



REVIEW REPORT 135-2015 and 136-2015

Executive Council

September 22, 2015

Summary: The Applicant submitted two access to information requests to Executive Council. Executive Council issued two fee estimates to the Applicant. The Applicant appealed the two fee estimates to the Information and Privacy Commissioner (IPC). The IPC recommended that Executive Council make minor amendments to the fee estimates.

I BACKGROUND

[1] On February 23, 2015, Executive Council received two access requests from the same Applicant. The two access requests were as follows:

All letters from the premier to other Canadian premiers, since November 8, 2007,

All letters from the premier to Canada's prime minister and federal cabinet ministers, since November 8, 2007.

[2] Also on February 23, 2015, an email was sent to the Premier's Correspondence Unit (PCU) that listed the above two access requests. The email requested the PCU conduct a search for responsive records and provide the Manager, Corporate Services at Executive Council with the responsive records.

[3] On March 25, 2015, Executive Council sent two fee estimate letters to the Applicant, one for each access request.

[4] In a letter dated March 7, 2015, the Applicant appealed to my office.

II DISCUSSION OF THE ISSUES

[5] Executive Council is a government institution pursuant to subsection 2(1)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

1. Are the fees estimated by Executive Council reasonable?

[6] Section 9 of FOIP provides Executive Council with the ability to issue a fee estimate to the Applicant where the amount will exceed the prescribed fee of \$50.

[7] Fee estimates are generally judged on the basis of whether they are reasonable. The government institution bears the burden of establishing the reasonableness of the fee.

[8] There are three kinds of fees that a public body can include in its fee estimates:

1. Fees for searching for a responsive records;
2. Fees for preparing the record for disclosure; and
3. Fees for the reproduction of records.

[9] Below is the analysis broken down into the above three kinds of fees to determine if Executive Council's fee estimate is reasonable.

a. Fees for searching for a responsive record

[10] Subsections 6(2) and 6(3) of the FOIP Regulations provide a government institution with the ability to recover costs associated with searching for responsive records.

[11] Where the search for responsive records exceeds two hours, Executive Council can charge \$15.00 for every half hour after that.

[12] In the past, my office has stated that search time consists of every 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/or

reading through files to determine whether records are responsive. However, 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 review the results of the search.

- [13] My office's *Guide to Exemptions for FOIP and LA FOIP* offers a few tests for how public bodies may estimate the amount of time it would take for a search. One of the tests includes the public body take a representative sample of records that may be responsive, and timing the amount of time it would take an experienced employee to look through the records to determine which records were responsive. The time can then be applied to the responsive records as a whole.
- [14] In its submission, Executive Council had its PCU conduct a search for records for both requests simultaneously. Instead of doing a representative sample of records, PCU had its employees search for all the responsive records and recorded the time it took for one PCU employee to search for records. It recorded 24.5 hours in total. For the two fee estimates, Executive Council recorded 12 hours each.
- [15] Fee estimates will take some effort and time to prepare but public bodies should not be undertaking a substantial amount of work to gather records before a fee estimate is accepted by the Applicant. Otherwise, if the Applicant does not accept the fee estimate, or is able to narrow the scope of the request after receiving the fee estimate, then the public body would have undertaken a substantial amount of work unnecessarily.
- [16] Executive Council describes such records to be logged in a database called Documents on Command (DOC). However, it asserts that such records are not stored electronically but filed into file boxes and stored on site in a vault.
- [17] In her submission, the Applicant argues that such records would be saved electronically, likely to be stored in the same folder or location, and that employees should have extensive familiarity with how and where these records are stored and would be able to locate such records in minimal time.

[18] I have no reason to believe that Executive Council's total time to search for records responsive to both requests to be unreasonable or inflated. FOIP does not require public bodies to store records electronically. However, to effectively respond to access requests, public bodies should have a filing system in place that enables them to locate records responsive to requests. It appears that Executive Council has such a filing system in place.

[19] I find that Executive Council's fee estimate for searching for records reasonable. In fact, its method of timing an employee to see how long it takes him or her to gather records is perhaps the most accurate way of "estimating" fees for search. However, I note that the disadvantage to this method is that the government institution may have expended more time than it needed to should the Applicant not accept the fee estimate and abandon the request. Therefore, I suggest that Executive Council amend its method to estimate the time to search for responsive records. Methods include:

- Determining an estimate of the total number of pages of records that may contain responsive records, and applying 1 minute for every 12 pages to determine responsiveness. An example is if there are 1200 pages of records an experienced employee needs to look through, then it would take approximately 100 minutes to review the 1200 pages of records to determine responsiveness.
- Determining the number of regular file drawers that need to be searched and applying 5 minutes for each file drawer. An example is if there are 10 file drawers that need to be searched, then the time estimate would be 50 minutes.
- If neither method above is applicable, then I suggest the public body take a representative sample of records, time an experienced employee looking through the responsive records, and then apply the time to the total number of pages that an employee would need to look through to determine responsiveness.

2. Fees for preparing the record for disclosure

[20] My office has established that an estimate of two minutes per pages to prepare the records requiring severance is reasonable. Subsection 6(2) of the FOIP Regulations allows the public body to charge a fee of \$15 for each half-hour for preparing of the records, if the time is in excess of two hours. Preparation includes time anticipated to be spent physically severing exemption information from records. Generally, it should take an experienced employee 2 minutes per page to physically sever only. If 2 minutes per page does not reflect the circumstances, then the public body should test the time it takes to sever a representative sample of records. Then the time can be applied to the responsive records as a whole.

[21] It should be noted that preparation time does not include deciding whether nor not to claim an exemption, packaging records for shipment, transporting records to the mail room, or photocopying.

[22] In its submission, Executive Council advised that it located approximately 175 pages of responsive records for the first request and 210 pages of responsive records for the second request.

[23] Executive Council estimated \$174 in fees for preparing records for the first request, and it estimated \$210 in fees for preparing records for the second request. These estimates are in line with the estimate of taking an employee 2 minutes per page to physically sever records. I find the fees for preparing the record reasonable.

a. Subsection 6(2) of FOIP

[24] Subsection 6(2) of FOIP provides that any time in excess of two hours should be charged at a rate of \$15 for each half-hour. I note that in each of the fee estimates, Executive Council subtracted two hours at \$15 per half-hour pursuant to subsection 6(2).

3. Fees for the reproduction of records

- [25] Subsection 6(1) of the FOIP Regulations allows for \$0.25 to be charged for each page to be photocopied.
- [26] For the first request, Executive Council estimated there to be 175 pages of responsive records. At \$0.25 per page, Executive Council's fee estimate for the reproduction of records should be \$43.75. Its fee estimate lists \$44. I recommend that Executive Council adjust its fee estimate to \$43.75 for the reproduction of records.
- [27] For the second request, Executive Council estimated there to be 210 pages of responsive records. At \$0.25 per page, Executive Council's fee estimate for the reproduction of records should be \$52.50. Its fee estimate lists \$52. I recommend that Executive Council adjust its fee estimate to \$52.50 for the reproduction of records.

III FINDINGS

- [28] I find that Executive Council's fee estimate for searching for records reasonable.
- [29] I find that Executive Council's fee estimate for preparing records reasonable.
- [30] I find that Executive council's fee estimate for the reproduction of records needs to be re-adjusted.

IV RECOMMENDATIONS

- [31] I recommend that Executive Council amends its method of estimating the time to search for responsive records so it does not undertake a substantial amount of work to gather records prior to the Applicant accepting the fee estimate.
- [32] I recommend that Executive Council amend its fee estimate for the reproduction of records for the first fee estimate to be \$43.75.

[33] I recommend that Executive Council amend its fee estimate for the reproduction of records for the second fee estimate to be \$52.50.

Dated at Regina, in the Province of Saskatchewan, this 22nd day of September, 2015.

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