



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 034-2019

Ministry of Education

August 14, 2019

Summary: The Commissioner reviewed a fee estimate prepared by the Ministry of Education (the Ministry) relating to an access to information request. The Commissioner found that the Ministry did not demonstrate that the fee estimate was reasonable. He recommended that the Ministry waive the fee. He also recommended that the Ministry follow certain steps when preparing a fee estimate and develop a written procedure.

I BACKGROUND

[1] On December 28, 2018, the Ministry of Education (the Ministry) received an access to information request for “all records (application forms, internal emails, etc), related to Kids Help Phone being granted funding from the department of education.” The time period was from 2014-2015 and 2016-2017.

[2] On January 27, 2019, the Ministry provided the Applicant with a fee estimate totalling \$465. The details of the estimate are as follows:

	Type of Fee	Calculations of Fees	Total Amount of Fees
1	Time required to search for records	10 x \$15.00/half hour	\$300.00
2	Time required to prepare records for disclosure	5 x \$15.00/half hour	\$150.00
3	Photocopies or computer printouts of Records	300 x \$0.25/page	\$75.00
4	LESS:	2 hours free x \$15.00/half hour	(\$60.00)
Total amount of fees required to process access request			\$465.00

[3] On January 21, 2019, the Applicant requested a review of the fee estimate by my office.

[4] On January 24, 2019, my office notified both the Ministry and the Applicant of my intention to undertake a review.

II RECORDS AT ISSUE

[5] As I am only reviewing the fee estimate, there are no records at issue in this review.

III DISCUSSION OF THE ISSUES

1. Does FOIP apply in these circumstances?

[6] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Is the Ministry's fee estimate reasonable?

[7] Subsection 9(2) of FOIP requires a government institution to provide a fee estimate where the cost for providing access exceeds \$100. Fees are intended to provide for reasonable cost recovery associated with providing individuals access to records. Subsection 9(2) of FOIP provides:

9(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

[8] Section 7 of *The Freedom of Information and Protection of Privacy Regulations* (the Regulations) provides:

7(1) For the purposes of subsection 9(2) of the Act, \$100 is prescribed as the amount of fees beyond which an estimate must be given by the head.

(2) Where the amount of an estimate exceeds the actual amount of fees determined pursuant to section 6, the actual amount of fees is the amount payable by the applicant.

[9] My office recommends that public bodies take the following steps when a fee estimate is necessary:

1. Contact the applicant:
 - a. advise that fees will be necessary;
 - b. attempt to clarify or offer ways to narrow the request to reduce or eliminate fees;
 - c. follow up in writing with the applicant when narrowing occurs;
2. Develop a search strategy;
3. Based on the search strategy, prepare a fee estimate (do not complete search);
4. Decide whether to charge a fee (refer to your public body's policy);
5. Send out fee estimate and suspend work;
6. If applicant initiates, clarify or narrow request with applicant and follow up in writing with the applicant when narrowing occurs;
7. When applicant pays the 50% deposit; start the search.

[10] There are three kinds of fees that a local authority can include in its fee estimate:

- a. Fees for searching for responsive records;
- b. Fees for preparing the record for disclosure; and
- c. Fees for the reproduction of records.

[11] The Ministry has prepared its fee estimate in this manner and I will evaluate each relevant category.

a. Fees for searching for responsive records

[12] Subsection 6(2) of the Regulations provides the ability for the Ministry to recover costs associated with searching for responsive records. Where the search for responsive records exceeds two hours, the Ministry can charge \$15.00 for every half hour after that.

[13] Subsection 6(2) of the Regulations provides:

6(2) Where time in excess of two hours is spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of \$15 for each half-hour or portion of a half-hour of that excess time is payable at the time when access is given.

[14] Search time consists of every half hour of manual search time required to locate and identify responsive records. For example:

- staff time involved with searching for records;
- examining file indices, file plans or listings of records either on paper or electronic;
- pulling paper files/specific paper records out of files; and
- reading through files to determine whether records are responsive.

[15] Search time does not include:

- time spent to copy the records;
- time spent going from office to office or off-site storage to look for records; or
- having someone else re-review the results of the search.

[16] Generally, the following has been applied:

- it should take an experienced employee one minute to visually scan 12 pages of paper or electronic records to determine responsiveness;
- it should take an experienced employee five minutes to search one regular file drawer for responsive file folders; and
- it should take three minutes to search one active email account and transfer the results to a separate drive.

[17] In instances where the above do not accurately reflect the circumstances, the public body should test a representative sample of records by timing the process. The time can then be applied to the responsive records as a whole.

[18] In its submission, the Ministry indicated that it identified three individuals in the Ministry involved in the subject matter to search for responsive records. It also indicated that these individuals completed their search on December 30 and 31, 2018. The submission indicated that it took a combined total of eight to ten hours for these three individuals to search for records. In its fee estimate, the Ministry estimated that it would take 10 hours to search.

[19] In Review Report 146-2015, 147-2015 and Review Report 115-2016, I found that it was not reasonable to charge an applicant fees for work already completed before the applicant had agreed to pay the fee. I recommended public bodies not complete the work when fee estimates are being prepared. It should be a true estimate. Completing the entire search before an applicant has agreed to pay fees or has the opportunity to narrow the search is a potential waste of government time.

[20] Therefore, the Applicant should not be charged for work already completed.

[21] The Ministry also indicated that responsibility for funding of the Kids Help Phone was transferred to a different area of the Ministry during the requested time period and because of that, records may be stored in the government's records centre. The Ministry indicated that the "time to receive and review the related records is incorporated into the cost estimate".

- [22] On July 23, 2019, my office asked the Ministry for more information about the estimated time to search the government's record centre. Specifically, my office asked if the Ministry's records manager was consulted about the search and, if so, on what date. The Ministry was also asked if there was an inventory of records, and based on the inventory of records, how many potential boxes required searching. In reply, the Ministry did not address the specific questions, and only indicated that someone would have to go to the government's record centre and "sort through files to find information".
- [23] It is unclear to me how the estimated time to search for records in the government's record centre was factored in to the fee estimate. Without basic information such as the number of boxes that require searching, or any other relevant details, I am not able to evaluate if the estimate of the search was reasonable. As such, I must conclude that it was not reasonable for the Ministry to include it in the fee estimate.
- [24] Finally, the Ministry indicated that the archived email account of one employee, who no longer works with the Ministry, would have to be searched for responsive records by its internal Information Technology department (IT department). Its submission indicated that the cost to retrieve those records were unknown and that a request would have to be sent to the IT department. The Ministry indicated there would be a charge for the records, but did not provide any detail on what the estimate might be.
- [25] In relation to the unknown cost of the IT department, the submission also indicated that the fee estimate is likely lower than what the actual cost will be to search for the records and that it is aware that it cannot charge more than the estimate pursuant to subsection 9(2) of FOIP. This should not be an excuse to allow public bodies to create fee estimates that cannot be explained in detail.
- [26] After reviewing the draft report, the Ministry indicated that it had not completed the search for records. However, it has not explained how it arrived at the estimate that it would take another ten hours to search. As such, I must conclude that it is not reasonable to include the search of the archived emails in the fee estimate.

b. Fees for preparing the record for disclosure

- [27] Preparation includes time spent preparing the record for disclosure including time anticipated to be spent physically severing exempt information from records.
- [28] Preparation time does not include:
- Deciding whether or not to claim an exemption;
 - Identifying records requiring severing;
 - Identifying and preparing records requiring third party notices;
 - Packaging records for shipment;
 - Transporting records to the mailroom or arranging for courier service;
 - Time spent by a computer compiling and printing information;
 - Assembling information and proofing data;
 - Photocopying; and
 - Preparing an index of records.
- [29] Generally, the test related to reasonable time spent on preparation is it should take an experienced employee two minutes per page to physically sever.
- [30] In instances where the above test does not accurately reflect the circumstances (i.e. a complex record), the public body should test the time it takes to sever on a representative sample of records. The time can then be applied to the responsive records as a whole.
- [31] In order to use the test to estimate how much time it will take to sever the record, the public body should have a reasonable estimate of how many pages of records there might be.
- [32] The Ministry's fee estimate indicated five hours of preparation time which would total \$150. It did not provide details about preparation fees in its submission to my office. On July 23, 2019, my office asked the Ministry how many pages of responsive records it estimated there would be. My office also asked the Ministry to provide details on how it arrived at five hours of preparation time. In reply, it indicated it based its calculations on 300 pages of records and estimated the preparation at two minutes per page as per the test established by my office.

- [33] By my calculation, preparation of 300 pages of responsive records, at two minutes a page, would take 10 hours. The Ministry may charge \$15 per half hour which should result in a fee of \$300. The Ministry only charged for five hours. The Ministry's error in calculations here is to the Applicant's advantage.
- [34] Nevertheless, I still must evaluate if the Ministry's estimate of five hours of preparation time is reasonable.
- [35] The Ministry indicated that it estimated that there will be approximately 300 pages of responsive records. However, it is unclear of how the Ministry arrived at the estimate of 300 pages.
- [36] Three people have already performed a search which yielded 40 pages of responsive records. I understand that the Ministry must now proceed to prepare the records if the Applicant proceeds with his request.
- [37] The Ministry has not indicated how it estimated that there would be an additional 260 pages of records.
- [38] From my understanding, there is one other email account of a former employee to search. If a search of three employees' email accounts produced less than 40 pages of records each, I would not expect more than 40 pages of responsive records in the account that must still be searched. If the Ministry estimates there will be more responsive records in this account, it has not explained why.
- [39] Further, there may be additional records at the government's record centre. However, the Ministry has not provided any details about the anticipated search, such as how many boxes it may need to search. Therefore, it is unclear how it arrived at an estimation of how many pages of responsive records there may be in the record centre.

[40] Without further details of how the Ministry arrived at the estimation of 300 records, I cannot conclude that the estimate is reasonable. The estimate should remain at 40 pages which would require 80 minutes of preparation time.

c. Fees for the reproduction of records

[41] Subsection 6(1)(a) of the Regulations is explicit with regards to the fees allowable for the reproduction of records. The allowable fee is \$0.25 per page.

[42] In its fee estimate, the Ministry estimated \$75 based on 300 pages of records at \$0.25 each. As explained above, the Ministry has not provided sufficient details of how it arrived at the estimate of 300 pages. As such, I cannot conclude that the estimate for reproduction fees is reasonable.

[43] In conclusion, I find the Ministry fee estimate was not reasonable. Based on the information provided by the Ministry, its fee estimate should have been the following:

	Type of Fee	Calculations of Fees	Total Amount of Fees
1	Time required to search for records	0 x \$15.00/half hour	\$0.00
2	Time required to prepare records for disclosure	80 minutes x \$15.00/half hour	\$45.00
3	Photocopies or computer printouts of Records	40 x \$0.25/page	\$10.00
4	LESS:	2 hours free x \$15.00/half hour	(\$60.00)
Total amount of fees required to process access request			\$10.00

[44] I also note that subsection 9(5) of FOIP provides:

9(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

[45] Subsection 9(1) of the Regulations provides:

9(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

(a) if payment of the prescribed fees will cause a substantial financial hardship for the applicant and, in the opinion of the head, giving access to the record is in the public interest;

(b) if the application involves the personal information of the applicant;

(c) if the prescribed fee or actual cost for the service is \$100 or less.

[46] In this case, the estimate is less than \$100 and meets the circumstances for a fee waiver listed in subsection 9(1)(c) of the Regulations. As such, I recommend that the Ministry waive the fees.

[47] Finally, in its submission, the Ministry indicated that it did not have contact with the Applicant to try to narrow the scope and reduce fees. However, it indicated it would be willing to do so. While I recommend that the Ministry waive the fees in this case, I also recommend that the Ministry adopt the steps for preparing a fee estimate outlined in this Report, which includes contacting applicants with the view of potentially reducing fees. This should include the creation of a written procedure.

IV FINDING

[48] I find that the Ministry did not demonstrate that the fee estimate was reasonable.

V RECOMMENDATIONS

[49] I recommend that the Ministry waive the fees.

[50] I recommend that the Ministry adopt the steps for preparing a fee estimate outlined in this Report. I recommend it create a written procedure which includes these steps.

Dated at Regina, in the Province of Saskatchewan, this 14th day of August, 2019.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner