

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2011-015

November 14, 2011

COUNTY OF THORHILD NO. 7

Case File Number F5468

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to bank statements from the County of Thorhild No. 7 (the Public Body). The Public Body identified 134 pages of responsive records. The Public Body estimated the costs of responding to the Applicant's access request to be \$182.00. It estimated that it would take 5.5 hours to retrieve and prepare the records at a cost of \$6.75 per quarter hour, or \$27 per hour. In addition, it estimated that its photocopying costs would be 25 cents per record.

The Adjudicator requested an explanation and breakdown of the fees the Public Body had estimated. The Public Body explained that its costs for preparing the records included severing costs, which it had calculated would take two minutes per page. This calculation was based on a formula set out in Order 99-011 and "FOIP Bulletin #1," a publication of Service Alberta.

The Adjudicator noted that section 93(6) of the FOIP Act prohibits a public body from charging costs greater than the actual costs of the services. She found that the Public Body had not established that it could reasonably be expected to take two minutes per page to sever information from the records in this case or that the amount it had calculated would reasonably reflect its actual costs. She also found that the Public Body had not established that the rates it had charged for searching for and preparing records, or for making photocopies were reasonably likely to reflect the actual costs of the services. She ordered the Public Body to recalculate the fees by estimating the actual time

it was likely to take to process the request and to use rates reflective of its actual costs in its estimate.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72, 93, 94 Freedom of Information and Protection of Privacy Regulation, Alberta Regulation 186/2008, s. 11, Schedule 2

Authorities Cited: **AB:** Orders 99-011, F2010-036 **BC:** Order F09-05 **ON:** MO-1421

FOIP Bulletin #1

Access and Privacy Branch, Alberta Government Services. *Freedom of Information and Protection of Privacy Guidelines and Practices 2009*. Edmonton: Government of Alberta, 2009.

I. BACKGROUND

[para 1] On May 31, 2010, the Applicant requested the following information from the County of Thorhild No. 7 (the Public Body):

Bank statements for the year 2009...
Cheque number 073419 dated 4/30/2009 for \$194.25 and cheque number 074381 dated 9/15/2009 for \$282.62

[para 2] The Public Body estimated that it would take 7 hours at a rate of \$6.75 per ¼ hour for retrieval and preparation of the records. The Public Body estimated that there would be 120 pages and that the cost of making photocopies would be 25 cents per page. The total estimated cost was \$219.00.

[para 3] The Applicant subsequently revised his access request to include only bank statements from July to December of 2009.

[para 4] The Public Body estimated that it would spend 5.5 hours “retrieving and preparing” the records and that the cost to the Applicant per ¼ hour for doing so would be \$6.75. The Public Body anticipated that there would be 134 records, for which the Applicant would be charged 25 cents per record in photocopying costs. The Public Body stated that the costs for the revised request were estimated at \$182.00.

[para 5] The Applicant requested review by the Commissioner of the manner in which the Public Body estimated and calculated the fees, particularly the amount of time it had calculated would be necessary to produce the statements.

[para 6] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 7] As I had questions regarding how the Public Body had arrived at its estimate of fees, I wrote the Public Body on April 29, 2011 so that it could address my questions. I said:

I note that at paragraph 42 of the Public Body's submissions states:

Given that the Public Body had not only to sever the requested records but it had to locate and retrieve them, it submits that the cost estimate for the time required to produce the records is not unreasonable. In fact, if the Public Body had included the above time for severing the documents, plus added time for locating and retrieving the documents, the fee quote would have been significantly higher.

The Public Body has included "severing" as part of "preparing and handling a record for disclosure". For the month of June, the Public Body estimates that severing records would take 2 minutes per page, for 160 pages of records and total 5.3 hours. The Public Body has also estimated its costs for severing at \$6.75 per quarter hour for severing information from records.

Section 93(1) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) states:

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

Section 93(6) of the FOIP Act states:

93(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.

Section 11(6) of the Freedom of Information and Protection of Privacy Regulation states:

11(6) A fee may not be charged for the time spent in reviewing a record.

Section 93(1) authorizes a public body to charge fees for services, as provided in the Regulation. Section 93(6) further limits the fees that may be charged by a public body to limit them to the actual costs to a public body. Finally, section 11(6) of the Regulation adds the limitation that a public body may not charge fees for the time spent reviewing a record.

I understand that the estimate of 2 minutes per page for severing is based in policy created by the Ontario Information and Privacy Commissioner's office, and was adopted as a reasonable way to estimate severing costs in Order 99-011 of this office.

However, I note that Ontario's fees provisions are different than those contained in Alberta's legislation. Section 57 of Ontario's legislation states:

57. (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

(a) the costs of every hour of manual search required to locate a record;

(b) the costs of preparing the record for disclosure;

(c) computer and other costs incurred in locating, retrieving, processing and copying a record;

(d) shipping costs; and

(e) any other costs incurred in responding to a request for access to a record. 1996, c. 1, Sched. K, s. 11 (1)...

Under Ontario's statute, fees are mandatory. They are also not limited to fees for services and are not restricted to the actual costs incurred by a public body. Moreover, neither Ontario's Act nor its Regulation contains a prohibition on charging for the time spent reviewing a record. It is therefore not clear to me that Ontario's fee estimate policies are of assistance in interpreting Alberta's legislative framework or in estimating fees.

I note that Service Alberta's *FOIP Guidelines and Practices Manual* states the following on page 74:

No fee may be assessed for time spent in reviewing a record to determine whether or not all or part of it should be disclosed.

This manual appears to reflect the view that fees may not be charged (or estimated) for making severing decisions.

To assist me to determine whether a fee for severing information from records may be charged under Alberta's FOIP Act, I ask that you answer the following questions.

1. Is severing information from records a service as contemplated by section 93(1) of the FOIP Act? If severing is not a service, can fees be charged for severing information from records?
2. The word "review" can mean "to examine or assess with a view to making changes where appropriate". In the Act itself, the term "review," where it is used, appears to have that meaning, given that applicants may request that the Commissioner review the decisions of public bodies. What does "review" mean for the purposes of section 11(6) of the Regulation?
3. Are applying exceptions to disclosure and severing information from a record different than reviewing a record?
4. Please provide a breakdown of the activities you have included in the term "preparing" in your arguments, and the estimated time spent doing each, and explain why an estimate of 2 minutes per page is reasonable in this case.

The Public Body provided submissions in response to my questions. The Applicant was given the opportunity to respond to the Public Body's additional submissions and did so.

II. ISSUE

Issue A: Did the Public Body properly apply the fee schedule as per section 93 (fees) of the Act?

III. DISCUSSION OF ISSUE

[para 8] Section 93 authorizes the head of a public body to charge fees for services. It states, in part:

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.

(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

...

(6) The fees referred to in subsection (1) must not exceed the actual costs of the services.

[para 9] Section 93(1), permits the head of a public body to require fees for services as provided for in the regulations, while section 93(6) prohibits a public body from charging fees in excess of the actual costs of providing services.

[para 10] Section 93(3) of the FOIP Act requires the head of a public body to estimate the total fees that will be charged to an applicant for providing services as set out in the regulations. Given that section 93(6) prohibits a public body from charging more than the actual costs for providing services, it follows that an estimate within the terms of section 93(3) is an estimate of the Public Body's actual costs for processing an access request.

Is the time estimated for preparing records reasonable?

[para 11] As set out above, the Public Body estimated that it would spend 5.5 hours "retrieving and preparing" the records, and calculated that the cost to the Applicant per quarter hour for doing so would be \$6.75. The Public Body anticipated that there would be 134 records, for which the Applicant would be charged 25 cents per record in photocopying costs. The Public Body estimated the costs at \$182.00 in total.

[para 12] Schedule 2 of the Regulation sets out the maximum fees a public body may charge for providing services to an applicant. Schedule 2 includes fees for "preparing and handling" records.

[para 13] In Order 99-011, the former Commissioner decided that it would be reasonable to estimate 2 minutes per page for severing as part of the fees for preparing records for disclosure. He said:

Schedule 2 of the Regulation allows a public body to charge a maximum of \$6.75 per ¼ hour for preparing and handling a record for disclosure (\$27.00 per hour). The Public Body said that it took 50 hours to prepare and handle the 5000 pages of records for disclosure, at a total cost of \$1,350.00. Although the Public Body was not able to provide me with a breakdown of only the cost of preparing and handling the records for viewing, that cost would have included physically deleting text in preparing records for viewing and the cost of reconstructing the file after viewing had occurred.

The Bulletin sets out some criteria for a public body to follow in determining those two costs: (i) two minutes per page is a reasonable time for severing records where only a few severances per page are being made, and (ii) an estimated processing time of four feet of records in a 7.25 hour day is a reasonable starting point where about a third of the records have to be replaced. These criteria seem reasonable, and I intend to follow them in this case.

Of the 219 pages of records the Applicant viewed, only 161 of those pages required severing. At two minutes per page for severing, the severing would have required 322 minutes or 5.37 hours, which I have rounded to 5.5 hours. At \$6.75 per ¼ hour (\$27.00 per hour), the cost to sever the 161 pages for viewing would be \$148.50.

The 219 pages of records are about 1.5 inches of records. If processing time is four feet of records (48 inches) in a 7.25-hour day, then I calculate the time to replace the 219 pages in this case, as follows:

$$1.5/48 \times 100 = 3.125\% \times 7.25 \text{ hours} = .23 \text{ hours (rounded to } \frac{1}{4} \text{ hour)}$$

At \$6.75 per ¼ hour, the cost to replace the records viewed would be \$6.75.

Therefore, the total cost of preparing and handling the records for disclosure would be \$155.25, consisting of \$148.50 to sever 161 pages for viewing and \$6.75 to replace the 219 pages viewed.

[para 14] As discussed in my letter to the Public Body, cited above, the bulletin to which the Commissioner referred in Order 99-011 was based on policy created by the Ontario Information and Privacy Commissioner's office. As Ontario's legislation regarding fees has significant differences to Alberta's, it is not clear to me that it is useful in interpreting Alberta's fee calculation provisions.

[para 15] The former Commissioner did not address what is now section 11(6) of the Regulation in Order 99-011, or provide detailed reasons for deciding that physically removing information from records would reasonably be expected to take two minutes per page in situations where minimal severing is required. The method of severing that was under consideration in Order 99-011 is unclear. In addition, the former Commissioner did not explain what was meant by "minimal severing". Consequently, I am not satisfied that Order 99-011 can be interpreted as establishing that it is always reasonable to estimate two minutes per page for removing information from records. Moreover, I am not satisfied that the calculations in that order serve as an accurate or reasonable guideline for estimating fees for severing information from records.

[para 16] As discussed above, section 11(6) of the Regulation prohibits a public body from charging fees for reviewing records. It states:

11(6) A fee may not be charged for the time spent in reviewing a record.

[para 17] I note that Service Alberta's *FOIP Guidelines and Practices 2009* (the manual) states the following on page 74:

No fee may be assessed for time spent in reviewing a record to determine whether or not all or part of it should be disclosed.

The manual reflects the view that fees may not be charged (or estimated) for the time spent reviewing records for the purpose of making decisions about severing information from records. Although the manual is not binding on me, I agree with its interpretation of section 11(6) of the Regulation. The word “review” can mean “to examine or assess with a view to making changes where appropriate”. As a result, “reviewing” a record under section 11(6) of the Regulation likely refers to the process of examining or assessing records with a view to making changes to them as appropriate, such as when a public body decides to sever information from the records.

[para 18] In Order F2010-036, I said:

In my view, section 11(6) likely reflects a concern that reviewing records may take significantly more or less time depending on the nature of the access request, the nature of the records, and the identity of the reviewer. Some records may take more time to review, while some reviewers may take longer to review records than others. As including time spent reviewing records could vary dramatically between reviewers, and potentially be viewed as arbitrary, it may be that cabinet decided to preclude public bodies from charging fees for reviewing records for that reason.

The Policy Manual distinguishes the time spent making decisions about severing from the act of severing itself. In my view, deciding what to sever from a record, by reading the record to assess its contents, cannot be meaningful separated from the process of reviewing records. In order to sever information from a record, one must review the information it contains to determine whether what is being severed is consistent with the decision to sever. This in itself is reviewing, as set out in section 11(6) of the Regulation.

Although the Public Body has not explained what contributed to the need to take 21 hours to prepare records for disclosure, I infer that it likely included time spent reviewing records in order to determine what to sever from them in the total. I draw this inference, as the actual time needed to remove records and to redact names, as was done in this case, and to handle the records prior to shipping them to the Applicant, would reasonably be expected to take significantly less time than 21 hours. As a result, it appears that the Public Body included the time spent reviewing records to decide what to redact from them, when it calculated the fees for preparing and handling the records.

In my view, the time spent redacting information from the records, if one does not count the time spent reviewing the information in the records, would be reasonably expected to take significantly less time than 21 hours. In addition, the Public Body has not explained what activities were included in preparing and handling records, or how the time was distributed for these activities. I am therefore unable to confirm the fees charged by the Public Body.

[para 19] In that case, I found that the time spent severing information from the records could not have taken 21 hours unless time spent reviewing records had also been included in the calculation. I ordered the public body to recalculate the fees charged for preparing and handling records by excluding the time spent reviewing records. Essentially, I found that reviewing records includes reading records in order to assess their contents and decide what to sever. However, I did not disallow the time charged for redacting information or removing records as costs for preparing and handling records.

[para 20] In the case before me, I am reviewing a fee estimate for processing the Applicant’s access request of May 31, 2010 with its subsequent revisions, rather than the

fees that were actually charged by the Public Body. The question I must answer is whether the Public Body's estimate is a reasonable estimate of what its actual costs for processing the Applicant's access request will be.

[para 21] The Public Body clarified that its estimate of the time that will be spent severing information from records is based on the former Commissioner's remarks in Order 99-011 and the Bulletin. As discussed above, in that case, the former Commissioner considered it reasonable to estimate the time spent severing information from records in that case as two minutes per page at a rate of \$6.75 per quarter hour.

[para 22] The Public Body provided a copy of FOIP Bulletin Number 1 (the Bulletin) to support its arguments that its fee estimate is reasonable. This Bulletin indicates that the following services are involved in preparing and handling a record for disclosure:

Severing the portions of the record that are excepted from disclosure, by, for example,

- Applying removable white tape to cover the excepted portions of the record;
- Selecting portions of the record to be severed using redaction software
- Marking up the text for automatic deletion by a photocopier with severing features; and
- Inserting the section of the Act applied and, if necessary, "best available copy".

Severing, within the terms of the Bulletin, is the physical act of removing information from a record and writing the section of the Act applied. It does not involve reading the information or deciding what to sever or considering what provision of the Act is applicable.

[para 23] The Bulletin also states:

The Ontario Information and Privacy Commissioner established two minutes per page as a reasonable time for severing records where only a few severances per page are being made. The Alberta Information and Privacy Commissioner endorsed this guideline as a reasonable estimate for the time involved in severing.

...

To obtain a reasonable estimate of the costs associated with preparing and handling a record for disclosure, the public body may need to examine a representative sample of the records. The percentage of pages requiring severing in the sample would be used to estimate the total number of pages that may require severing. The "two minutes per page" guideline would be applied to estimate the cost of preparing and handling a record for disclosure.

[para 24] In my view, the Bulletin fails to address why it could reasonably be expected to take 2 minutes per page to remove information using any of the methods it describes. Instead, it refers to Order 99-011 and the Ontario Office of the Information and Privacy Commissioner as authority for this proposition. However, Order 99-011 does not discuss the methods for severing referred to in the Bulletin or establish that removing information from records can, in all cases, be reasonably expected to take two minutes per record.

[para 25] In Order MO-1421, an adjudicator with the Office of the Ontario Information Privacy Commissioner explained the “two minute rule” in the following way:

Although this amount of time [two minutes per page] has generally been recognized as the appropriate standard in most cases, the circumstances of each case must be considered in determining whether it is appropriate in any given situation. The amount of time required to sever a page of a record is generally based on a variety of considerations, such as *the nature of the record, the amount of information on the page, and the nature and amount of information to be severed, for example whole paragraphs as opposed to many interspersed words.* [my emphasis]

This passage indicates that two minutes per page for severing should not be charged if the circumstances do not warrant it. In this, Ontario’s legislative scheme is similar to Alberta’s. However, Order MO-1421 also indicates that reviewing the amount of information a record contains is a factor calculated into the rate of two minutes per page, given that the amount of text on a page, its location and its nature, and not merely the amount that will be severed, are included considerations. As section 11(6) of Alberta’s Regulation prohibits a public body from charging fees for reviewing records and the “two minute rule” incorporates time spent reviewing records, I find that it is an improper method for calculating time spent severing records under Alberta’s legislation.

[para 26] In response to the Applicant’s argument that severing could reasonably be expected to take seconds per page, rather than 2 minutes per page, the Public Body states:

The Applicant suggests that the severing required was minimal and should only take seconds per page. We submit that as the request became more defined, the Public Body began processing the request and became more aware of the cost to process and sever. In the case of bank statements, it was discovered ... as the request was processed that the bank statements contained sensitive personal financial and personal information that was exempt from disclosure and necessary to sever under the FOIP Act. In addition, we note that the Public Body’s estimate is consistent with the OIPC’s endorsement of a severance guideline of 2 minutes per page where only a few severances per page are being made.

[para 27] The Public Body has not provided for this inquiry an example of the severing it intends to do to support its argument that the time spent physically removing text from responsive records could reasonably be expected to take two minutes per page.

[para 28] However, the Applicant provided, as exhibits, records that the Public Body apparently provided in response to another access request made by another requestor. While I agree with the Public Body that these records do not establish how much severing the Public Body is likely to do in this case, I note that the Public Body’s submissions do not establish this amount either. However, in its submissions, the Public Body indicates that “only a few severances” per page, or “minimal severing,” will be necessary. I find that exhibits submitted by the Applicant are on point to the extent that they indicate the Public Body’s method for removing information from records and are an example of records where only “a few severances” were required.

[para 29] The Applicant's exhibits indicate that the Public Body does not use any of the methods of severing described in the Bulletin above, or in Order 99-011, but draws a line with a black felt marker through information it seeks to withhold. In addition, the Public Body does not detail the section of the Act being applied on each record. That is not to say that this is not an appropriate method of severing; however, it would not necessarily be expected to consume the same amount of time as the activities described in the Bulletin. Moreover, I am also not satisfied that any of the severing methods referred to in the Bulletin could reasonably be expected to take two minutes per record where only "minimal severing" is required, in the absence of any evidence to that effect.

[para 30] Having reviewed the records submitted by the Applicant and which contain severing done by the Public Body, I am satisfied that a generous estimate for the time that would be spent removing information from them with a felt pen would be a total of 5 seconds per record, and not 120 seconds per record.

[para 31] The Public Body argues that the fees it estimated for preparing and handling the records are reasonable as they follow the "two minute guideline", referred to in the Bulletin. In answer to my question as to why it considered the fees estimated for preparing and handling records were reasonable, it states:

In addition, the Public Body emphasizes that the guideline is only a guideline and that the fee estimate is only a calculated guess at what it might cost to respond to an applicant's request; it is not the actual cost of processing the request. This was recognized by the OIPC in Order F2010-005. Given this, the Public Body need only prove that the cost estimate provided to the Applicant is reasonable. The OIPC has recognized that 2 minutes per page to sever a document with some redactions is reasonable in helping to determine the amount of time it may require to prepare a document for disclosure. The records in question contained some personal information of third parties and financial information of the Public Body that would require severing. As such, it is submitted that the Public Body's reliance on this 2 minute guideline was reasonable in estimating the cost of the Applicant's request.

[para 32] I agree with the Public Body that fee estimates, are, at best, a calculated guess as to what the fees for processing an access request are likely to be. I also agree with the Public Body that it has the burden of proving that the cost estimate it provided to an Applicant reasonably reflects what the costs are likely to be. However, I do not agree that it is reasonable to estimate that it will take 2 minutes per page at a rate of \$6.75 per quarter hour to remove some personal and financial information from each record, in the absence of evidence that it would be reasonably likely for an employee of the Public Body to take that amount of time to do so.

[para 33] In order to determine what activities it had included in its estimate of the time it would spend preparing records, I asked the Public Body whether it had factored in the time spent reviewing records as part of the time spent preparing the records. I also asked it what kinds of activities it had included in the estimate of its costs for preparing the records. As discussed above, the Public Body did not explain what activities would be involved, or provide examples of the proposed severing, but stated the position that applying the guideline of two minutes per page for severing time is reasonable.

[para 34] The Public Body relies solely on the “two minute rule” set out in the Bulletin and referred to in Order 99-011. I have already rejected that approach to estimating the fees for severing as it has the effect of including the time spent reviewing records.

[para 35] The best evidence available to me for this inquiry regarding the Public Body’s severing methods and severing time are the exhibits provided by the Applicant. These exhibits suggest that it would take approximately five seconds at most per record to sever the information described by the Public Body, using its severing method. I do not accept that it is reasonable to estimate two minutes per page to complete this kind of severing by relying on a bulletin or previous order of this office that is not clearly on point. If a public body estimates its severing time at two minutes per page, even if its severing time may reasonably be estimated as likely to take five seconds per page, the result would be that fewer applicants could afford to make access requests and applicants might also be deterred by the estimated costs from exercising the right of access. Moreover, a public body would not be estimating its costs by doing so, but arriving at a figure that has no relationship to the costs of providing services to an applicant.

[para 36] In my view, a better approach to estimating the actual costs of severing in this case would be to take a page the Public Body considers to be reflective of the average amount of information it will sever, and to time how long it takes to draw a felt pen through each piece of information the Public Body has already decided to sever. The Public Body would then add up the time taken to sever each piece of information and use that sample to estimate the fees for severing all the records.

[para 37] For the reasons above, I find that the Public Body’s estimate of the time it will spend severing information from the records is not reasonable. I will therefore order it to recalculate the time, and therefore the fees, it has estimated for preparing the records.

Do the charges estimated by the Public Body reflect actual costs?

[para 38] I turn now to the rates the Public Body has estimated it will charge for processing the Applicant’s access request. The Public Body explains its selection of the rate of \$6.75 per quarter hour for searching, locating, retrieving and preparing records in the following way:

A public body may charge the maximum amounts for services as set out in Schedule 2 of the FOIP Regulation, including (1) \$6.75 per ¼ hour for searching for, locating, and retrieving a record, (2) \$6.75 per ¼ hour for preparing and handling a record for disclosure and (3) \$0.25 per page for producing a black and white 8 ½ x 14” paper copy of a record.

[para 39] As cited above, the former Commissioner stated the following in Order 99-011:

Schedule 2 of the Regulation allows a public body to charge a maximum of \$6.75 per ¼ hour for preparing and handling a record for disclosure (\$27.00 per hour).

In my view, the above is not an entirely accurate statement of the manner in which the FOIP Act permits a public body to assess fees for providing services, as it does not take into account the prohibition against charging fees in excess of actual costs set out in section 93(6) of the FOIP Act. Clearly, Schedule 2 of the Regulation contains maximum amounts that may be charged. However, the maximum amount under the Regulation cannot be charged for a service unless a public body incurs the maximum amount as an actual cost in providing that service. In the case of an estimate, the maximum amount cannot be charged unless a public body anticipates that it will likely incur costs reflecting the maximum amount. If a public body incurs a lesser cost than the maximum in processing an access request, that amount may be charged, but the maximum cannot be. Moreover, if a public body does not incur costs in providing a service, then it may not charge costs for providing that service.

[para 40] This point is made in Order F09-05, a decision of the British Columbia Office of the Information and Privacy Commissioner. As in Alberta, British Columbia's freedom of information legislation contains provisions that require public bodies not to charge fees that exceed the actual costs of providing services to an applicant. The Adjudicator in that case said:

Having determined that FCT was a "commercial applicant", the Law Society had then to charge FCT the "actual cost" of providing services. It could have charged less than the "actual cost", but it could not charge more. The Law Society must, using appropriate factors, calculate the "actual cost" of making paper copies for disclosure to FCT.

The Adjudicator required the Law Society of British Columbia to calculate the fees based on actual costs, including actual photocopying costs.

[para 41] The Adjudicator also rejected the argument of the Law Society that it was not possible to calculate the actual cost of making paper copies of records. She said:

I do not find persuasive the Law Society's reasons for not calculating the "actual cost" of the paper copies it made. The costs of paper, toner and other items may indeed have fluctuated during the processing of this request (although the Law Society provided no evidence of this). I fail to see however why it would not be feasible for the Law Society, as part of its general request-processing responsibilities under FIPPA, to calculate the "actual cost" of making paper copies for use in its requests involving "commercial applicants". I also note that the Law Society provided no evidence to show whether or not the 25¢ per page copying fee it charged was more than the "actual cost" of providing copies of the records to FCT.

In her view, a public body's actual costs for photocopying could be calculated based on the costs of paper, toner, and any other items involved in photocopying the applicant's request.

[para 42] I acknowledge that previous orders of this office, other than Order F2010-036, do not address the requirements of section 93(6) and appear to interpret the Regulation as authorizing public bodies to charge maximum amounts for services, regardless of the actual cost of providing the service. As discussed above, Order 99-011 is an example of such an order.

[para 43] The Regulation is ancillary legislation and cannot have the effect of amending a provision of the FOIP Act, unless the authority to do so is contained in the FOIP Act. However, section 94(1)(o) of the FOIP Act limits the Lieutenant Governor in Council's regulation making authority to making regulations "respecting fees to be paid *under this Act* and providing for circumstances when fees may be waived in whole or in part." That the fees to be paid are those "under this Act" indicates that the legislature intended that the regulations respecting fees conform to the requirements of section 93 of the FOIP Act, rather than amend or negate those requirements.

[para 44] The FOIP Act does not define "actual costs" and, for that reason, it is not entirely clear what considerations a public body is to include in its calculation of actual costs. The Regulation establishes only maximum amounts that may be *charged* for performing specific services. That this is so is evident from the opening words of Schedule 2, which state that "the amounts of the fees set out in this Schedule are the maximum amounts that can be charged." Therefore, the figures in Schedule 2 are not in themselves "reasonable" estimates of actual costs, but maximum amounts that may be charged.

[para 45] In my view, using the maximums to arrive at an estimate of the costs of processing an access request, rather than amounts that the public body believes will approximate its actual costs, is unreasonable. I say this because this practice takes into account an irrelevant consideration, i.e. the statutory maximum that may be charged, and ignores relevant ones, i.e. a public body's costs.

[para 46] In situations in which the maximums are used as estimates, if the actual costs turn out to be significantly lower than the maximums, this discrepancy could have the effect of dissuading an applicant from going ahead with the access request, even though the applicant would have proceeded had the estimates calculated the approximate actual cost. Such a result would be contrary to the purpose of the legislature in enacting the FOIP Act, and contrary to the clear intent of section 93(6).

[para 47] In the case before me, the Public Body has stated that it will cost 25 cents per page to provide photocopies of the records requested by the Applicant, but the genesis of that number is simply the fact that this number is set out as a maximum in Schedule 2. The Public Body has not established in this case that it is reasonable to estimate its actual costs for photocopying to be 25 cents per page, as it has not provided any evidence of its usual costs for photocopying. Rather, from its submissions, I understand it to rely on the view that a public body may charge or estimate the maximums set out in Schedule 2 regardless of the actual costs incurred, or that it expects to incur.

[para 48] In my experience, and as discussed in British Columbia Order F09-05, a rate of 25 cents per page for photocopying is consistent with a commercial rate for photocopying, and may not necessarily reflect the actual cost of making photocopies, given that commercial rates are often calculated so that the service provider may make a

profit. However, section 93(6) precludes public bodies from making a profit when they provide services.

[para 49] A reasonable approach to estimating a public body's actual photocopying costs for processing an access request would be to use an amount per page reflective of the cost per page for making photocopies that the Public Body usually incurs, on average, regardless of whether the photocopying is being done in response to an access request. This amount would include consideration of such things as the costs of paper and toner to the Public Body, and any other things that the Public Body usually incorporates into its approximation of its per page photocopying costs when it is budgeting these costs. That approximate cost per page would then be multiplied by the number of records the Public Body anticipates photocopying to satisfy the access request. It may be that this rate will prove to be 25 cents per page; however, that cannot be established in the absence of evidence as to how the Public Body arrived at its estimate of costs.

[para 50] Schedule 2 authorizes a Public Body to charge up to a maximum of \$6.75 per quarter hour for both "searching for, locating and retrieving a record" and "preparing and handling a record." The Public Body has selected the rate of \$6.75 per quarter hour, or \$27.00 per hour, for the time it estimates it will spend conducting these activities. The Public Body's arguments indicate that it selected this rate on the basis that it is the maximum that may be charged. It may be that this rate accurately reflects the actual costs the Public Body will incur for processing the Applicant's access request. However, that cannot be established until the Public Body provides evidence and explanation as to why it anticipates incurring costs at this rate in processing the Applicant's access request. Evidence would include the rates paid to employees to search for, locate, and retrieve records, and for preparing and handling records, and the activities involved. A Public Body must also explain how these rates reflect the Public Body's actual costs for providing the service.

[para 51] In saying this, I do not mean that a public body must conduct a detailed analysis of each and every factor contributing to its actual costs every time it estimates fees. Rather, it is sufficient for a public body to approximate actual costs such as photocopying and the rates of employee time, once, and then incorporate these amounts into subsequent fee estimates. Provided that a public body can demonstrate with evidence or explanation that these approximations are reasonable, the fee estimate relying on them will likely also be found to be reasonable.

[para 52] In summary, I am unable to confirm that the rates the Public Body has chosen to charge for "searching for, locating or retrieving" records and "preparing and handling records" are reasonable, in the absence of evidence that these rates are likely to reflect actual costs of providing these services. In addition, I am unable to confirm that 25 cents per page is a reasonable estimate of its actual cost per page for photocopying. I will therefore order the Public Body to recalculate these costs by estimating the actual costs for providing these services.

IV. ORDER

[para 53] I make this Order under section 72 of the Act.

[para 54] I order the Public Body to recalculate the time spent severing information by selecting a sample record the Public Body considers reflective of the average amount of severing required, and to measure the time it takes to draw a line with a felt pen through each piece of information the Public Body intends to sever. The Public Body may then add up the time taken for each instance of severing on that page and multiply that figure by the number of records to estimate the total costs for severing.

[para 55] I order the Public Body to recalculate the fees for photocopying by using an amount reflective of its usual photocopying costs and multiplying that amount by the number of records it estimates are responsive to the access request.

[para 56] I order the Public Body to recalculate the rate for “searching for, locating or retrieving” records and “preparing and handling” records by selecting an amount that will reflect the actual costs that the Public Body is likely to incur in conducting these activities.

[para 57] I order the Public Body to provide a new estimate to the Applicant of the total fees based on the foregoing.

[para 58] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator