



**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Carmen Stuart**

REVIEW REPORT FI-14-16(M)

August 29, 2014

Cape Breton Regional Municipality

Summary

The Applicant made an Application for Access to a Record [“Access Request”] to the Cape Breton Regional Municipality [“CBRM”], under *Part XX* of the *Municipal Government Act* [“Act”], for detailed financial records. The Access Request was filed after CBRM failed to provide the records through an informal process, as promised ten months earlier.

CBRM disclosed some records to the Applicant. However, after the Applicant informed CBRM that the response was incomplete, CBRM treated this as though it were a new request and issued a fee estimate.

The Review Officer finds that CBRM has not met its duty to assist, has not calculated the fee estimate fairly and accurately and should therefore waive all fees. The Review Officer recommends that CBRM process the full responsive records for disclosure free of charge.

Statutes Considered

Part XX of the Municipal Government Act, sections 462, 467(1)(a), 467(2), 471(2), 471(5), 471(6), 471(7), 471(8) and Freedom of Information and Protection of Privacy Regulations

Other Sources

Nova Scotia Review Reports FI-12-77 and Nova Scotia Information Access and Privacy Office Procedures Manual - FOIPOP (2005), c. 3

Background

This Access Request involves extensive background that is relevant to this Review. It can be summarized as follows:

- In March 2013 the Applicant requested information from CBRM. Detailed financial information for a specific fiscal period, was requested because the “published finance statements of the CBRM do not provide enough clarity for meaningful debate.” This request was time sensitive. The Applicant was seeking the information to be provided “before budget meeting dates” and was to be shared with a taxpayers’ group.
- This request was not made under the *Act*; however, it was forwarded by the recipient within CBRM to the FOIPOP Administrator [“FOIPOP department”].
- After some initial internal collection of the information, the informal process stalled.
- After being told to formalize the request, on December 19, 2013 the Applicant filed a formal Access Request.
- After much back and forth internal communication, the CBRM issued a disclosure decision on January 15, 2014.
- The Applicant was not satisfied with this amount of information and again contacted the person within CBRM to which the original informal request was made.
- On January 27, 2014 the FOIPOP department responded to the Applicant seeking clarification of the scope of the Access Request.

On January 30, 2014 the CBRM issued a fee estimate of \$760.00 for 23 hours to retrieve, produce and prepare the records; copy 280 pages; and ship the records.

On February 10, 2014 the Applicant filed a Request for Review [“Review”] about the fees. The Applicant also requested the Review Officer recommend a fee waiver.

The Review Office’s attempted informal resolution was not successful; therefore this file was forwarded to formal Review.

Issues

The issues I must decide are the following:

1. Whether CBRM has met its statutory duty to assist under section 467 of the *Act*.
2. Whether CBRM calculated the fee fairly and accurately in accordance with section 471 of the *Act*.
3. Whether CBRM should have waived all or part of the fees as allowed for in section 471(7) of the *Act*.

Discussion

Issue #1: Am I satisfied that CBRM has met its duty to assist the Applicant?

Section 467(1)(a) of the *Act* imposes a duty on CBRM to assist applicants as follows:

. . . *the responsible officer shall make every reasonable effort to assist the applicant and to respond **without delay** to the applicant **openly, accurately and completely** . . .*

[Emphasis added]

Section 467(2) of the *Act* imposes a deadline for CBRM to provide a response to applicants as follows:

*The responsible officer shall respond in writing to the applicant **within thirty days** after the application is received . . .*

[Emphasis added]

In this case, the Applicant first sought the information via an informal route. While the Applicant acknowledges that s/he did not file the request under the *Act*, it would be reasonable to assume the initial request for information was being treated as an Access Request under the *Act*.

The Applicant was told “[g]iven the detailed nature of your request, I am forwarding your communication to the [person] responsible for Freedom of Information and Protection of Privacy requests.” This was done on February 28, 2013.

On March 7, 2013 the Applicant was told by the FOIPOP department that it would be responding after its busy budget time, within “a reasonable time limit”, with work starting the week of April 2, 2013.

It wasn’t until December 19, 2013, 294 days after the request was provided to the FOIPOP department for response that CBRM asked the Applicant to instead file an official Access Request.

I find CBRM did not meet its duty to assist the Applicant openly, accurately and completely without delay for a number of reasons, including:

1. CBRM should have honoured the receipt of the initial request by the FOIPOP department as being an official Access Request given the wording used to inform the Applicant and the FOIPOP department’s commitment to respond within “a reasonable time limit”.
2. On March 6, 2013 one of the people involved in the search for records made the following observation “I think [the Applicant] should be made aware that there is likely to be a cost to compiling this information as it is not as simple as printing a report.” This indicates that as far back as March 6, 2013 CBRM was planning on processing the request under the *Act*.
3. After 11 months, CBRM made the Applicant essentially re-apply for the same information it had previously said it would provide informally.
4. On December 19, 2013 CBRM told the Applicant “we did gather some of the information you requested, however it was my assessment that the rest of the records you were seeking would require additional search time” and “as part of our duty to assist, I have asked for updated information on some of the easily accessible records you have requested.”

5. The decision that was issued was incomplete. The “clarification” of January 27, 2014 was unnecessary. CBRM should have known based on the wording of the Access Request what the Applicant was seeking. It was clear to me upon first reading.
6. Some information was vetted from the disclosure provided to the Applicant without applying severances. On December 20, 2013 CBRM staff acknowledged that the requested information had been “pulled” previously and offered a recommendation on how to approach the request – add up all of the line items and give as one big number, not as an itemized number by vendor.
7. It was clear from the onset that the Applicant had requested the records for the purpose of participating in discussions related to CBRM’s finances. This had long past by the time the Applicant was required to file an Access Request and subsequently received only a vetted version of the responsive records.
8. In most cases, applicants will not have a detailed knowledge of the types and description of records that the public body has in its custody or control. Reasonable steps need to be taken to address this knowledge imbalance. “If there is no duty to assist, the right of access may be more illusory than real” [NS Report FI-12-77]. In this case, if the FOIPOP department thought that it was providing the level of detail the Applicant sought, it should have asked. It is not appropriate to make assumptions.
9. At the beginning of the Review, CBRM demonstrated an unwillingness to participate meaningfully in the process and predetermined the outcome by making such statements about the “recommendation only” powers of the Review Officer and by referring to an apparent blanket policy to not waive fees.

Issue #2: Am I satisfied CBRM has calculated the fee fairly and accurately?

One of the primary purposes of the *Act* gives applicants a right of access to all records that are in the custody or under the control of a public body, encouraging and promoting accountability, transparency and openness. In deciding to allow for a fee to be charged, the legislature attached a real value to the time and work involved in meeting the requirements of the *Act*. The charging of fees is a legitimate charge but it cannot be used as a means of discouraging access to the *Act*. Fees associated with access to information should not act as a barrier to public access to information. For this reason, the legislation allows public bodies to waive certain fees.

A public body may require applicants to pay fees to offset the cost of locating, retrieving and producing the record, preparing it for disclosure, shipping and handling the record, and providing a copy to an applicant [section 471(2)]. These fees cannot exceed the actual cost of the services [section 471(8)]. A public body must provide an estimate of the total fee and may require complete or partial payment in advance [sections 471(5) and 471(6)]. The procedure and approved service fees are detailed in the *Regulations*.

Public bodies should consider the following principles, as set out in the provincial FOIPOP Administrator manual, to guide it in the preparation of fee estimates:

Authorized: The estimate is prepared in accordance with the *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.

I find CBRM has not calculated the fee fairly and accurately in accordance with section 471 of the *Act* for a number of reasons, including:

1. Fees cannot be charged for work that was already done. It is clear from the documents that have been provided by CBRM that the records have already been retrieved; the search was already completed. Claiming that additional effort is required to respond to the complete scope of the Access Request is not accurate.
2. Fees cannot be charged for sorting through disorganized filing systems to locate and retrieve the records.
3. Fees cannot be charged for time spent for locating or retrieving records in order to prepare the fee estimate.
4. Fees cannot burden the Applicant with costs for poor administrative systems.
5. CBRM has provided no real explanation of how it could possibly take 23 hours to locate and retrieve the records.
6. When staff were requested to provide the FOIPOP department with an estimate of the hours required to locate and retrieve the records, one response was “it took me 8 minutes to prepare the report for disclosure”. This is a clear indication that the 23 hour estimate to locate and retrieve the records included other work, such as vetting.
7. If fees were going to be charged, the Applicant should have been given a fee estimate much earlier in the process. On December 19, 2013 CBRM made the comment “we admittedly should have provided an estimate for that additional search time.” It would seem reasonable to believe this statement was meant to acknowledge that it was too late to charge fees.

Issue #2: Should CBRM waive all or part of the fees?

As I have found that the fee estimate is not fair and accurate, it is unnecessary for me to proceed. In this case however, I will continue with a view to providing a full analysis.

The Review Officer can only review the decisions, actions and non-actions of a public body. The Review outlines what decision, action or non-action the Applicant wants to be reviewed. In this case, the Applicant received a fee estimate for \$760.00 from CBRM. Upon receiving the fee estimate, the Applicant filed a Review and requested that the Review Officer recommend the fees be waived. The decision that the Applicant asked to be reviewed was the calculation of the

fees. No fee waiver had been requested by the Applicant, so no decision had been, or could have been, made in that regard by CBRM.

The decision to grant a fee waiver is discretionary. During a Review, if the Review Officer finds differently than the public body, she can exercise her discretion differently and come to a different finding.

Section 471(7) of the *Act* gives CBRM the discretion to waive fees as follows:

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.

I find CBRM should waive all fees for a number of reasons, including:

1. CBRM did not meet its duty to assist the Applicant.
2. CBRM did not ensure that it understood the full scope of the Applicant's Access Request before issuing its decision. If it had, any misunderstanding would have been resolved and there would not have been a need for the Applicant to provide "clarification" after the fact, upon which the fee estimate was based.
3. There does not appear to be any sort of exercise of discretion. During the Review process CBRM referred to an apparent blanket policy to not waive fees.
4. All relevant factors must be considered. As part of the Review, the Applicant requested that CBRM waive the fees for two reasons: the inability to afford the payment and because the information was requested to share with a taxpayers group and is therefore in the public interest.
5. On March 2, 2013 internal communications show that this request was believed to be an informal request for information. Apparently it is the practice in cases such as this to provide information requested by citizens outside of the formal FOIPOP process if possible. At the time the CBRM questioned if the information could be provided without the Applicant having to go through FOIPOP.
6. The responsive records, by their nature, should likely be considered routinely releasable without the need for an Access Request.

Conclusion

CBRM has not processed this Applicant's request for information in an appropriate manner that is consistent with the purpose of the *Act*, found at section 462:

The purpose of this Part is to

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

(i) giving the public a right of access to records,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,

(iii) specifying limited exceptions to the rights of access, (iv) preventing the unauthorized collection, use or disclosure of personal information by municipalities, and

*(v) **providing for an independent review of decisions made pursuant to this Part;***

*(b) **provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to***

(i) facilitate informed public participation in policy formulation,

(ii) ensure fairness in government decision-making, and

(iii) permit the airing and reconciliation of divergent views;

and

(c) protect the privacy of individuals with respect to personal information about themselves held by municipalities and to provide individuals with a right of access to that information. 1998, c. 18, s. 462.

[Emphasis added]

To avoid such a situation in the future, CBRM may wish to turn its attention to improving its records management system to make this information easier to retrieve. This Applicant has indicated that s/he will be making a similar request in the future, in relation to current fiscal budgets at that time. CBRM may also wish to consider making these types of records subject to a routine access policy.

Recommendation

Under the authority of section 492 of the *Act*, I recommend that CBRM:

1. Process all of the responsive records free of charge and provide the Applicant with a new open, accurate and complete decision. The decision is to be sent to the Applicant and copied to the Review Officer within 30 days of acceptance of this recommendation.

Carmen Stuart, CIAPP – M

Acting Freedom of Information and Protection of Privacy Review Officer for Nova Scotia