not provide anything to the Applicant free of charge and the request likely does not involve a large volume.
16. I find that the Applicant could have made a greater effort to narrow the scope (though s/he did try to some extent), stick to his/her original request to view the Record rather than obtaining a copy and propose a compromise given the circumstances.
17. I find, considering all of the factors, on balance, the decision not to waive part or all of the fees, in these circumstances, not to be unfair or unreasonable.

RECOMMENDATIONS

I make the following Recommendations to Kings County:

1. Kings County provide the Applicant with the opportunity to view the Record already compiled and thereafter conduct a search of what may be missing from the compiled Record.
2. In order to comply with Recommendation #1, Kings County will meet with the Applicant and together conduct an electronic search for the Record.
3. After conducting the electronic search together, Kings County will provide the Applicant with the opportunity to view the Record in an electronic form identified during the electronic search.
4. Kings County ***may charge*** the Applicant for its ***actual time*** to conduct the electronic search and for photocopying should the Applicant want paper copies, ***but only after the search done together is completed.***

Respectfully,

Dulcie McCallum
The Freedom of Information and Protection of Privacy Review Officer