

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 08-068

File: 07-253-4

March 28, 2008

BACKGROUND

On September 10th, 2007, the Applicant made a request for access to a number of records from the Department of Human Resources. In his request, the Applicant requested that the records be provided in electronic format rather than as paper copies. On September 24th, the public body responded to the Applicant indicating that pursuant to section 50(2) of the *Access to Information and Protection of Privacy Act*, a fee was applicable to the Request for Information and estimated that fee at \$75.25 for the copying of records. The response further pointed out that the fee could be reduced to \$58.00 if the Applicant were willing to forego receiving records which were, in essence, duplicates.

The Applicant corresponded with the public body challenging the fee assessment arguing that, because he was not requiring a hard copy of the records, there should be no charge for photocopying. He pointed out that the current fee schedule does not provide for a fee for scanning of records and provided only a fee of \$10.00 for a "floppy disk". Furthermore, he pointed out that even that was not a necessary charge as he was happy to receive the response by e-mail.

In response, the public body wrote to the Applicant and addressed what they referred to as the Applicant's request for a fee waiver. They indicated that, after reviewing the provisions of the Act with respect to fee waivers and the over-riding statutory principles of the *Access to Information and Protection of Privacy Act*, they were denying the request for a fee waiver.

On October 13th, the Applicant submitted a Request for Review to this office seeking a

review of the fee assessment.

ISSUE

The issue in this review is whether the public body properly assessed a fee for the photocopying of records.

THE RELEVANT SECTIONS OF THE ACT

The following are the relevant sections of the *Access to Information and Protection of Privacy Act* for the purposes of this review:

Section 50:

50.(1) The head of a public body may require an applicant who makes a request under section 6 to pay the prescribed fees for services provided.

(2) Where an applicant is required to pay fees for services, the public body shall give the applicant an estimate of the total fee before providing the services.

Section 7 may also assist in consideration of the issue. That section reads:

7.(1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

(2) The head of a public body shall create a record for an applicant where

- (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical

expertise, and

- (b) creating the record would not unreasonably interfere with the operations of the public body.

The Regulations under the Act establish the fee structure and provide further guidance with respect to the assessment of fees. In particular Sections 10 and 12 of the Regulations provide as follows;

10. (1) An estimate of fees provided under subsection 50(2) of the Act must set out

- a) the time and cost required to
 - i) search for and retrieve the record,
 - ii) prepare and physically sever the record for disclosure, and
 - iii) copy the record
- b) the cost of computer time involved in locating and copying a record, or, if necessary, programming to create a new record;
- c) the cost of supervising an applicant who wishes to examine the original record, where applicable; and
- d) the cost of shipping the record or a copy of the record

(2) An estimate of fees for access to a record of the personal information of the applicant need only set out the time and cost of copying the record.

12.(1) This section applies to a request for access to a record that is a record of the personal information of the applicant.

- (2) The only fees that may be charged for the processing of a request for personal information relating to the applicant are fees for copying a record as set out in item 6 of Schedule B.
- (3) Where the amount of the fees does not exceed \$25.00, no fee is to be charged.
- (4) Where the amount of the fees exceeds \$25.00, the total amount is to be charged.

Schedule B of the Regulations outline the maximum fees that are chargeable to an Applicant. The relevant portions of that schedule include:

6. For copying a record:

(a) photocopies, hard copy laser print and computer printouts	\$0.25 / page
(b) floppy disks	\$10.00 / disk
(c) computer tapes	\$55.00 / tape
(d) microfiche (diaz film)	\$0.50 / fiche
(e) duplication of 16mm microfilm	\$25.00 / roll
(f) duplication of 35mm microfilm	\$32.00 / roll
(g) duplication of microfilm or microfiche to paper	\$2.00 / page
(h) photographs (colour or black and white from negative)	4" x 5" - \$10.00
	5" x 7" - \$13.00
	8" x 10" - \$19.00
	11" x 14" - \$26.00
	16" x 20" - \$40.00
(i) plans and blueprints	\$5.00 / sq. m
(j) duplication of slide	\$2.00 / slide
(k) duplication of audio cassette	\$5.00 / tape
(l) duplication of video cassette (1/4", 1/2" or 8mm - 1 hour)	\$20.00 / tape
(m) duplication of video cassette (1/4", 1/2" or 8mm - 2 hours)	\$25.00 / tape

DISCUSSION

It is the Applicant's position that there is no basis for a fee to be assessed in this case because he is not asking for a paper copy of the records in question. He has, instead, requested an electronic version of the record only. He says that the most that the public body should be charging him in these circumstances is \$10.00 for a "floppy disk". The Applicant takes the position that because almost all of the requested records in this case are originally in the form of e-mails and, therefore, already in electronic format, there is no need for any photocopying and he should not be charged for photocopying costs.

The public body takes the position that in order to properly process a Request for Information, electronic records must be copied first. They note that section 5 of the Act provides that the right of access does not extend to information excepted from disclosure under the Act. Rather, section 5 provides that, where exempt information can reasonably be severed, an applicant has a right to receive the remainder of the record. This, of course, requires each page to be read through and, where exempt information is included in the record, for that record to be physically altered so as to prevent the inappropriate disclosure of exempt information. The public body further points out that the department is unable to electronically sever e-mails. In order to provide e-mails in electronic form, the following steps are necessary:

- a) the e-mails must be printed,
- b) exempt information must be physically severed from each e-mail,
- c) the severed copies must then be scanned to put them back into electronic format

The public body says that the software and technical expertise required to sever e-mail records electronically is costly and at this time no GNWT department has brought in this software for the processing of Access Requests. Until such time as they do, they say, copies will first have to be made. The department also points out that although one of

the overriding statutory principles of the Act is to foster open and transparent government, the Act also contains the principle that the user should pay. In this case, the public body points out that they accommodated the Applicant's request that his response be provided in electronic form but that accommodation created more work than would normally be necessary to make a paper copy, not less as suggested by the Applicant.

I note that section 7 of the Act requires that public bodies to "create a record for an applicant" where that can be done. It does not require the record to be provided in the format requested by the Applicant. In this case, there was a specific request by the Applicant to have the response in electronic form. Despite the fact that this created more work for the department, they accommodated the request. Nor did they add a charge for the "floppy disk" as they were entitled to do under the Act. The assessed fee was for copies only.

I am satisfied that the public body in fact had to make a paper copy of the electronic records in order to properly process the Request for Information. Although the Act provides that the public body must provide a copy of requested records to an applicant, the Act does not require that copy to be provided in the format requested by the Applicant. That the public body in this case went above and beyond what they were strictly required to do and acceded to the Applicant's request that the records be provided electronically is a positive thing, particularly as it required more time and effort than simply providing the paper copy. It is a credit to them and in accordance with section 7(1) which requires a public body to make every reasonable effort to assist an applicant. However, in my opinion, an Applicant cannot avoid the cost of photocopying merely by demanding that a response be provided in electronic format. The copy still has to be made so that it can be properly vetted and edited as necessary in accordance with the Act.

SUMMARY AND RECOMMENDATION

Based on the above discussion, I agree with the public body's assessment of a fee in this case. Whether the response is provided in paper or electronic form, in order to properly process a Request for Information the records must first be copied. It would, however, be appropriate for the Government of the Northwest Territories to review the regulations under the Act to update them to reflect the current state of technology and, perhaps, to clarify this issue for future users.

Elaine Keenan Bengts
Information and Privacy Commissioner