



REVIEW REPORT 146-2015 and 147-2015

Ministry of Environment

September 29, 2015

Summary: A journalist made two access to information requests to the Ministry of Environment. He was charged \$600 and received 47 pages of responsive records. The Commissioner reviewed the fees charged, time extension, and search for records. He found that the majority of the fees and time extension were unreasonable. He also found the Ministry performed an adequate search.

I BACKGROUND

[1] On May 11, 2015, the Applicant who is a journalist submitted two similar access to information requests to the Ministry of Environment as follows:

- 1) "... all correspondence between [name of a Ministry employee] and any [name of third party business] employee, manager, executive or board member from January 15, 2015 and May 10, 2015."
- 2) "... all correspondence between staff reporting to [name of a Ministry employee] and any [name of third party business] employee, manager, executive or board member from January 15, 2015 and May 10, 2015."

[2] On May 22, 2015, the Ministry responded to the Applicant. It provided a fee estimate for both requests. Both fee estimates totaled \$375. For each request, \$75 was identified as costs for photocopying.

[3] The Applicant worked with the Ministry to narrow the scope of the review in the hopes of reducing the cost of the request. He also requested that the records be provided electronically so as to eliminate photocopying charges. The revised requests were as follows:

- 1) “ ... all correspondence between [name of a Ministry employee] and any [name of third party business] employee, manager, executive or board member from January 15, 2015 and May 10, 2015 related to [a request by the Applicant] or related to air quality or air emissions or action plans related to air quality/emissions or schedules related to emission reduction or related to hazard assessment.”
- 2) “ ... all correspondence between staff reporting to [name of a Ministry employee] and any [name of third party business] employee, manager, executive or board member from January 15, 2015 and May 10, 2015 related to [a request by the Applicant] or related to air quality or air emissions or action plans related to air quality/emissions or schedules related to emission reduction or related to hazard assessment.”

[4] On May 28, 2015, the Ministry responded to the revised request with a revised fee estimate for \$300 for each request. The accompanying letter stated that it was the Ministry’s “standard process to provide access requests in hard copy only”. However, it indicated it would waive the \$75 photocopying fee for each request. However, the letter indicated that the access request was still significant and the rest of the fee estimate remained unchanged.

[5] We live in an electronic age. I find it surprising that the Ministry sticks to an older practice of just providing paper. In this electronic time, I believe all ministries should adjust to procedures to offer information electronically or in paper. Providing information electronically takes less work, lowers the fee and the Applicant gets the information sooner. I will be recommending that all ministries take a look at their processes and adjust to these electronic times.

[6] On June 8, 2015, the Applicant paid a deposit of half of the fee estimate pursuant to subsection 9(4) of *The Freedom of Information and Protection of Privacy Act* (FOIP). On June 9, 2015, the Ministry replied to the Applicant indicating that the Ministry would be giving notification to third parties pursuant to subsection 34(1) of FOIP. It also

indicated that it would be extending the response time pursuant to subsection 12(1)(c) of FOIP.

[7] On July 23, 2015, after the Applicant paid the remainder of the fee, the Ministry provided the Applicant with 15 pages responsive to the first request and 32 pages for the second request. Personal information was severed from the records.

[8] On July 29, 2015, the Applicant requested a review from my office. He requested a review of the fees charged, a review of the search and a review of the extension of time. On August 5, 2015, my office provided notification to the Applicant and the Ministry of our intention to undertake a review.

II RECORDS AT ISSUE

[9] There were 15 pages of records responsive to the first access request and 32 pages responsive to the second access request. The Applicant was charged \$300 for each request.

III DISCUSSION OF THE ISSUES

1. Were the fees applied by the Ministry reasonable?

[10] Subsection 9(1) of FOIP states:

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

[11] Subsections 6(2) and 6(3) of the FOIP Regulations provide a government institution ability to recover costs associated with searching for responsive records. In past reports, my office has previously established that there are three kinds of fees that a public body can include in its fee estimate:

- fees for searching for a responsive record;
- fees for preparing the record for disclosure; and
- fees for the reproduction of records.

- [12] The Ministry has applied search and preparation fees to the request. For each request, the Ministry estimated and charged 10 hours of search and preparation time.
- [13] This office has previously established the following guidelines for estimating search time:
- Generally, it should take an experienced employee one minute to visually scan 12 pages of paper or electronic records to determine responsiveness;
 - Generally, it should take an experienced employee five minutes to search one regular file drawer for responsive file folders.
- [14] In its submission, the Ministry indicated that for the first request, it took the Ministry one hour to coordinate the search and 5.5 hours to search for e-mails on May 12, 2015 and May 13, 2015. The search resulted in 300 pages of e-mails. It did not provide details about the steps of the search or why an electronic search took 5.5 hours. The Ministry also noted that some e-mails had lengthy attachments but did not say how many pages. The Ministry later clarified there were 99 pages of e-mails and 85 pages of attachments. It noted that it took an additional 100 minutes to review these pages again “for responsiveness”. It is unclear why an electronic search took 5.5 hours and then the e-mails were reviewed for responsiveness a second time. This accounts for eight hours which the Ministry charged the Applicant for the first request.
- [15] The Ministry’s submission for the second request was almost identical and accounts for eight hours the Ministry charged the Applicant for the second request. It later clarified that there were 75 pages of e-mails and 264 pages of attachments.
- [16] However, this activity occurred before the Ministry provided the first fee estimates to the Applicant on May 22, 2015. Further, the Applicant only agreed to the second fee estimates which were provided on May 28, 2015.
- [17] Section 7(1) of the FOIP Regulations state:
- 7(1)** For the purposes of subsection 9(2) of the Act, \$50 is prescribed as the amount of fees beyond which an estimate must be given by the head.

[18] The Ministry was required to provide the estimates once the fees would surpass \$50. However, it did eight hours of work on each request and identified all responsive records before providing the first fee estimates. I recommend that public bodies take the approach that fee estimates occur early in the process. Some initial work will be required in order to make a determination that a fee estimate is warranted. However, completing the entire search before the Applicant has agreed to pay fees or has had an opportunity to narrow the request is a potential waste of government time. Any work searching for records that a Ministry does before an Applicant agrees to pay fees is done at the risk of the Ministry as an Applicant may or may not agree to pay the fees. The recommended steps for processing and access to request when charging fees are as follows:

1. Clarify or narrow request with Applicant.
2. Make a search plan (non-compensable).
3. Based on search plan, prepare a fee estimate (do not complete the search).
4. Decide whether charging a fee (consistent with the policy of the public body).
5. Send out fee estimate and suspend work.
6. If Applicant initiates, clarify or narrow request with Applicant.
7. When Applicant pays deposit, start search.

[19] Therefore, it is not reasonable to charge the Applicant fees for work completed before he agreed to the fees and pays the deposit.

[20] The Ministry's submissions for each request also state:

As [the two requests are very similar] ministry staff were also required to cross reference between both requests to ensure that there was no duplication, and to also ensure that only responsive documents were included in each request. This meant searching through roughly 600 pages of materials.

[21] This statement gives me concern. Records responsive to an access request should be identified as such regardless of the fact that the Applicant made two similar requests at the same time and an overlap might occur. The Ministry did not indicate how much time was spent cross referencing the material. By my calculation, the Ministry counted an hour for this activity on each file. The Applicant should not be charged for this cross referencing time. The Ministry has acknowledged that the Applicant should not have been charged for this activity.

[22] Once the Ministry had searched for and identified all of the records for both requests and provided the initial fee estimate to the Applicant, the Ministry encouraged the Applicant to narrow the scope of the request. My office encourages public bodies to work with Applicants to narrow requests. Narrowing requests can eliminate unnecessary work searching for and preparing records the Applicant may not want and reduce potential fees. However, the search had already been completed and records identified when the Ministry allowed the Applicant to narrow the scope.

[23] The Applicant narrowed the request on May 25, 2015 in the hopes of reducing the fees. He also requested that the records be provided electronically to reduce the photocopying fees. On May 28, 2015, the Ministry provided him with a second fee estimate for each file. Only \$75 was removed from each fee estimate as the Ministry agreed to waive the photocopying charges. Essentially, the estimate for search and preparation time was the same even though the scope had been narrowed.

[24] Before paying the deposit, the Applicant spoke with the Ministry. His submission states:

I was given the impression that very few documents were eliminated by my narrowing of scope. There was no suggestion at all that my narrowing eliminated 90 per cent of the documents from the original estimate but they would continue to charge me exactly the same fee. Had they been transparent about the consequences of the narrowing of the scope I would have made very different decisions.

[25] The Ministry contends that it did not “implicitly or explicitly imply” that the narrowing of the request would result “in a significant reduction of costs”. In the end, the Ministry only provided the Applicant with 15 pages out of 184 for the first request and 32 pages out of 339 pages for the second. He had paid \$600 for 47 pages of responsive e-mails.

[26] The Ministry’s submission for each request indicate that after the Applicant narrowed the request and paid the deposit, it spent an additional 100 minutes for each request to find records that were responsive to the newly narrowed request despite the fact that the Ministry had already done the work to identify the records responsive to the broader request. The Applicant was charged \$45. It is unreasonable for the Ministry to charge

the Applicant additional search fees to determine responsiveness to a narrowed request when the search for the broader request had been completed.

[27] Finally, the Ministry indicated that it spent one hour on each request severing personal information. Our office has established that an estimate of two minutes per page to prepare the records requiring severance is reasonable. The first request produced 15 responsive pages. A reasonable fee would be for 30 minutes of work. The second request produced 32 pages. Fees for one hour of work are reasonable.

[28] Below are tables which summarize the fees charged for each request and what is reasonable.

FIRST REQUEST

<i>Activity</i>	<i>Time Spent</i>	<i>Fee Charged</i>	<i>Reasonable?</i>	<i>Recommended charge</i>
Coordination of search before fee estimate	1 hours	\$30	No	\$0
Search time before fee estimate	5.5 hours	\$165	No	\$0
Second review for responsiveness	100 mins	\$60	No	\$0
Search and review after narrowed request	100 mins	\$60	No	\$0
Cross referencing	1 hours	\$30	No	\$0
Severing	1 hours	\$30	No	\$15
Two hours 'free'		-\$60	-	-
Total	12.5	\$315 (\$300 charged)		\$15

SECOND REQUEST

<i>Activity</i>	<i>Time Spent</i>	<i>Fee Charged</i>	<i>Reasonable?</i>	<i>Recommended charge</i>
Coordination of search before fee estimate	1 hours	\$30	No	\$0
Search time before fee estimate	5.5 hours	\$165	No	\$0
Second review for responsiveness before fee estimate	100 mins	\$60	No	\$0
Search and review after request narrowed	100 mins	\$60	No	\$0
Cross referencing	1 hours	\$30	No	\$0
Severing	1 hours	\$30	Yes	\$30
Two hours 'free'		-\$60	-	-
Total	12.5	\$315 (\$300 charged)		\$30

[29] My office has previously stated that fees should not present an unreasonable barrier to access information in Saskatchewan. Fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights. The Ministry allowed the Applicant to narrow the scope of the request even though the search for the broader request had already been performed. The Applicant was charged for the broader search and did not receive those records. The search fees charged to the Applicant were unreasonable. The Ministry advised us by telephone on September 25, 2015 that it intends to refund fees to the Applicant if my office recommended it.

2. Did the Ministry conduct a reasonable search for records?

[30] The Applicant requested a review of the Ministry's search for records for two reasons. The first reason centres around the narrowing of the request. The Ministry indicated to the Applicant that there were about 300 pages of records responsive to each of the broader requests. After he narrowed the request and was provided the second fee estimate, he was under the impression that there would be many responsive records because the fees estimate did not change. In the end, he only received 15 pages for the first request and 32 pages for the second. He is concerned that his narrowed request was interpreted too narrowly.

[31] Given the Ministry had already searched for and identified the records responsive to the Applicant's broader request, and to satisfy the Applicant's concern that the Ministry encouraged him to narrow the scope of the request to avoid releasing certain records, I recommend that the Ministry release records responsive to the broader request to the Applicant free of charge. The Ministry has indicated that it intends to do so.

[32] The second reason why the Applicant requested a review of the Ministry's search is because he only received e-mails. He requested "correspondence". He did not receive copies of any paper correspondence or text messages.

[33] In the notification e-mail of August 5, 2015, my office asked the Ministry to provide details of its search for records. We referred to our resource which explains what kind of details my office requires when reviewing a search. The Ministry's submission did not provide sufficient details about the search.

[34] On August 27, 2015, my office asked the Ministry for additional details about the search. More specifically, we asked the Ministry about its search for correspondence other than e-mail, such as written correspondence and text messages. The Ministry responded on September 2, 2015 and stated:

This is to confirm that a search for written correspondence and text messages was performed for both requests. No records were found in the case of text messages, and the only existing written correspondence responsive to the applicant's request was included with the email correspondence. Therefore, the ministry confirms that all "correspondence" was searched for and all responsive materials were released to the applicant for both requests.

[35] My office provided the Ministry with a draft copy of this report. In reply, it provided additional information about its search. The Ministry's reply stated:

The records provided were all electronic; however, all records of any form or format were considered. All records associated with this request involved correspondence that were either emails with scanned paper attachments (for those documents not already electronic), emails with electronic attachments (in the form of word, pdf documents, audio files), or just emails. Correspondence relevant to this access request did not involve text messages...

The search was conducted by the staff members mentioned in the Access requests. The search involved review of specific electronic files intentionally set up by ministry staff for the storage of records of this nature. The electronic filing system, set up by the employees, captured the records associated with the time, and parties of interest. The search conducted for FOI 24/15G did not involve any other units, persons, or parties outside of the Environmental Protection Branch.

[36] My office asked the Ministry additional questions about text messages as follows:

- Do the relevant employees have cellular phones issued by the Ministry of Environment?
- Do they send text messages in the performance of their duties as Ministry employees?
- Have they ever sent work related text messages to employees of the third party business Refinery?

[37] In response, the Ministry indicated that the two relevant employees were issued government cell phones. However, the Ministry noted that these employees do not communicate with external clients via text message and had never texted employees of the third party business.

3. Did the Ministry's extension of the response deadline satisfy the criteria set out in subsection 12(1)(c) of FOIP?

[38] Subsection 12(1)(c) of FOIP states:

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

...

(c) where a third party notice is required to be given pursuant to subsection 34(1).

[39] The Ministry supplied my office with copies of its subsection 34(1) notification to two third parties. One was sent on June 9, 2015 and the other was not sent until near the end of the extension period on June 29, 2015.

[40] The Ministry's submission indicated that the responsive record was identified by May 13, 2015. The Applicant narrowed the scope of the review once the responsive records had been identified. However, the 47 pages of records that the Applicant has received would

have been part of the records identified on May 13, 2015. Third party notification should have been made at that time.

[41] In response to the draft report the Ministry noted that “the extension of the requests’ deadlines was a direct result of waiting to determine whether the applicant wished to proceed with the requests by paying the associated fees.” The Ministry also stated that “to notify and seek third party approval prior to determining the wishes of the applicant is to create the possibility of unnecessary work on the part of the ministry and the third party.” I note again that the Ministry was willing to search for all of the records before determining whether the applicant wished to proceed with the requests by paying the associated fees. Notification should be made to third parties as soon as the responsive records are identified.

[42] The time extension was not necessary.

IV FINDINGS

[43] I find that reasonable fees would total \$15 for the first request and \$30 for the second request.

[44] I find that the Ministry performed an adequate search for records.

[45] I find that the Ministry’s extension of 30 days was not in accordance with subsection 12(1)(c) of FOIP.

V RECOMMENDATIONS

[46] I recommend that the Ministry refund to the Applicant \$285 for the first request and \$270 for the second request.

- [47] I recommend that the Ministry provide all records responsive to the broader request, subject to any legitimate exemptions, free of charge.
- [48] I recommend that the Ministry, and all public bodies, in the future, accommodate Applicants and where practical provide the record electronically.
- [49] I recommend that the Ministry of Justice make changes to the FOIP Regulations allowing for the provision of records electronically.
- [50] I recommend that all public bodies review their policies and procedures to store and protect text messages and include looking for them in their search procedures.
- [51] I recommend that all public bodies review their policies and procedures so that when charging a fee, minimal work will be done before the Applicant accepts the fee.

Dated at Regina, in the Province of Saskatchewan, this 29th day of September, 2015.

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