

Issues

- [4] The issues in this review are:
- a. Is the fee estimate for staff time allowable?
 - b. Is the fee estimate for photocopying allowable?
 - c. In the circumstances of the case, is it fair that the Applicant be excused payment, in whole or in part, of the fee?

Facts

- [5] On or about October 2, 2021, some residents of Iqaluit started posting, on social media, complaints that their tap water smelled of fuel. Over the ensuing days, more complaints were posted.
- [6] On October 12, 2021, the City of Iqaluit declared a state of local emergency due to the potential of hydrocarbons in the municipal water supply. On the same day, the Government of Nunavut (GN) issued a Do Not Consume advisory for Iqaluit drinking water. Later, it was confirmed that hydrocarbons had indeed entered the water supply. There was substantial public interest—locally, nationally, even internationally—in Iqaluit’s water emergency. As of the date of this Review Report, over 40 days later, the state of emergency and Do Not Consume orders remain in effect.
- [7] Especially at the outset, Iqalumiut had many questions about what happened. Among them was the question of how the municipal and territorial governments had responded to the initial complaints. The GN is subject to the ATIPPA, but the City of Iqaluit is not.
- [8] The Applicant filed an ATIPP request with the GN Department of Health for “All correspondence regarding evidence of petroleum hydrocarbon contamination in Iqaluit’s water supply sent between any Health or GN staff for the dates of Oct. 2 and Oct 12, 2021”. The Applicant paid the required \$25 application fee.

[9] It is my practice, when writing decisions, to give identifying information about an ATIPP applicant only to the extent strictly necessary to an understanding of the decision. In this case, it is relevant that the Applicant is a journalist.

[10] The department responded with a fee estimate of \$295, less the initial \$25 fee, for a balance of \$270. The fee estimate was based on nine hours of work involved in searching for and retrieving the information (\$243) plus photocopying (\$52).

[11] On November 15, 2021, the Applicant wrote to the department, requesting a fee waiver on the grounds of public interest. The deputy minister wrote the department's response, which reads in full as follows:

Thank you for your email.

I have considered your request and have decided to not waive the estimated fee.

Your request was very time consuming for departmental staff. The fee estimate is not based on page numbers only but the time that is required to gather the information.

[12] The Applicant then applied to this office for review of the fee estimate. In order to ensure the file would continue to be processed, the Applicant paid half the fee estimate, in accordance with section 13(1)(b) of the regulations.

Law

[13] The right of access to a record is subject to the payment of any applicable fee: ATIPPA, section 5(3).

[14] The head of a public body may require the payment of a fee: ATIPPA, section 50(1). This is a permissive requirement. Charging a fee is not mandatory.

[15] Before charging a fee for services, the public body must give the applicant an estimate of the total fee before providing the services: ATIPPA, s 50(2).

This is a mandatory requirement. By receiving an estimate, an applicant has the opportunity to consider what to do before a fee is incurred.

- [16] The ATIPPA Regulations, in sections 9 to 14 and Schedule B, spell out in more detail the allowable fees. For staff time, the maximum fee is \$6.75 per quarter-hour. For photocopying, the maximum fee is twenty-five cents per page.
- [17] A fee may be waived “if, in the opinion of the head, the applicant cannot afford the payment or, for any other reason, it is fair to excuse payment”: ATIPP Regulations, s 14.

Analysis

- [18] I will start my analysis by considering whether the fee estimate for staff time and photocopying is supported by the legislation and the facts. I will then turn to the question of whether it is fair to excuse payment of the fee.

Fee estimate for staff time

- [19] At the time the request for review was filed, the department had already retrieved the responsive records. The fee estimate is therefore based, at least in part, on a known quantity of staff time.
- [20] The regulation allows \$6.75 for each quarter-hour of staff time. The department’s estimate is for nine hours, or \$243. Staff time covers “searching for and retrieving a record” (Schedule B, item 1) and “reviewing, preparing and handling a record for disclosure” (Schedule B, item 3).
- [21] I have spoken with the department’s ATIPP coordinator. They also sent a detailed written explanation of the work they have done. They identified the staff likely to have responsive records, and combed through the email records for the requested time period. The search was very thorough—indeed probably more thorough than usual. The coordinator believed that the usual “keyword” search might not produce all responsive records, and

so went through all the emails of staff they had identified. The coordinator says they spent quite a bit more than nine hours on the task, but charged only for the nine hours that a more ordinary search might have taken.

[22] The Applicant responds that they should not have to pay for an unusually thorough search. While that is probably true, I have no trouble accepting that the coordinator spent more than nine hours on the task. The nine hours in the fee estimate was already an amount discounted from actual time spent. The coordinator has explained to me in detail their search strategy, and I can find no fault with it.

[23] The fee estimate for staff time is supported by the legislation and the facts. But that is not the end of the matter. There is still the question of a fee waiver, which I will get to after considering the photocopying fee.

Fee estimate for photocopying

[24] The fee estimate also includes \$52 for photocopying (208 pages x 25 cents per page). Under the regulation, twenty-five cents per page is the maximum allowable rate.

[25] The difficulty is that the department did not, in fact, do any photocopying.

[26] The ATIPP Regulations are old. There have been a few amendments over the years, but the core of the regulations were enacted in 1996 in the Northwest Territories. The NWT regulations were adopted by Nunavut upon its creation in 1999. In the 25 years since the NWT regulations were first enacted, there has been a revolution in the way information is created, handled and stored. There has not been a corresponding revolution in the fee regulations. It is not always obvious how to apply the old wording of the fee regulations to today's technology.

[27] According to item 6(a) of Schedule B, twenty-five cents per page can be charged "for copying a record" if the records are "photocopies, hard copy laser print and computer printouts".

[28] These days, almost all ATIPP records are processed as PDF documents. Review and redaction are done using industry-standard software. Once that work is done, copying of PDF documents is almost instantaneous and essentially costless to the GN. Records are usually emailed to applicants, or delivered on a USB key.

[29] The digital revolution still leaves plenty of work for ATIPP coordinators to do. Emails, for example, do not generally come in PDF format. They have to be converted to PDF, arranged, numbered, and reviewed for exemptions. This work is important and requires attention to detail, but it is covered by the allowance for staff time. It is not photocopying.

[30] Section 16 of the *Legislation Act*, S.Nu. 2020, c. 15, provides guidance on how to interpret an enactment:

16. (1) The words of an Act and regulations authorized under an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

(2) An enactment is to be interpreted as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objectives.

In my view, this statutory principle of interpretation requires some flexibility to meet changing circumstances, but it does not require words to be stretched beyond recognition.

[31] In the present case, there was no photocopying. If the GN wishes to modernize the fee schedule to reflect current information technology, it should amend the regulations. Until that happens, a photocopying fee is allowable only for photocopying.

[32] In its written submission on this review, the department appears to agree that the photocopying fee will be dropped.

Fee waiver or reduction

[33] I turn now to the real heart of the case: the Applicant's request for a fee waiver.

[34] A public body may waive a fee: ATIPPA, section 73(d); ATIPP regulations, section 14. Section 14 of the regulations reads as follows:

The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head, the applicant cannot afford the payment or, for any other reason, it is fair to excuse payment.

The Applicant has not explicitly asked to be excused payment on the grounds of inability to pay. The legal test, then, is simply this: is it fair to excuse payment?

[35] Sometimes a fee waiver is sought on the grounds of public interest: for example, *Review Report 17-126 (Re), 2017 NUIPC 13 (CanLII)*. More often, a fee waiver is sought on the grounds that the public body has fumbled some aspect of claim processing and therefore it is fair to right the balance by waiving the fee: for example, *Review Report 21-182 (Re), 2021 NUIPC 1 (CanLII)*; *Department of Human Resources (Re), 2021 NUIPC 16 (CanLII)*.

[36] The department also has the option of reducing the fee. This is implicit in section 14's reference to excusing "part" of a fee. Moreover, although the fees in Schedule B of the ATIPP Regulations are usually treated as fixed fees, they are maximum fees. A public body always has the option of charging less than the maximum.

[37] The charging of a fee has been part of the ATIPPA from its inception. The fees are not meant to be a complete indemnity for the GN, but they are a recognition that processing ATIPPA applications has a cost, sometimes a very substantial cost, in staff time and production costs. Applicants are expected to share some of that cost. The fees that can be charged to an Applicant seeking their own personal information are restricted.

- [38] The charging of a fee also has a secondary function of regulating applicant behaviour. If there were no fees at all, applicants would have little incentive to craft their applications with care and limit their scope in terms of number, time, subject-matter, location, and public body.
- [39] On the other hand, fees are a blunt instrument to share cost or regulate behaviour. It is a disincentive to those with limited funds, while being insignificant for better-off applicants. The total collected in fees is a drop in the budgetary bucket for the GN, but can be enough to discourage an individual applicant.
- [40] In this case, the Applicant argues that it is in the public interest for the fee to be waived. The Applicant made that argument to the department, but the department declined to waive the fee. The deputy minister's reply, which is quoted in full in the Facts section above, did not address the public interest argument. The deputy minister referred only to the staff time involved in responding to the Applicant's request.
- [41] Because the deputy minister did not address the public interest, I will fill the gap. There are three aspects of the public interest that I will consider: the purpose of the request; the role of journalists; and the fact that the department received overlapping ATIPP requests from different applicants. My conclusion, taking all relevant factors into account, is that it is fair to excuse payment of the fee.

Purpose of the request

- [42] Generally, it is not relevant for a public body, or this office on review, to know or speculate why an applicant has made an ATIPP request. It is simply not their business. An ATIPP request can be fulfilled without knowing to what use, if any, the information will be put.
- [43] It is also unwise for a public body to judge whether an ATIPP request is worthy or reasonable. The statutory purpose of the ATIPPA is to hold the GN to account, not to hold applicants to account. There are mechanisms within the ATIPPA to deal with unreasonable applications or unreasonable

applicant behaviour: see, for example, sections 7(2)(b), 10(2)(b), and 11(1)(a) and (b), and especially section 53.

- [44] Nevertheless, section 14 of the regulations says a fee can be waived or reduced where it is “fair” to do so. When a fee waiver is requested on the grounds of fairness, it is permissible for the public body to assess all relevant circumstances, including the purpose of the request.
- [45] The contamination of Iqaluit’s water supply affected every resident of Nunavut’s capital city and largest settlement. There was a ten-day period between the first public complaints and the issuance by the GN of a Do Not Consume order. The question of what was happening inside the GN during that ten-day period is, in my view, a matter of substantial public interest.
- [46] I want to stress that I am not suggesting, in any way, that anything untoward was happening within the Department of Health during that ten-day period. The point is that Iqalumiut do not know what was happening. The purpose of the Applicant’s request was to shine a light.

Role of journalists

- [47] In my view, it is also relevant, when considering a fee waiver in the public interest, that the Applicant is a journalist.
- [48] On numerous occasions, the Supreme Court has reiterated “the vital importance of the media and its special role in society”: for example, *R. v. Vice Media Canada Inc.*, 2018 SCC 53 (CanLII) at paragraph 21, per Justice Moldaver. A free press is vital to maintaining the rule of law and healthy democratic institutions. One of the overarching objectives of the ATIPPA is “to make public bodies more accountable to the public”. Without reporters, the GN would be much less accountable than it is.
- [49] Reporters have a particular interest in our governments. They keep an eye on the legislature and its committees, the courts, administrative tribunals, and municipal councils. Sometimes they are the only ones to attend. They

ask questions at government news conferences, scour government news releases, read government reports, and track down public officials for comment. They are also frequent users of ATIPP, which makes them particularly sensitive to fees. Each fee considered in isolation may be small, but over the course of a year the fees can add up.

- [50] The press is, as the Supreme Court of Canada said in a unanimous decision earlier this year, “the eyes and ears of the public”: *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII) at paragraph 1. Reporters have a set of journalistic standards and ethics that turn their job into a profession. They bring the experience and archives needed to give context to their stories. When they do not have expertise, they find experts to help with the analysis. When they make a mistake, they publish corrections. They have liability insurance and often seek legal advice to stay on the right side of defamation law. They are, by nature, curious and persistent. Although most are subject to daily deadline pressures, they can also stay with a story for weeks or months. All of this makes journalists more than just citizens with a pen and notebook.
- [51] I also take notice of the fact that the news media in Canada is under financial strain. The rise of the internet, and the corresponding shift in where advertising dollars are spent, broke the traditional business model of news outlets. The search for a sustainable business model is ongoing. Some news outlets have gone out of business. Of those that remain, newsrooms are a fraction of their former size. Reporters’ pay is comparatively low.
- [52] Nunavut has, considering its population, a surprisingly vigorous media scene. Outlets with resident reporters include Nunatsiaq News, Nunavut News, CBC, Radio-Canada, APTN, and Canadian Press, in addition to freelancers. There is competition to get the story.
- [53] But media budgets for ATIPP requests are slender. The Applicant in this case, in their written submission, says “I depend on access to information legislation in order to do my job. Twenty-five dollars is a steep fee to get a

request going...”. The Applicant adds that it is frustrating not knowing whether a given ATIPP request will result in a fee of zero or several hundred dollars. I have heard similar comments from other reporters. Fees are applied inconsistently across the GN.

- [54] At the same time, the public-policy challenges in the territory are many and significant. Those challenges include the challenges highlighted by the Iqaluit water emergency: the condition of the territory’s infrastructure, and the ability of the GN to respond to contamination of a municipal water supply. The ATIPP system should be an aid, not a barrier, to the airing of information and engendering of debate about these public-policy issues. Reporters have a special role in making that happen.
- [55] In this context, the Applicant-reporter’s request for a fee waiver in the public interest should, I think, be given the most careful consideration.
- [56] In this case, the Applicant submitted a reasonably targeted ATIPP request. The time period was limited to ten days. The subject-matter was limited to “correspondence regarding evidence of petroleum hydrocarbon contamination”. The only portion that was potentially too broad was the reference to “between any Health or GN staff”. The GN is large and searching email of “GN staff”, taken literally, would have been a very large undertaking. The ATIPP Coordinator at Health kept the search within manageable bounds by restricting their search to the four people most likely to have been dealing with the Iqaluit water issue. That was a reasonable thing to do.
- [57] I do not mean to suggest that reporters should always be excused the payment of fees. If the Legislative Assembly had intended reporters to have an automatic exemption from fees, it could have said so in the ATIPPA. Fees do serve the function, albeit bluntly, of sharing the cost of the ATIPP system and of regulating applicant behaviour. Public bodies should, however, always keep in mind “the vital importance of the media and its special role in society” and the fact that reporters are “the eyes and ears of the public”.

Overlapping requests

- [58] There is a third relevant factor: the Department of Health has confirmed to me that they received a number of overlapping ATIPP requests, including the Applicant's, related to the Iqaluit water emergency.
- [59] The Iqaluit water emergency was of wide public interest. It is not surprising that multiple ATIPP requests were filed. The ATIPPA does not currently apply to the City of Iqaluit, so the requests have all been directed to the GN. I have not seen the other requests, but I surmise they cover roughly the same subject-matter over the same period. They will not have identical wording. Some may be broader or narrower in time and scope than the Applicant's.
- [60] The ATIPPA and regulations do not explicitly take into account the possibility of overlapping applications. There is therefore a theoretical possibility that a public body could receive more than one fee for the same records. There is also a possibility that the first person to apply will have to pay, while later applicants will not. Neither outcome is desirable for achieving the objectives of the ATIPPA.
- [61] The regulation says that fees may be excused where it is "fair" to do so. It is fair for a public body to take overlapping requests into account, and to waive or reduce fees accordingly. At the very least, the cost of staff time can be shared among applicants. When there are overlapping requests, it is not fair for the fee burden to fall on the first to apply.

A final comment

- [62] I think there is sometimes a sense, among the management of public bodies, that waiving an ATIPP fee devalues the work of the public body's ATIPP staff. Management believes the public body deserves the fee because staff have put in the time.
- [63] But from a legal perspective, excusing a fee in the public interest is unconnected to the merit of GN staff. In this case, the Department of

Health's ATIPP coordinator has done their usual excellent work. Indeed this staff person is a model for others in the GN. Excusing fees does not detract one iota from their merit.

- [64] In the end, the Nunavut ATIPPA allows me only to make recommendations. I cannot order the Department of Health to excuse payment of the fee. But for the reasons given, and taking all relevant circumstances into account, I recommend it do so.

Conclusion

- [65] The fee estimate for staff time is allowable.
- [66] The fee estimate for photocopying is not allowable.
- [67] Taking all relevant circumstances into account, it is fair that the Applicant be excused payment of any fee.

Recommendations

- [68] **I recommend** the department waive payment of the full fee for this application.
- [69] If the department accepts my recommendation for a full fee waiver, **I recommend** the department refund to the Applicant the fees already paid.
- [70] If the department does not accept my recommendation for a full fee waiver, **I recommend** the fee be reduced proportionately to the number of ATIPP applications received covering the same records. For example, if five overlapping applications have been received, the fee estimate given to the Applicant for staff time should be 20% of the original estimate.

[71] In any event, I **recommend**, for the reasons given in this decision, that the department make no charge for photocopying.

Graham Steele

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