



**OFFICE OF THE
INFORMATION & PRIVACY COMMISSIONER
for
Prince Edward Island**

Order No. OR-24-005

Re: Department of Transportation and Infrastructure
(OIPC File Nos. C/24/00052, C/24/00053, C/24/00054, and C/24/00055;
formerly FI-21-435, FI-21-436, FI-21-437 and FI-21-438)

**Denise N. Doiron
Information and Privacy Commissioner**

May 15, 2024

Summary:

An applicant made several access requests to the Department of Transportation and Infrastructure (the “Public Body”). The Public Body issued fee estimates in four of the access requests. The Applicant asked for a fee waiver on the basis that they could not afford the fees. The Public Body did not have enough information to assess whether the Applicant was able to pay. The Applicant sought a review, looking for a full fee waiver. The Commissioner agreed that the Applicant did not provide enough evidence to show that they were not able to pay the fees, and confirmed the Public Body’s decision.

Statutes cited:

Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 1988, Cap. F-15.01, sections 6, 61, 76

Freedom of Information and Protection of Privacy Act General Regulations, PEI Reg. EC564/02, sections 9,11,12, Schedule 2 (Fees)

Cases Considered:

Order FI-15-007, *Re: Department of Economic Development and Tourism*, 2015 CanLII 66635 (PE IPC)

I. BACKGROUND

- [1] The Applicant made several access requests to the Department of Transportation and Infrastructure (the “Public Body”), pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01 (“*FOIPP Act*”). The Applicant was not requesting their own personal information.
- [2] The *FOIPP Act* permits a public body to charge an applicant fees, in addition to the application fee and any copying fees, when the request is for information other than their own personal information, and if the amount of time it would take to locate, retrieve, and process the requested records would be more than three hours. The *FOIPP Act General Regulations* (the “*Regulations*”) set out the types of things a public body can charge fees for and the maximum amounts permitted. For example, among other things, a public body is permitted to charge an applicant up to a maximum of \$15.00 per half hour for locating and retrieving records, and up to a maximum of \$15.00 per half hour for preparing and handling a record for disclosure. Fees cannot exceed the actual costs of the services.
- [3] The Applicant made numerous access requests to the Public Body, all related to various components of the same subject matter. The Public Body responded to eight access requests without requiring the Applicant to pay fees other than the \$5.00 application fee. One of these access requests was addressed with more than 345 pages of records being made publicly available which the Applicant could access directly, and a second resulted in no records being found. The remaining six of these access requests resulted in approximately 2,500 pages of records being disclosed to the Applicant by the Public Body.

- [4] The Applicant then made six more access requests to the Public Body seeking access to records about the same subject matter. The Public Body estimated the time it would take to locate and retrieve records responsive to each of these access requests, and issued fee estimates to the Applicant for all six access requests. The total of the fee estimates was \$2,046.00.
- [5] When calculating the estimates, the Public Body estimated the total time required to locate and retrieve potentially responsive records, assessed the fees for the time at \$15.00 per half hour, the maximum rate permitted in the Regulations. The Public Body then deducted \$90.00 from the fee estimate for each access request, which represented the first three hours of service, before issuing the fee estimates.
- [6] A public body must give an applicant an estimate of the fees before providing the services. The Regulations state that the processing of an access request ceases once a fee estimate has been given and does not recommence until the applicant pays at least 50% of the estimated fee, with any balance to be paid at the time the information is delivered to the applicant. If the estimated fee was higher than the actual cost to the Public Body, only the actual cost incurred is payable by the applicant, and any amount already paid in excess of that actual cost is refunded to the applicant.
- [7] The Public Body issued the six fee estimates, and requested the Applicant pay at least 50% of the estimated fee in each file before beginning their work on locating and retrieving records related to the request, as required in the Regulations. The Applicant asked the Public Body to excuse them from paying the required fees, asserting that they could not afford to pay, under clause 76(4)(a) of the *FOIPP Act*.
- [8] The Public Body requested information about the Applicant's assertion they were unable to pay the estimated fees. The Applicant provided the Public Body with information about their annual income and a list of expenses, but no amounts associated with the expenses. The Public Body determined, based on the information provided by the Applicant, that they had insufficient evidence to conclude that the

Applicant was unable to pay the fee.

- [9] Further, the Public Body indicated that, even if they were able to reach a conclusion that the Applicant was unable to pay the required fee, they would not have exercised their discretion to waive the fees. The Public Body noted there was extensive overlap with the Applicant's previous access requests and processing these requests would result in duplicated efforts of past searches and place an unreasonable burden on the Public Body.
- [10] The Public Body also noted that the Applicant had made multiple access requests for records about the same subject matter to at least five other public bodies. Those other access requests resulted in over 2,100 pages of records being disclosed to the Applicant by other public bodies, with no fees, in addition to the approximately 2,500 pages already disclosed by the Public Body.
- [11] The Public Body suggested the fee estimates could be decreased if the Applicant refined their access requests to exclude any records already disclosed through their previously processed access requests. They suggested the Applicant review the wording of each of their requests to identify overlap and determine any reasonable opportunities to narrow, clarify or withdraw the outstanding requests. They explained that this might reduce the time the Public Body would need to spend on searching and locating potentially responsive records and, in turn, could help decrease the fees being required.
- [12] The Applicant proposed that any tests that had been disclosed in their previous access requests could be removed from the scope of these access requests. The Public Body responded that this would not refine the search or eliminate duplication of past searches from the Applicant's previous access requests. Therefore, this proposal would not reduce the search efforts required and would not help to reduce the fees. The Applicant declined to refine their access requests further.
- [13] The Applicant reached out to the Minister of the Public Body and an MLA about the fees, but they did not reduce or waive the fees. Neither the Minister nor the MLA were

delegated head of the Public Body and would not have had authority to reduce or waive the fees in any event. The Applicant offered to pay a lesser amount of \$1,170.00 to the Public Body as full payment for the fees in their outstanding access requests. The Public Body declined to accept this lesser amount as payment for all the fees in all the Applicant's outstanding access requests, but offered to give the Applicant the opportunity to decide which access requests to proceed with in order to stay within their proposed payment amount.

[14] The Applicant did not respond to the Public Body's proposal and did not pay the required fees. The Public Body put the processing of the access requests on hold while the Applicant decided how they wanted to proceed. After a time, the Applicant applied to the Commissioner for a review of the Public Body's decision to refuse to waive the fees in four of the access requests. The Applicant did not proceed with their other two access requests.

[15] The Applicant submitted their request for review of the Public Body's decision not to excuse them from paying the fees in the four access requests after the 60-day time limitation in subsection 61(2) of the *FOIPP Act*. The Applicant requested that I extend their time for making a request for review, pursuant to subclause 61(2)(a)(ii) of the *FOIPP Act*.

[16] I permitted the Applicant to make their request for review beyond the 60-days, pursuant to subclause 61(2)(a)(ii) of the *FOIPP Act*.

II. JURISDICTION

[17] The Applicant made several access to information requests to the Public Body, and the Public Body required the Applicant to pay a fee to process some of the access requests. The Applicant requested the Public Body excuse them from paying the required fees, but the Public Body refused. The Applicant requested a review of those decisions.

[18] The Department of Transportation and Infrastructure is a public body under the *FOIPP Act*. Section 76 of the *FOIPP Act* authorizes a public body to require an applicant to pay a fee for an access request, or to excuse an applicant from paying part or all of a fee. The *FOIPP Act* allows such an applicant to ask the Information and Privacy Commissioner (the “Commissioner”) to review a public body’s decision to require a fee be paid or to refuse to excuse the applicant from paying part or all of a fee being required.

[19] I am satisfied I have jurisdiction in this matter.

III. ISSUES

[20] The only issues in this review are whether the Applicant has established that they cannot afford to pay the fees the Public Body estimated for the four access requests in question and, if so, whether the Public Body exercised their discretion reasonably.

IV. BURDEN OF PROOF

[21] An applicant seeking to have fees waived pursuant to clause 76(4)(a) of the *FOIPP Act* bears the burden of proof to establish that they cannot afford to pay the required fees. This is because it is the Applicant who is requesting fees be waived based on their stated inability to afford to pay the fees, and it is the Applicant who would be in the better position to provide evidence relating to their financial ability to pay the estimated fees.

[22] If that burden of proof is met, the burden then shifts to the Public Body to show that they exercised their discretion reasonably in refusing to waive the fees.

V. ACCESS REQUESTS AT ISSUE

[23] The Applicant made multiple access requests to the Public Body, but the Public Body did not require fees to be paid for eight of them. The Public Body required fees to be paid

in six subsequent access requests the Applicant made. The Applicant requested to be excused from payment of the required fees on the basis that that they could not afford to pay. The Public Body declined to excuse the Applicant from paying the required fees in all six access requests. The Applicant requested a review of the Public Body’s refusal to waive the required fees in four of the access requests, specifically: 2020-056 TIE, 2020-121 TIE, 2020-122 TIE, and 2020-270 TIE. These are the access requests that will be addressed in this order.

[24] The access requests and the fee estimate for each are as follows:

File number	Estimated time to locate and retrieve	Estimated cost @\$15 per 0.5 hr.	Waiver for first 3 hrs.	Fee estimate
2020-056 TIE	30 x 0.5 hrs.	\$450	\$90	\$360.00 (+ flash drive @\$11)
2020-121 TIE	30 x 0.5 hrs.	\$450	\$90	\$360.00 (+ flash drive @\$11)
2020-122 TIE	28 x 0.5 hrs.	\$420	\$90	\$330.00 (+ flash drive @\$11)
2020-270 TIE	30 x 0.5 hrs.	\$450	\$90	\$360.00 (+ flash drive @\$11)
TOTAL				\$1,454.00

[25] I will refer to these collectively as “the access requests at issue”.

VI. ANALYSIS

[26] Section 6 of the *FOIPP Act* gives applicants a right of access to records in the custody or under the control of a public body, subject to limited and specific exceptions as set out in the legislation. Subsection 6(3) states that this right of access is subject to the payment of any fee required by the Regulations.

[27] The Regulations require an initial fee of \$5.00 for access to information that is not the applicant’s own personal information, and gives a public body the discretion to charge

additional fees if the amount of time spent, as estimated by the public body, exceeds three hours. They also require that an applicant must pay at least 50% of the estimated fee before the access request is processed and must pay the remaining balance before the records are given to the applicant. The services a public body can charge for, and the maximum allowable amounts, are set out in Schedule 2 of the Regulations.

[28] Section 76 of the *FOIPP Act* gives a public body the authority to require an applicant to pay fees for responding to an access request, but also provides the public body with the discretion to excuse the fees in certain circumstances.

[29] Subsection 76(4) of the *FOIPP Act* authorizes the head of a public body to excuse an applicant from paying all or part of a fee if certain circumstances apply. Clause 76(4)(a) provides the authority for a public body to waive fees in circumstances where the public body believes an applicant cannot afford to pay a fee that is required. Clause 76(4)(a) reads as follows:

76. Fees

...

Waiver of Fee

(4) The head of a public body may excuse an applicant from paying all or part of a fee if, in the opinion of the head,

(a) the applicant cannot afford the payment or for any other reason it is appropriate to excuse payment; or

...

[30] There is always a cost associated with responding to access requests, as a public body must use staff time and other resources in doing so. When fees are not required, taxpayers cover the costs of access. The legislation recognizes that it is not the taxpayers' responsibility to assume the costs of access for anyone who makes an access request. This is why there is a provision built into the legislation that allows public bodies to charge fees. Because, for some, a fee is a barrier to access, the legislation also permits an exception to fee requirements where an applicant has an inability to pay. But it is not sufficient for an applicant to merely assert they cannot afford to pay a fee for access in order to be excused from paying. The individual asserting that they are

unable to pay a fee must provide sufficient proof of that inability to pay, so the public body can make an informed decision about whether to excuse the individual from paying all or part of the fees.

[31] When a public body decides to waive a fee, the cost of responding to that access request is paid by public funds, and the public body must be accountable to the public for the expenditure. If an applicant is requesting a public body to excuse them from paying all or part of a required fee because of impecuniosity, there is an expectation that they provide some kind of evidentiary support for their assertion, including satisfactory evidence of their financial circumstances. This is so that the public body has sufficient information upon which to formulate an opinion that the applicant cannot afford the payment being required, and so they can make an informed decision under clause 76(4)(a) of the *FOIPP Act* about whether to excuse the applicant from paying all or part of the fee due to inability to pay and have the taxpayers assume that cost. This goes to both the public body's accountability obligations and the principle of fairness.

[32] In Order FI-15-007, *Re: Department of Economic Development and Tourism*, 2015 CanLII 66635 (PE IPC), former Commissioner Karen Rose addressed this issue at paragraph 28, stating:

[28] When claiming an inability to pay, an applicant must present evidence about its financial position. A failure to do so prevents the head of the public body from exercising discretion to waive the fees, or not. In Order F2009-034, 2010 CanLII 98664 (AB OIPC), the Alberta adjudicator states at paragraph 15, as follows:

Because access requests involve the use of public resources that are paid for by taxpayers and public bodies are accountable for the use of public resources, it is reasonable, and in fairness to all, that decisions to waive fees be based on sufficient information that clearly shows that an inability to pay exists (Order 2000-001 at para.31).

[33] Whether fees are charged is a balance of fairness between those seeking access to information and taxpayers. It is also a balance of transparency and accountability of public bodies. Public bodies must be transparent in their actions from an information perspective, but they also have to be transparent and accountable in the way they

expend their time and public funds. Charging fees for the time and effort required in responding to access to information requests is one way to carry out this balancing act.

- [34] The Regulations say that fees can be charged if the amount of time spent on responding to an access request exceeds three hours. The policy of many public bodies, this one included, is to not charge for the first three hours of a search. So, this portion of the cost of an access request is generally always borne by the taxpayers. When access requests are more complex, or applicants are asking for records that are more extensive and require more time to search for and locate, or to process, a public body must expend more time, and therefore more taxpayers' dollars, on the effort.
- [35] Such situations could be because the access request covers a large period of time, potentially responsive records are in paper format and may be stored in archives or off-site storage, the topic is extensive with a large volume of records that would need to be searched for, retrieved and processed, there are multiple employees' records or locations that must be searched, or an applicant could make numerous access requests to a public body. In such circumstances, there could be a large number of employees within a public body expending large amounts of time on a single access request or multiple access requests by a single applicant. It could be unfair for taxpayers to foot the bill for these kinds of situations.
- [36] In the present matter, the Applicant made numerous access requests to the Public Body and the Public Body processed many of them, resulting in over 2,500 pages of records being disclosed by the Public Body without the Public Body charging the Applicant more than the \$5.00 application fees. The Applicant also received more than 2,100 additional pages of records from access requests to several other public bodies, also with no fees charged. However, the Applicant continued to make access requests to the Public Body, some of which would result in efforts already expended by the Public Body to respond to their previous access requests. So, the Public Body decided to require the Applicant to pay fees for process their last six access requests.

[37] The first step is to review whether the Applicant can afford to pay the fees required by the Public Body. If not, then the second step is to determine whether the head of the Public Body reasonably exercised their discretion to refuse to waive the fee in each access request at issue.

[38] When the Applicant requested to be excused from paying the required fees, they provided the Public Body with the following information:

My yearly income is just over [income amount]. The list of expenses I have are as follows; [child] in university, mortgage, property taxes, house insurance, electricity, internet, heating, propane, cell phone, car (maintenance, gas and insurance), medical expenses and medications, dental, visual, food, clothing and necessities, city sewer and water, general house maintenance.

[39] The Applicant later added that they also had credit card payments to make. The Applicant did not provide information about the amounts of the expenses or supporting documentation.

[40] The Public Body decided that there was insufficient evidence to persuade them that the Applicant was unable to pay the fees and refused to waive the fees they were requiring for the four access requests at issue. The Public Body also advised the Applicant that even if they were persuaded that the Applicant was not able to afford the fees, they would not waive them in the circumstances.

[41] The Public Body stated in their decision letters to the Applicant regarding the four access requests at issue:

When assessing whether to waive a fee, a public body must exercise its discretion fairly and judiciously. Even when a public body has determined that an applicant is unable to pay a fee, a fee is not automatically waived. A public body has an obligation to take into consideration the relevant facts and circumstances surrounding the issue, as well as the principles and objectives of the Act. This includes balancing an applicant's right to access with the off-setting of costs to the tax payer. Generally speaking, an applicant should bear some of the burden of the cost to obtain records.

The Department of Transportation and Infrastructure has processed six requests and disclosed approximately 2,500 pages of records relating to the same subject

matter to you at no charge. This does not include previous requests relating to the same subject matter that you have submitted to at least five other public bodies, from which you were provided with over 2,100 additional pages of records at no charge.

[42] The Public Body is correct in stating a public body must exercise its discretion fairly and judiciously. I also agree that a fee should not be automatically waived even if a public body determines that an applicant is unable to pay a fee. Each case should be examined on its own merit and a decision made based on the circumstances of each individual case.

[43] The Public Body stated in the decision letters for three of the access requests at issue:

There is extensive overlap between the wording of your previous requests against the wording of [request number].

[44] In all four of the decision letters, the Public Body stated:

Excluding any tests you have already received will not refine it, nor eliminate duplication of past searches already conducted to respond to your previous requests. Proceeding with this request will result in duplicated efforts of past searches and place an unreasonable burden on the public body.

Taking into consideration all circumstances, we would not be willing to waive the fee to search, locate, retrieve and prepare records responsive to this request, even if you had demonstrated a limitation in your ability to pay.

[45] In their request for review, the Applicant asserted that they could not afford to pay the fees being charged in the four access requests at issue and requested we order the Public Body to waive the fees. They indicated the \$1,170.00 they had previously offered the Public Body was not from their own funds but was raised through fundraising efforts to help them cover the fees. We asked the Applicant for more details about their expenses, so that we could assess their ability to pay fees.

[46] The Applicant provided a statement of the amounts of expenses they claimed for their household and their own income information. The Applicant later updated their income information and expense amounts. The amounts the Applicant provided appeared to be the full amounts payable for the expenses being claimed, and the expenses they were asserting they were paying on an annual basis were more than double their annual

income. While it is possible that the Applicant is living so far beyond their means, it is more likely that the Applicant is not solely responsible for paying all the claimed expenses.

- [47] We communicated to the Applicant that the information they provided did not appear to be complete, as the expenses they were claiming far exceeded their stated income. We requested more information from the Applicant to support their claim of impecuniosity, and specifically asked whether they were the sole income earner in the household, and whether the expenses were shared.
- [48] The Applicant acknowledged having a spouse who earned an income and participated in the responsibility for the household financial obligations, but declined to provide information about their spouse's income or how the financial obligations were proportioned between the two income earners. Further, they did not provide any information of assets they may own or any level of indebtedness or equity they may possess. This leaves an incomplete picture of the Applicant's financial situation and whether they could afford to pay the fees required.
- [49] The Applicant's assertions about their financial means are not supported by the evidence they have provided. Ultimately, the Applicant's submissions and evidence leave many unanswered questions about their financial situation and ability to pay a fee for access. The evidence provided by the Applicant is insufficient to establish that they cannot afford to pay the fees required by the Public Body in the four access requests at issue, and does not meet the burden to establish that they cannot afford to pay the fees for the access requests at issue.
- [50] As I do not have enough evidence to show the Applicant is not able to afford the fees in the access requests at issue, the Applicant is not entitled to a fee waiver. Because the Applicant is not entitled to a fee waiver, it is not necessary for me to consider whether the Public Body exercised their discretion reasonably.

[51] I therefore confirm the Public Body's decision to refuse to waive the fees for the four access requests at issue in this matter under clause 76(4)(a) of the *FOIPP Act*.

VII. FINDINGS

[52] I find that the Applicant has not provided sufficient evidence to support their assertions that they are unable to pay the fees assessed by the Public Body for the location and retrieval of responsive records in access requests 2020-056 TIE, 2020-121 TIE, 2020-122 TIE, and 2020-270 TIE.

[53] I find that the Applicant has not met their burden of proof to establish that they cannot afford to pay of the fees in access requests 2020-056 TIE, 2020-121 TIE, 2020-122 TIE, and 2020-270 TIE, and therefore have not met their burden to show that they should be excused from paying the required fees pursuant clause 76(4)(a) of the *FOIPP Act*.

VIII. DECISION

[54] For the reasons outlined above, I confirm the Public Body's decision that the Applicant has not demonstrated that they cannot afford the fees, and is not entitled to a fee waiver pursuant to clause 76(4)(a) of the *FOIPP Act* in the Applicant's access requests 2020-056 TIE, 2020-121 TIE, 2020-122 TIE, and 2020-270 TIE.

[55] If the Applicant wishes the Public Body to proceed with responding to access requests 2020-056 TIE, 2020-121 TIE, 2020-122 TIE, and 2020-270 TIE, or any of them, I confirm that the Applicant is required to pay at least 50% of the estimated fee in each access request before the Public Body commences processing the request, with the balance due at the time the responsive records for each request are delivered to the Applicant, as required under section 12 of the Regulations.

- [56] In accordance with section 67 of the *FOIPP Act*, this decision is final. However, an application for judicial review of the Order may be made pursuant to section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.
- [57] If no judicial review has been undertaken, and the Applicant has not paid 50% of the estimated fee for any of the access requests at issue within 60 days of the date of this Order, the Public Body may consider the access request abandoned, and shall issue a notice to the Applicant, in writing, declaring the access request abandoned.

Signed: Denise N. Doiron

Denise N. Doiron
Information and Privacy Commissioner