



REVIEW REPORT 136-2022

Water Security Agency

March 30, 2023

Summary:

The Applicant submitted an access to information request to Water Security Agency (WSA). WSA responded to the Applicant providing a fee estimate in the amount of \$200. While the Applicant indicated that they were requesting a fee waiver, they did not provide documentation to support this request. Along with the fee estimate, WSA requested details to allow it to determine if a fee waiver should be granted. After the Applicant failed to provide details to support the fee waiver request or pay the deposit to proceed with their request, WSA advised the Applicant that their application was deemed abandoned. The Applicant requested a review. The Commissioner found that the fee estimate was not reasonable and recommended WSA issue a revised fee estimate. The Commissioner also recommended WSA develop and implement a policy or procedure regarding fee estimates. The Commissioner also found that the prescribed circumstances for a fee waiver do not exist and that the conditions for issuing a notice of abandonment pursuant to section 7.1 of FOIP were not met.

I BACKGROUND

[1] On April 19, 2022, the Applicant submitted an access to information request to the Water Security Agency (WSA) requesting the following records:

All record of [location redacted] owner [name of owner] for year of 2010 and RM of 335 complaints, conversation, changes made.

[2] I note that on their access to information request form, the Applicant also requested a fee waiver.

[3] On May 17, 2022, the WSA sent a letter to the Applicant issuing a fee estimate in the amount of \$200 and requested a deposit of \$100 to proceed with the request. The letter also noted that while the Applicant had requested a fee waiver on their access to information request, the Applicant did not provide details for how the fee would cause financial hardship or how the release of records was in the public's interest. The WSA requested the Applicant provide supporting documentation so it could make a decision with respect to the waiver of fee request.

[4] On May 26, 2022, the Applicant submitted a request for review to my office.

[5] In correspondence dated June 29, 2022, the WSA advised the Applicant as follows:

We contacted you on May 17th, 2022 by providing an estimate of fees for your request. As no response has been received to the previous letter provided, your access to information request has been deemed abandoned pursuant to subsection 7.1(1) of *The Freedom of Information and Protection of Privacy Act*.

[6] On July 19, 2022, my office notified the WSA and the Applicant that my office would be undertaking a review.

[7] On September 1, 2022, the WSA provided my office with its submission. The Applicant did not provide a submission.

II RECORDS AT ISSUE

[8] As this review considers the reasonableness of the WSA's fee estimate, decision to not consider the Applicant's fee waiver and how the WSA arrived at the conclusion that the Applicant had abandoned their request, there are no records at issue.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[9] The WSA qualifies as a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP and section 3(a) and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I find I have jurisdiction to review this matter.

2. Was WSA’s fee estimate reasonable?

[10] Section 9 of FOIP provides:

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.

(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.

(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

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

[11] FOIP provides for reasonable cost recovery associated with providing individuals access to records. A reasonable fee estimate is one that is proportionate to the work required on the part of the government institution to respond efficiently and effectively to an applicant’s request. A fee estimate is equitable when it is fair and even-handed; that is, when it supports the principle that applicants should bear a reasonable portion of the cost of producing the information they are seeking, but not costs arising from administrative inefficiencies or poor records management practices (*Guide to FOIP*, Chapter 3, “Access to Records”, updated June 29, 2021 [*Guide to FOIP*, Ch. 3], p. 50).

[12] FOIP is an instrument to foster openness, transparency and accountability in government institutions. Fees should not present an unreasonable barrier to access to information requests in Saskatchewan. Therefore, fees should be reasonable, fair and at a level that does not discourage anyone from exercising their access rights. At the same time, the fee regime should promote and encourage applicants to be reasonable and to cooperate with government institutions in defining and clarifying their access requests (*Guide to FOIP*, Ch. 3, p. 50)

[13] In its May 17, 2022, fee estimate letter, WSA provided the following fee breakdown to the Applicant:

Type of Fee	Calculation of Fees	Total Amount of Fees
Time required to search for records	2 hours @ \$15/half hour	\$60
Time required to prepare records	5 hours @ \$15/half hour	\$150
Duplicate records	200 pages @ \$0.25/page	\$50
LESS:	2 hours free @ \$15/half hours as per FOIPP Act	(\$60.00)
Total estimated fee to process access to information request		\$200

[14] Generally, there are three kinds of fees that a government institution can include in a fee estimate:

1. Fees for searching for records;
2. Fees for preparing records; and
3. Fees for the reproduction of records.

[15] The following is an analysis of the three kinds of fees to determine if WSA’s fee estimate is reasonable.

a. Fees for searching for a responsive record

[16] Fees for searching for a responsive record are pursuant to subsection 6(2) of the FOIP Regulations. The government institution should develop a search strategy when preparing its fee estimate. Fees for 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.

(Guide to FOIP, Ch. 3, p. 52)

[17] WSA's submission provides that its search for records involved "one request for assistance file" and the cost for the search "included two employees within two regional offices to search for responsive records. Physical searches for records as well as electronic were completed." Based on the submission and subsequent clarification submitted by WSA, the actual search was conducted, rather than an estimate for a search for the records.

[18] The *Guide to FOIP*, Ch. 3, p. 52, provides average time estimates for search, however in this case details about what was searched was not provided. The *Guide to FOIP* (Ch. 3, p. 53) further provides that "instances where the above does not accurately reflect the circumstances, the government institution should design a search strategy and test a representative sample of records for time. The time can then be applied to the responsive records as a whole." In this case however, rather than estimating the fee for search based on the average times suggested in the *Guide to FOIP* or using a representative sample to estimate the fees for search, WSA has confirmed that, "the physical search did occur and, as described in the original submission, resulted in the hours included in the estimate." In the future, WSA should be developing a search strategy and preparing an estimate for the search, rather than conducting the actual search at this stage of a request.

[19] In my office's [Review Report 115-2016](#) concerning the Ministry of Agriculture, I stated as follows at paragraphs [14] and [15]:

[14] The Ministry was required to provide the estimates once the fees would surpass \$50. However, it did five hours of work on the request and identified all responsive records before providing the fee estimates. I have recommended 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. In past reports 146-2015 & 147-2015, 149-2015 and 098-2016, I have recommended the following steps for processing an access to request when charging fees:

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.

[15] Therefore, it is not reasonable to charge the Applicant fees for work completed before he agreed to the fees and pays the deposit. I recommend that the Ministry remove the \$150.00 search charge from the estimate.

[20] Government institutions should 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 resources. This is supported by the language found at subsection 9(4) of FOIP which indicates a deposit is paid by the applicant "before a search is commenced for the records" (*Guide to FOIP*, Ch. 3, p. 54)

[21] In my office's [Review Report 034-2019](#) at paragraphs [18] to [20], the Ministry of Education indicated that the number of hours for search in the fee estimate was based on searches already completed. Consistent with what was stated in the past report referenced above, in this matter it is not reasonable for WSA to charge the Applicant for the time it already spent searching for the record. As such, I recommend WSA remove its search charge from the estimate.

b. Fees for preparing records

[22] Fees for preparing the record for disclosure is pursuant to subsection 6(2) of the FOIP Regulations. Preparation includes time spent preparing the record disclosure, including the time anticipated to be spent physically severing exemption information from records (*Guide to FOIP*, Ch. 3, p. 53).

[23] The test related to reasonable time spent on preparation is that generally it should take an experienced employee two minutes per page to physically sever (*Guide to FOIP*, Ch. 3, p. 54).

[24] WSA's submission provided the following regarding preparing the records:

... this estimated cost uses the Guide to FOIP's test of a reasonable review time of 2min per page. The responsive records that are being considered for this access request amount to approximately 200 pages of physical records. Since there is a named individual on this request, private information will need to be redacted prior to release of any documents. This is one of two requests related to compliance records, therefore previous experience is not able to be relied upon during the review phase of this request.

[25] When requested to provide additional clarification regarding the hours estimated for the preparation of the records stated:

200 pages is the accurate estimated page count. Using 5 hours in the estimate of fees as the time to prepare records was selected because it was discovered the records for this access request were a portion of the applicant's first request. What may have been missed in this submission was details surrounding the decision to go with a lower amount of hours. This figure was likely executed to reflect a more detailed initial review of the information with the employee. That review took place as a result of identifying this request as a portion of the first. A result of further discussion, it was concluded that this file may not have as many sensitivities that could lend themselves to redactions, which is why the lower amount of hours was used.

[26] The estimate for the preparation of records appears to be reasonable.

c. Fees for reproduction

[27] Fees for the reproduction of records are pursuant to subsection 6(1) of the FOIP Regulations as follows:

6(1) Where access to a record or part of a record is given by providing the applicant with a copy of the record, the following fees are payable at the time when access is given:

(a) for a photocopy, \$0.25 per page;

(b) for a computer printout, \$0.25 per page;

...

[28] WSA's submission provided the following:

... duplication fees were only included for the paper records associated with the request. It is possible that during the review of responsive records there would be a discovery that the electronic records are portions or parts of the complete paper records. In this circumstance, the paper records would be the source of truth for the official records and not the electronic record.

[29] My office requested WSA provide clarification regarding how it arrived at its estimated number of responsive records. WSA advised "the page count used in the estimate of fees was calculated based on the stack of physical records and the space they filled in a banker's box which determined the page count."

[30] The fee estimate for reproduction of records is reasonable as WSA has estimated the number of pages that would need to be reproduced and used the \$0.25 per page prescribed in the FOIP Regulations.

[31] Based on the analysis above, I find that the fee estimate is not reasonable. I recommend WSA issue a revised fee estimate based on the analysis in this Report within 30 days of the issuing of this Report.

[32] I recommend the WSA take no further action unless the Applicant agrees to provide the deposit, based on the recommended revised fee estimate.

[33] In addition, my office followed up with WSA to determine if it had a policy or procedure in place regarding fee estimates and it responded that it does not have a formal written policy. Rather, a search request form is used by staff to record details of the search and the time it took to perform the search. I recommend WSA develop and implement a policy or procedure for issuing fee estimates that outlines the prescribed fees and the activities that are included in determining those fees. Additionally, the policy or procedure should outline when it is appropriate to conduct a search versus when a search strategy should be prepared to provide an estimate for a search. WSA may find the following resources helpful in this regard:

- [Steps to Charging Fees](#)
- [Fee Estimate - Quick Calculation Guide](#)
- [Understanding the Duty to Assist](#)

3. Do the prescribed circumstances for a fee waiver exist?

[34] On the Applicant's access to information request form, the Applicant marked the box on the form indicating that they were requesting a waiver of fees. WSA had requested the Applicant explain how the fee would cause financial hardship and requested the Applicant use an attached waiver of fees request form. The waiver request form requested the following:

Are you receiving any of the following financial assistance?

1. Assistance pursuant to The Saskatchewan Assistance Act as an individual or as part of a family unit
2. Receiving assistance pursuant to The Training Allowance Regulations; or
3. Receiving legal assistance or representation from any of the following organizations, including any of the same organizations operating from time to time under another name:
 - (i) The Saskatchewan Legal Aid Commission;
 - (ii) Pro Bono Law Saskatchewan;
 - (iii) Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

If yes to any of the above, please provide supporting documentation that verifies receipt.

[35] The Applicant requested my office review WSA's decision to not grant a fee waiver for the requested information. Subsection 9(5) of FOIP provides the following regarding waiver of fees:

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

[36] The prescribed circumstances for waiving a fee can be found at section 9 of the FOIP Regulations:

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.

(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

(a) is receiving assistance pursuant to *The Saskatchewan Assistance Act* as an individual or as part of a family unit;

(b) is receiving assistance pursuant to *The Training Allowance Regulations*; or

(c) is receiving legal assistance or representation from any of the following organizations, including any of the same organizations operating from time to time under another name:

(i) The Saskatchewan Legal Aid Commission;

(ii) Pro Bono Law Saskatchewan;

(iii) Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

[37] When one or more of the circumstances set out in subsection 9(1) of the FOIP Regulations exist, the head will need to exercise their discretion to waive the payment of fees or not. Waiving the fees are not necessary, but the head must demonstrate that they have exercised their discretion properly.

[38] Based on WSA's submission, the Applicant did not provide any representations to demonstrate substantial financial hardship. As the Applicant did not provide any details regarding financial hardship, the circumstances set out in subsection 9(1)(a) of the FOIP Regulations does not exist. As it appears the actual cost would be in excess of \$100, the circumstances set out in subsection 9(1)(c) of the FOIP Regulations also does not exist. I note that WSA did not state if the records would contain any of the Applicant's personal information and whether the prescribed circumstances set out at subsection 9(1)(b) of the FOIP Regulations would exist. Therefore, I find that none of the prescribed circumstances pursuant to subsection 9(1) of the FOIP Regulations exist.

[39] As the Applicant did not provide my office or the WSA with any details regarding how they would qualify for a fee waiver, I find that the prescribed circumstances for fee waiver do not exist and recommend the WSA take no further action regarding the fee waiver request.

4. Did WSA appropriately conclude the Applicant had abandoned their request pursuant to section 7.1 of FOIP?

[40] Section 7.1 of FOIP provides the following regarding the abandonment of an application:

7.1(1) If the head has invited the applicant to supply additional details pursuant to subsection 6(3) or has given the applicant notice pursuant to clause 7(2)(a) and the applicant does not respond within 30 days after receiving the invitation or notice, the application is deemed to be abandoned.

(2) The head shall provide the applicant with a notice advising that the application is deemed to be abandoned.

(3) A notice provided pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

[41] Often, it is clear when an applicant has decided not to pursue an access request. An applicant will indicate either in writing or on the telephone an intention not to proceed. This may be for a variety of reasons. For example, the applicant has found the information is available another way or no longer needs the information. (*Guide to FOIP*, Ch. 3, p. 42)

[42] Sometimes situations will arise where an applicant simply ceases to respond during the processing of an access to information request. No indication is given that the applicant has decided not to pursue the request. They simply do not respond to queries from the government institution. When this situation occurs, section 7.1(1) of FOIP sets out provisions for declaring an application abandoned. (*Guide to FOIP*, Ch. 3, p. 42)

[43] Subsection 7.1(1) of FOIP provides that the government institution can consider an application for access abandoned:

- if the government institution invited the applicant to supply additional details to help identify the record pursuant to subsection 6(3) of FOIP and the applicant does not respond within 30 days; or
- if the government institution provided a subsection 7(2)(a) notice and the applicant does not respond within 30 days.

(*Guide to FOIP*, Ch. 3, p. 42)

[44] In WSA's May 17, 2022 letter providing the fee estimate, WSA noted that should the Applicant fail to provide the requested details within 30 days of this notice that the applicant would be deemed abandoned:

If WSA does not receive additional details within 30 days of this notice the application will be deemed abandoned pursuant to Section 7.1 of the Act. In the event the response period expires, an additional notice will be provided advising that this application is deemed to be abandoned.

[45] WSA's submission provided the following details regarding its conclusion that the application be deemed abandoned:

...WSA received two phone calls from the applicant. During the first phone call on May 20th, 2022 at 9:23am, after the applicant explain their request for a different

survey record they were interested in accessing, they were asked if they had any questions directly related to their access request. From the applicant's response it seemed they weren't interested in pursuing the application anymore as they had decided to escalate their concerns to the Minister's Office.

The second phone call received on May 25th, 2022 at 9:03am focused around the applicant's request to waive fees, however the applicant only expressed that [they] checked the waiver of fees box on the request form and that "can't pay that, the WSA has bankrupt me." The conversation did not involve a review of the estimate of fees nor any requests for ways to reduce fees such as narrowing the scope of the request. The applicant also wasn't interested in pursuing any of the waiver of fee options as outlined in their estimate of fees letter.

Following the last correspondence on May 25th, the applicant did not provide any representations or documentation for consideration. From the date of the estimate of fees letter, 43 days had passed and 35 days had passed after the date of the applicant's second phone call. Section 7.1(1) of FOIP provides that the government institution can consider an application for access abandoned if the government institution provided a subsection 7(2)(a) notice and the applicant does not respond within 30 days. Since more than 30 days had lapsed, WSA drafted and sent a letter on June 29th, 2022 to provide notice that the application has been deemed abandoned.

[46] Based on the information before me, it is apparent there was communication between WSA and the Applicant between the time the WSA issued its fee estimate letter and the time the Applicant requested a review of the fee estimate.

[47] Additionally, in my office's [Review Report 302-2018, 303-2018, 304-2018](#), the City of Regina (City) had received three separate access to information requests along with a request to waive the full fees for processing each request. At a certain point, the City deemed the applications abandoned, because the applicant had not provided the required deposit to proceed with each request in what the City felt was the applicable timeline. The applicant requested a review by my office. I found that the conditions for issuing a notice of abandonment pursuant to section 7.1 of LA FOIP were not met and that the City improperly issued a notice of abandonment to the applicant. In other words, subsection 7.1(1) of LA FOIP was not applicable following the issuance of a fee estimate. It was only applicable for the final notice of payment of the remainder of the fees pursuant to subsection 7(2)(a) of LA FOIP.

[48] As was the case in that report, the WSA also deemed the application abandoned after a fee estimate, which as found above, is not applicable to section 7.1 of FOIP.

[49] Subsection 7(2)(a) of FOIP speaks to the head providing notice within 30 days of an application being made stating that access to the record (or part of it) will be given upon payment of the prescribed fees. At this stage, however, I am considering a fee estimate, which the Applicant has requested that my office review. At this stage, the time to process an access request is suspended pursuant to subsection 9(3) of FOIP, meaning that WSA is not required to do anything; rather, it is up to the Applicant to determine how they wish to proceed. Subsections 49(1)(a.1), (a.2) and (2) of FOIP provide as follows:

49(1) Where:

(a.1) an applicant is not satisfied that a reasonable fee was estimated pursuant to subsection 9(2);

(a.2) an applicant believes that all or part of the fee estimated should be waived pursuant to subsection 9(5);

...

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

(2) An applicant or individual may make an application pursuant to subsection (1) within one year after being given written notice of the decision of the head or of the expiration of the time mentioned in clause (1)(b).

[50] We are not even at a point in the process where subsection 7(2)(a) of FOIP comes into consideration, and so I find WSA's action to have been premature. Further, pursuant to subsections 49(1)(a.1), (a.2) and (2) of FOIP, an applicant has up to a year to determine if they wish to have my office review their fee waiver request and/or the fee estimate. In this matter, a year has not elapsed since the Applicant received notice of WSA's fee estimate, and so they were within their right to ask my office to conduct a review. Therefore, I find that the conditions for issuing a notice of abandonment pursuant to section 7.1 of FOIP were not met and that WSA improperly issued a notice of abandonment to the Applicant.

IV FINDINGS

[51] I find that I have jurisdiction to conduct this review.

[52] I find that the fee estimate was not reasonable.

[53] I find that the prescribed circumstances for fee waiver do not exist and recommend the WSA take no further action regarding the fee waiver request.

[54] I find the conditions to abandon the Applicant's access to information request pursuant to section 7.1 of FOIP do not exist and that the notice of abandonment of the Applicant's request is not applicable at this time.

V RECOMMENDATIONS

[55] I recommend WSA develop and implement a policy or procedure for fee estimates that outlines the prescribed fees and the activities that are included in determining those fees.

[56] I recommend WSA issue a revised fee estimate as outlined in paragraphs [17] to [32] within 30 days of issuance of this Report.

[57] I recommend the WSA take no further action unless the Applicant agrees to provide the deposit, based on the recommended revised fee estimate.

[58] I recommend the WSA take no further action regarding the fee waiver request.

Dated at Regina, in the Province of Saskatchewan, this 30th day of March, 2023.

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