

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Investigation Results and Analysis

Following are the results and analysis of the Office of the Information and Privacy Commissioner in response to a complaint filed by the Applicant, in which she requests an investigation into the fee charged by the Town of Happy Valley-Goose Bay ("the Town") with reference to her Access to Information Request of August 22, 2008. This investigation is pursuant to paragraph 44 (a) of the *Access to Information and Protection of Privacy Act (ATIPPA)*, which states that:

44. The commissioner may investigate and attempt to resolve complaints that

(b) a fee required under this Act is inappropriate.

In its response to her Request, the Town first provided the Applicant with an Estimate of Cost of \$150.00. However, after the Applicant agreed to pay that amount, and forwarded a deposit of \$75.00, the Town increased the total amount payable to \$288.00. The Applicant paid the balance of \$233.00 in order to obtain the requested records, and subsequently filed the present fee complaint.

In its response to our inquiry, the Town expressed the view that an estimate was just that, only an estimate, and that the final cost might be greater than or less than the estimate, depending on the actual time that it took to process the request. Its understanding was that if the cost ends up being less than the estimate, the difference is to be refunded to the Applicant. If, however, the actual cost is greater than estimated, the Town's view was that the Applicant would be responsible for paying the difference, in order to receive the documents. As it turned out, processing the request took longer than estimated. The Town billed the Applicant, in accordance with the established fee schedule, for the actual hours spent.

This is the first time that this issue has been placed before this Office, and therefore it has been the subject of considerable research and discussion. Our conclusion is that, under the *ATIPPA*, a fee estimate by a public body ought to be final and binding, and the public body should not charge more, even where the actual time involved would result in a greater amount. Following are the reasons why we have reached that conclusion.

We start by looking at what the *ATIPPA* itself says about fees. In section 68 it provides for fees for searching, preparation, copying and delivery related to an access request, in accordance with a fee schedule set by the minister. It provides for estimates, which are to be given before the service is provided. It provides that the fees charged are not to exceed the actual cost. But the *Act* is silent on the question of costs that exceed the estimate.

The Regulation under the *ATIPPA* discusses the possible waiver of fees, but does not talk about estimates. The Fee Schedule published by the Minister on 3 January 2004 provides more detail about how fees are to be assessed, but on the subject of estimates, says only that an Applicant may be required to pay a deposit of 50% of the estimate before the work is begun, and has to pay the “outstanding balance” before getting the records. It does not address the issue before us.

The ATIPP Office of the Department of Justice, which is responsible for the administration of the *Act*, has produced a detailed Policy and Procedures Manual that was recently updated in March 2008. Fees are covered on pp. 3-29 and 3-30. Those paragraphs go into additional detail on the subject of estimates, and reiterate that where actual costs are less than the estimate, the difference is to be refunded, but again, like the *Act*, the Regulation and the Fee Schedule, the Manual is silent on what to do if actual costs exceed the estimate.

In summary, the *ATIPPA*, the Regulation, the Fee Schedule and the Manual provide a great deal of assistance on the subject of fees, but do not directly address the issue before us. While they do not provide for the payment of additional costs that exceed the estimate, they do not prohibit it either. We therefore turned our attention to the experience of other Canadian jurisdictions. We discovered that in one province, the relevant legislation provides explicitly that in such a situation the Applicant must pay the actual costs. In two other provinces the Act or regulations state explicitly that the final cost must not exceed the estimate. In all of the other jurisdictions the language of the legislation is similar to ours, and is similarly silent. In addition, we have found no reported cases discussing this issue from those jurisdictions. Therefore in our view the matter must be resolved by returning to the principles underlying the *ATTIPA* and the purposes to be served by it.

The purposes of the *ATIPPA* are set out in section 3, which reads, in part:

(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records;

Since the object of the *ATIPPA* is to facilitate access to information, then the legislature must have intended the provisions regarding fees to be interpreted in a way that is consistent with that object.

It is clear, first of all, that fees cannot be intended to be a barrier or deterrent to access requests. That would be contrary to the fundamental purpose of the *Act*. Thus we see that the application fee is nominal - \$5.00 – and is presumably intended to deter only frivolous requests. The *Act* further provides that fees may be waived if payment would impose an unreasonable hardship, so it is equally clear that access to information is not restricted to those who have the ability to pay.

The fees for search and preparation time are set at \$15.00 per hour, which certainly would not cover the labour costs (wages, benefits and overhead) of administrative staff of most public bodies. In addition, under our scheme the first two hours of search and preparation time are free. Furthermore, a public body is not always permitted to charge the applicant for some things it may need to do in order to respond to an access request – for example, obtaining legal advice. Evidently the legislature did not intend that public bodies should be able to achieve anything like full cost recovery from the applicable fees.

Under those circumstances, then, we have drawn two inferences. First, an estimate of fees by a public body under the *ATIPPA* is not intended to be a quotation, as if the public body were a commercial organization selling a service. If it were, it would be permitted to charge the full amount of the estimated fee, regardless of the actual cost, and any difference would be retained as profit. Rather, an estimate is intended to be only an approximation, a guide that tells the applicant roughly how much the request is likely to cost. After receiving an estimate, the applicant has a number of options: to accept the request, to abandon it, or to modify it in order to try to reduce the cost. In that situation, the applicant should at least be secure in the knowledge that agreeing to an estimate effectively establishes an upper limit on the cost of the transaction, and that there is at least some hope that the actual cost may turn out to be somewhat less.

Second, it is important that the fee estimate itself not function as a deterrent to proceeding with an access request. We recognize that in some circumstances a public body may not have much experience to rely on, and may not be able to estimate the cost accurately. Nevertheless, every public body has a duty under the *ATIPPA* to assist applicants with their requests, and in our view this duty includes the responsibility to make every reasonable effort to provide realistic fee estimates. In those situations where unforeseen circumstances result in a significantly longer than estimated time to complete a request, then at least the applicant is not penalized with an unforeseen additional fee.

It has been suggested that if public bodies were not permitted to charge an actual fee in excess of an estimate, it could have the effect of encouraging public bodies to inflate their fee estimates in order to ensure that actual costs would be recovered. We agree that, if that were the case, it would mean that the estimate itself could be an unreasonable deterrent to proceeding with an access request. However, public bodies should keep in mind that the fees associated with access requests are not, as stated above, intended to achieve full cost recovery. Rather, we must recognize that the principles of accountability and transparency in the conduct of public administration may require that certain costs have to be incurred in order to provide statutory services, and not all of those costs are intended to be recovered from individual citizens. In the result, public bodies should exercise great care to keep fee estimates reasonable, and especially be careful not to over-estimate, in keeping with their duty to assist applicants.

We are confirmed in our judgment that this approach is consistent with a proper interpretation of the *ATIPPA*, by an inquiry to the Department of Justice ATIPP Office, which is the body responsible for the administration of the *Act*. The ATIPP Office advises that this is the principle followed in its training courses: that public bodies should not charge more than estimated amounts.

In conclusion, then, it is the view of this Office that fee estimates under *ATIPPA* are intended to be binding, that where the actual cost of a request turns out to be less than the estimate, the public body should refund any excess paid by the applicant, but where the actual cost exceeds the estimate, the applicant should not be required to pay more than the estimated amount.

We therefore recommend that the Town, on receipt of this Report, make arrangements to refund to the Applicant the amount by which the final amount exceeded the estimate.

Submitted by:

Lionel G. Clarke
Investigator

