ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2019-18

May 13, 2019

REGIONAL MUNICIPALITY OF WOOD BUFFALO

Case File Number 002285

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Regional Municipality of Wood Buffalo (the Public Body) for records "held by Human Resources about [him] from May 13, 2012 to present, including communications with WCB and various departments involved in the accommodation process". The Public Body provided the Applicant with a fee estimate for the photocopying involved. The Applicant paid the fee and received records but believes that the Public Body did not adequately search for responsive records.

The Applicant requested a review of the Public Body's fees and response to his access request. After the review, the Applicant requested an inquiry, which the Commissioner agreed to hold.

The Adjudicator found that the Public Body ultimately performed an adequate search, with the exception of the search performed by an employee identified by the Applicant as possibly having records. That employee is no longer with the Public Body so the Adjudicator ordered the Public Body to search relevant types of records and/or areas where that employee may have maintained responsive records.

The Adjudicator found that the Public Body failed to substantiate that the $0.25 per page for photocopying that it charged to the Applicant did not exceed the Public Body's actual costs, as required by the Act. The Adjudicator therefore ordered a refund of some of the fees.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 72, 93, 95, Freedom of Information and Protection of Privacy Regulation, Alberta Regulation 186/2008, Schedule 2.

Authorities Cited: AB Investigation Report F2019-IR-01, Orders 97-006, F2007-029, F2010-036, F2011-015, F2012-16, F2013-10, F2013-27, F2013-54, F2014-05, P2012-09, **BC**: F09-05

Cases Cited: *Alberta (Information and Privacy Commissioner) v. Alberta (Freedom of information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36

Other Sources Cited: FOIP Guidelines and Practices Manual (2009)

I. BACKGROUND

[para 1] The Applicant made an access request to the Regional Municipality of Wood Buffalo (the Public Body) for records "held by Human Resources about [him] from May 13, 2012 to present, including communications with WCB and various departments involved in the accommodation process". The Public Body provided the Applicant with a fee estimate for the photocopying involved. The Applicant paid the fee and received records but believes that the Public Body did not adequately search for responsive records.

[para 2] The Applicant requested a review of the fees charged by the Public Body, as well as a review of the adequacy of the search. The Commissioner agreed to hold the inquiry.

II. RECORDS AT ISSUE

[para 3] As the issue relates to a fees and the duty to assist, there are no records at issue.

III. ISSUES

[para 4] The issues in this inquiry, as set out in the Notice of Inquiry, dated July 24, 2018, are:

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

2. Did the Public Body properly estimate the fees for services?

IV. DISCUSSION OF ISSUES

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 5] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 6] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 7] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> In general, evidence as to the adequacy of a search should cover the following points:
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> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 8] The Applicant states that he has emails that were sent to his personal email account (presumably from the Public Body) that were not provided to him in response to his access request. He believes other emails may have been deleted and would only be located by searching the offsite server. The Applicant is particularly interested in emails that would be found in a particular Public Body employee's email account (CB).

[para 9] In his rebuttal submission, the Applicant alleges that CB "openly admitted" to having deleted responsive emails. The search summary filled out by CB (provided by the Public Body) states that some emails may have been deleted prior to the request being received. It is not unusual for transitory emails to be deleted; indeed, an extraordinary amount of storage would be required if emails could never be deleted. (See OIPC Investigation Report F2019-IR-01 concerning allegedly improper deletion of Government of Alberta emails, and OIPC publication "Guidelines for Managing Emails"[1]).

[para 10] The Applicant also believes that not all Public Body employees searched for responsive documents or notes.

[para 11] With its submission, the Public Body provided copies of 'search summaries' filled out by each employee who searched for responsive records. These summaries include a list of areas or types of records searched to be checked off (not all will be relevant in every case) as well as a space for the employee to describe the search terms used. Some summaries were filled

[1] https://www.oipc.ab.ca/media/993375/Guide_Managing_Email_Mar2019.pdf

out in great detail and some were not. For example, the HR Director checked off only "email" for location or types of records searched. In contrast, a manager in the HR area searched email, electronic documents (Word etc.), paper files, handwritten notes, network drives, hard drives, file cabinets and desks. In all, the Public Body provided me with search summaries of 17 employees.

[para 12] The Applicant states that "not everyone that was involved has searched for relevant documents or meeting notes" (request for inquiry attachment). In his rebuttal submission he named two employees (DC and TH) who he states took notes during meetings with him. TH's search summary indicates they searched only their email. DC's summary indicates they searched email, electronic documents and paper files. Neither indicates they searched handwritten notes. There may be a reason for this (perhaps they transcribe all handwritten notes to electronic documents and discard the notes) but no such reason was recorded on the summaries or otherwise offered to me. The Public Body states (initial submission at page 2):

> Though some of the search summaries are blank or vague it's clear that for the most part staff conducted keyword searches (on the applicant's name) in their email and electronic repositories and copies were made of his hardcopy "personnel" file and hardcopy medical files. As the applicant was a current employee at the time of the request, there was no need to search offsite records storage as only terminated/retired employee files are stored offsite.
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> …
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> After release, the applicant requested a review of the search adequacy and the Commissioner's Office in its letter of findings, determined that one HR staff member [CB], had not documented that she performed the search so the Commissioner's office recommended that another search of her email account was performed. This additional search was performed by her and the completed search tracking form is attached (Attachment D). As a result of the search, an additional 13 pages of records from [CB]'s email account and an additional 24 pages of records that came from a grievance file were found and were sent directly to the applicant in November 16 2016…

[para 13] In its rebuttal submission, the Public Body further states:

> All staff completed a thorough search but may not have checked off all boxes in the search and retrieval forms. The search form checklist is meant as a guide/reminder for staff to search all records for all record formats and in all locations. I believe the issue is more a matter of lack of guidelines/policy from the Commissioner's Office and AB Government on what standard of "search proof" is necessary.
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> If the Commissioner's Office does indeed make an Order solely based on how staff are completing a public body's internal "search form", the Municipality requests that the Commissioner's Office issue a standard "search documentation proof form" for all public bodies to use in the future that will satisfy Commissioner's reviews/inquiries.

[para 14] Regarding the Public Body's last request, the FOIP Guidelines and Practices Manual published by Service Alberta states:

> A public body must be prepared to support claims for the adequacy of a search with evidence as to how the public body conducted its search in the particular circumstances (IPC Orders 98-003 and

2000-030). In IPC Order [F2007-029], the Commissioner stated that evidence as to the adequacy of a search should cover the following:

- the specific steps taken by the public body to identify and locate responsive records,
- the scope of the search conducted (e.g. physical sites, program areas, specific databases, off-site storage areas),
- the steps taken to identify and locate all possible repositories of relevant records (e.g. keyword searches, records retention and disposition schedules),
- who did the search, and
- why the public body believes no more responsive records exist than what has been found or produced.

[para 15] The list above was copied from past Orders of this Office and is the same list of circumstances that continues to be used by this Office and was reproduced in the Notice of Inquiry for this inquiry. It is up to each public body to best determine how to provide this evidence in the event of an inquiry into the search performed. The search summaries used by the Public Body appear to be a good starting point. However, if the employees tasked with conducting the searches do not adequately fill out forms, *any* form would be inadequate, whether the form was created by the Public Body, this Office or the Government of Alberta.

[para 16] Further, it is not necessary to provide individual search forms if the public body can otherwise meet its burden to show that it conducted an adequate search for records.

[para 17] Regarding the search conducted by particular Public Body employees, it may be that they performed an adequate search for records. However, in an inquiry, the Public Body must also be able to *show* that it performed an adequate search. In this case, some of the search summaries indicate minimal searches by some employees who the Applicant identifies as those who may have additional records. The Public Body alleges that the searches were thorough, and that only the forms were improperly filled out by those employees. That may be true, but I cannot make a finding that a search was adequate if the only evidence put before me indicates otherwise.

[para 18] In its February 1, 2019 response to questions, the Public Body further states that DC states that she in fact searched her note books and electronic files. Regarding TH, the Public Body states that she left the Public Body, and so the Public Body can only contend that TH "used the checklist as a guide to perform her search."

[para 19] Of the employees named by the Applicant, I accept that DC conducted an adequate search for records. This is based on the search summary filled out by DC, and the Public Body's submission that DC states she searched her notes and electronic files.

[para 20] Given the submissions and evidence provided by the Public Body, the evidence indicates inadequate searches performed by TH. That individual cannot conduct another search as they are no longer with the Public Body. However, that individual may have created responsive records that were left with the Public Body (as they would relate to the Public Body's functions). I will order the Public Body to conduct a search of relevant types of records and/or areas where TH may have maintained responsive records, to the extent possible. Presumably

TH's email account cannot be searched but hard drives can be, if they were not wiped, as can network drives, and electronic documents that TH may have created. This is not an exhaustive list. I will order the Public Body to inform the Applicant of the steps taken to perform this further search. If the Public Body determines that all relevant records of TH have already been searched and that there are no additional areas to search, the Public Body is to provide an explanation of that determination to the Applicant (for example, if all official records created by TH were encompassed in previous searches and no unofficial or transitory records of TH remain in the custody or control of the Public Body).

[para 21] Regarding CB, the Applicant argues that her search was not adequate to begin with. The Public Body asked CB to conduct a search as a result of the investigation by this Office that preceded this inquiry. Further records were found and provided to the Applicant. The Applicant's arguments regarding CB's search relate to emails he believes were deleted. I will deal with that issue below. Aside from the emails, the Applicant has not indicated that CB ought to have located other records. Based on the information in the Public Body's submission about CB's search, I have no reason to expect that it was inadequate.

Deleted emails

[para 22] CB noted in the search summary that emails may have been deleted before the Applicant's request was made. The Applicant argues that the Public Body should search for deleted emails.

[para 23] The Public Body states that its email server retains two years of deleted items before they are permanently deleted. As the Applicant's request relates to records more than two years old, the email server will no longer have responsive deleted emails and the Public Body cannot search for them.

[para 24] The Public Body also explained that it has a "point in time" backup of each email account but that these backups do not contain deleted emails (which are permanently deleted after two years).

[para 25] I accept the explanations provided by the Public Body, that any deleted emails responsive to the Applicant's request have been permanently deleted such that they cannot be searched.

Inclusion of records the Applicant states are non-responsive

[para 26] In his request for review, the Applicant alleged that the Public Body included a 209-page PowerPoint presentation (at $0.25 per page) "out of spite" (presumably as he had to pay for a copy of it). The Applicant states that this presentation is from a course he attended and was not related to his access request.

[para 27] The Public Body states (February 1, 109 submission at page 7):

> The records at issue are attached and though the email does not appear to be addressed to

> [the Applicant], the Human Resources department submitted these records as [the Applicant]was a participant in the "Stress Mgmt and Conflict Resolution Workshop". The record is an email from [a Public Body employee] who is part of the Learning Branch of the Human Resources Department, thus this email (and all attachments) was a record in the custody of control of the Human Resources Department. As the record dealt with an educational course given to [the Applicant], the record forms part of his "educational history" and thus is defined as personal information of [the Applicant] according to section 1 (n)(vii) of the FOIP Act.
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> [The Applicant]'s wording was for "All records held by Human Resources about [the Applicant]from May 13, 2012 to present, including communication with WCB and various departments involved in accommodation process."

[para 28] A public body's duty to assist includes clarifying the scope of the Applicant's request. Past Orders of this Office have found that a public body will fail to meet this duty to assist if it unilaterally narrows the scope of an Applicant's request. In Order F2014-05, I noted the tension between requiring an applicant to pay for records they did not seek and unduly narrowing the applicant's request. I said (at para. 42):

> However, if the Public Body is in doubt as to what records the Applicant is seeking by reference to these meeting minutes, I recommend that the Public Body clarify this point with the Applicant. The Applicant should not be required to pay for four hours of search time at $27 per hour for records he did not request. That said, I do not think that the Public Body necessarily erred by not interpreting the request narrowly (which would have resulted in the Public Body telling the Applicant that responsive records do not exist). I agree with the adjudicator in Order F2012-09, when she stated:
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> > If a public body interprets a request for records too restrictively, or wrongly, the public body runs the risk of unilaterally narrowing the scope of the access request and failing in its duty to assist the Applicant, by failing to search for records falling within the scope of the access request. (at paragraph 53)

[para 29] In this case, the Applicant is arguing that the Public Body provided him with records that were not responsive to his request. He states that this inclusion of unresponsive records was punitive insofar as he had to pay for those records. Specifically, the Applicant points to a 209-page PowerPoint presentation that was printed and provided to him. At $0.25 per page, the cost of that presentation is $51.50.

[para 30] On one hand, public bodies have been instructed to avoid narrowing the scope of an access request without confirming the request with the applicant. I do not want to make a finding against a public body for interpreting an access request broadly if the public body's understanding of the request was reasonable. In other words, if it was reasonable to conclude that the PowerPoint presentation was responsive to the Applicant's request, the Public Body may have been correct to include it (even if the Applicant didn't in fact want it).

[para 31] That said, the duty to assist includes clarifying the access request with the Applicant – misunderstandings can be avoided with good communication between the applicant and public body. In this case, the Public Body sent the Applicant a fee estimate on October 29, 2015, which listed the categories of records located. The Public Body states that this fee estimate letter

provided the Applicant with options to reduce the fee "such as reducing date range or eliminating records categories as outlined in the fee estimate letter" (Public Body rebuttal submission, at page 3). The categories of records listed in that letter are:

- Personnel File (68 pages)
- Medical – WCB Chart (501 pages)
- Correspondence – Part 2 (2014 and Prior) (541 pages); and
- Correspondence – Part 1 (2015) (1014 pages)

[para 32] Nothing in those descriptions could reasonably have alerted the Applicant that 209 pages of the records were comprised of a PowerPoint presentation from a course he attended as part of his job duties. Clearly the PowerPoint is not medical, nor does it appear to be 'correspondence'. The closest descriptor is "personnel file"; however, while it might be reasonable to expect to find a record of the fact that the Applicant attended the course, it is not apparent that the materials from any course attended while an employee would be maintained in that file. Further, as the "personnel file" category includes only 68 pages, it appears that the PowerPoint presentation was not part of that category. In my view, the Public Body missed an opportunity to describe the records and narrow the Applicant's request by failing to notify the Applicant that some of the responsive records include course materials related to his job duties.

[para 33] After the fee estimate, the Public Body and Applicant exchanged numerous emails regarding the timing of the Public Body's response. I do not see any indication that the Public Body attempted to clarify the Applicant's request.

[para 34] The Public Body provided the Applicant with responsive records, with an accompanying letter dated December 1, 2015. In that letter, the Public Body described the responsive records as:

- Personnel File (The official HR personnel file of [the Applicant])
- Medical-WCB Chart (The medical case file of [the Applicant])
- Correspondence Part 1 (2015 correspondence about [the Applicant])
- Correspondence Part 2 (Dec 2014 and prior correspondence about [the Applicant])
- A folder containing voice messages (electronic only on USB Drive, no hardcopy exists)

[para 35] Again, a PowerPoint presentation of a course attended by the Applicant as part of his job duties does not appear to fall into any of these categories.

[para 36] The duty to clarify a request does not create a standard of perfection; it is not fair to make a finding based only on hindsight rather than what was reasonable at the time. There may be many reasons for a miscommunication between a public body and applicant regarding the scope of a request. For example:

- the public body may not be uncertain about the scope of a request such that it does not seem necessary to clarify the scope with the applicant,
- the applicant may be uncertain about what records they are seeking, especially if they are not clear what records exist,

- the communication between the applicant and public body may be difficult for various reasons, such that the public body's reasonable attempts to clarify a request have failed.

[para 37] Based on the Public Body's submissions, the relevant circumstance in this case appears to be that the Public Body believed the PowerPoint presentation was responsive. The question is whether this determination was reasonable such that the Public Body did not have a duty to ask the Applicant. In my view, the answer is no.

[para 38] The Public Body states that because the course was educational, it is part of the Applicant's educational history and therefore is his personal information. The fact that the Applicant took this course may be his personal information. The fact that the Applicant took this course may be noted in his personnel file. But the course materials are not the Applicant's personal information; they would not be responsive to a request for his personal information.

[para 39] In Order P2012-09, regarding an applicant's request for personal information from her former employer made under the *Personal Information Protection Act* (PIPA), I said (at para. 15):

> For example, as the Applicant's position with the Organization required certain safety training, some of the records provided to the Applicant by the Organization were training materials (for example, pages 622-649 consist of an operator training manual). The Organization's training manuals cannot be characterized as the Applicant's personal information. This is the case even in the instances wherein the training materials included quizzes with the Applicant's answers, as well as her signature affirming that she had read the materials, as there is no personal dimension to the information in these records. I make the same finding with respect to copies of organization-wide policy memos and records of work-related meetings and attendance at those meetings.

[para 40] The same analysis applies here. It seems clear from the Applicant's access request that he was seeking records in which his employment was discussed. Course materials are not reasonably responsive. At minimum, the Public Body had a duty to confirm with the Applicant whether he was seeking such records, before charging him more than $50 to provide them. It could have done this in the letter providing the fee estimate by providing a more detailed breakdown of responsive records that would have alerted the Applicant that the responsive records included course materials.

[para 41] I will order the Public Body to refund all fees relating to the provision of the PowerPoint presentation.

2. Did the Public Body properly estimate the fees for services?

[para 42] The Applicant's request was a request for personal information. The Public Body states that the total number of records provided to the Applicant is 2107. The Public Body also confirmed that the Applicant was charged only for photocopies (not for also providing an electronic copy on a USB stick). The Public Body charged the Applicant $0.25 per page for photocopies. The final fees charged to the Applicant by the Public Body are $526.75.

[para 43] Section 93 of the FOIP Act authorizes public bodies to require applicants to pay fees. The relevant provisions state:

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

[para 44] Section 95 authorizes a local public body, such as the Public Body, to create bylaws setting the fees it requires to be paid. This provision states:

> *95 A local public body, by bylaw or other legal instrument by which the local public body acts,*
>
> > *(a) must designate a person or group of persons as the head of the local public body for the purposes of this Act, and*
> >
> > *(b) may set any fees the local public body requires to be paid under section 93, which must not exceed the fees provided for in the regulations.*

[para 45] The Public Body states that its municipal council adopted the FOIP Regulation's fee schedule in its bylaw. Schedule 2 of the FOIP Regulation sets out the maximum amounts that can be charged to applicants.

[para 46] In Order F2011-015 the adjudicator stated the following (at para. 39):

> 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.

[para 47] A local public body's ability to set fees under section 95(b) does not override the prohibition in section 93(6) against charging more than actual costs. Further, a municipal bylaw cannot override the limit in section 93(6) of the Act that requires fees not to exceed actual costs. All of these provisions must be read together: section 95(b) permits a local public body to set out its own fees, so long as those fees do not exceed its actual costs and do not exceed the maximums set out in Schedule 2. The Public Body is therefore limited to charging the Applicant actual costs. In this case, the Applicant's request was for personal information so the only costs that can be charged are costs for photocopying.

[para 48] In its initial submission the Public Body argued (at pages 2-3):

> It is practically impossible to calculate the actual cost, by page, to provide the hardcopy and electronic copies of records in a FOIP request. The Municipality does not have the means to calculate the following factors down to a "per page cost":
>
> - Photocopier/scanner lease cost - our leases are not based on number of copies or scans. It is a basic annual lease.
> - Toner cost - There is no known measurement tool to calculate the exact percentage of toner used for a page of records so how can an exact cost per page be calculated?
> - Paper cost - Yes you can calculate the costs by page to purchase paper but that does not account for the shipping costs to the Municipality for this paper, the storage costs at supply warehouse, etc. Again, to calculate "actual costs" by page is virtually impossible.
> - Electricity cost to power the photocopier/scanner - The Municipality does not have any tools to measure power consumption by specific photocopier units nor is it billed that way by our power supplier. It is impossible to calculate a cost by page for FOIP requests.
> - USB Flash Drive Cost (costs vary depending on the storage capacity needed. It is not known what the capacity size of the USB key provided to [the Applicant])
> - Cost for bindings (clips, staples, elastics, etc). Is it expected that a Public Body count the number of bindings used for every FOIP request to calculate this cost? Does that sound reasonable when it could be hundreds or thousands of bindings and the time involved in counting and calculating their costs? I would argue no public body could ever hope to respond to FOIP requests in the legislated timeframe if force to count every binding!!
>
> The Municipality would challenge that the vast majority of public bodies can not and have not the means to calculate "actual cost" for copying/scanning and that the clause in the legislation is not practical. The Municipality uses the fee schedule in the FOIP Regulation to estimate and assess fees. Our Municipal Council adopted the regulation's fee schedule in our Municipal FOIP Bylaw. The Municipality would be very surprised if the "actual cost" was not above .25 cents a page after you consider all the above factors.

[para 49] In his rebuttal submission, the Applicant responded to the Public Body's arguments regarding calculating actual costs. He said (at page 2):

> [The Public Body's] argument here is essentially that it is impossible to estimate the fees that should be charged. It is childish to assert that they need to count every staple to come up with a reasonable fee. I believe some common sense could clearly be of use here when complying with section 93(1) and 93(6) of the FOIP Act.

[para 50] The Public Body reiterates the impossibility of calculating actual costs in its rebuttal submission (at page 2, emphasis in original):

> The Municipality can not calculate "actual costs" due to the above and probably many other cost factors we have yet to consider. **In fact the Municipality could not adhere to any Commissioner Order to charge the "actual costs" as again they are incalculable!**

[para 51] The Public Body's frustrations with the fee provisions in the Act are not unwarranted. In *Alberta (Information and Privacy Commissioner) v. Alberta (Freedom of information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36, the Court of Appeal had the following to say regarding the complexity of the FOIP Act (and the *Personal Information Protection Act*, PIPA) (at para. 15):

> Both *FOIPPA* and *PIPA* are complex pieces of legislation. Sections in each refer to other sections and when those sections are scrutinized they refer to yet more provisions. Each act is a web, or more accurately a maze, which makes them difficult to interpret. Their enactment has resulted in an entire new area of law requiring specialists who traverse their intricacies. To suggest that they are user unfriendly is an understatement.

[para 52] The provisions of the FOIP Act setting out fees for access requests were not at issue in that case; the Court's comments were about the Act in general. In my view, the fee provisions in the Act and Regulation are not exempt from this characterization.

[para 53] Adding to the complexity is the significant change in the interpretation of the fee provisions by this Office. Early Orders of this Office referred to the maximum fees in Schedule 2 as the fees public bodies can routinely charge. However, the Orders of this Office issued in the last eight or so years (since Order F2010-036), have consistently rejected that interpretation. The more recent Orders place a greater emphasis on the prohibition in section 93(6) against charging more than actual costs, and have scrutinized some of the maximum amounts set out in Schedule 2 in light of that prohibition.

[para 54] In Order F2010-036, the adjudicator found that "[i]t is not open to a public body to charge the maximum amount for providing a service, if the public body's actual costs for providing the service are lower than the maximum" (at para. 145). In Order F2011-015, the adjudicator reviewed the interpretation of similar provisions in the BC Act. She concluded (at paras. 39-40, 44-46):

> … 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.
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> …
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> 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:
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> > 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.
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> …
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> 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.
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> 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.
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> 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 55] In BC Order F09-05 (cited above), the adjudicator also rejected the argument of the Law Society (which is a public body under the BC Act) 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.

[para 56] In Order F2011-015, the adjudicator acknowledged the lack of clarity in the Act regarding "actual costs" and what is to be included in that calculation. The Public Body has raised several fair questions regarding the necessity of approximating any "actual costs". However, I disagree with the Public Body's apparent solution: to ignore the existence of section 93(6) or the clearest interpretation of it, which has been consistently applied by this Office for eight years.

[para 57] If public bodies find the fee provisions difficult to interpret and/or apply, they may consider requesting amendments to the fee provisions (in the Act and in the Regulation). Clearer fee provisions could provide greater certainty for public bodies and applicants alike. I note that the Ontario legislation provides a set fee for photocopies, without reference to charging only actual costs, which leaves little to no room for differing interpretations.

[para 58] In a letter dated January 16, 2019, I told the Public Body that other public bodies have calculated their actual costs for photocopying to be significantly lower than $0.25/page. For example, in Order F2013-10, the public body determined its actual costs to be $0.045 per page for photocopying, including paper, leasing costs and power (see para. 79). In Order F2012-16 the public body calculated a per-page cost of $0.0635, based on the cost of paper and related supplies, as well as the rental fee for the photocopier (see para. 22). In Order F2013-54 the public body calculated a per-page cost of $0.04685 for black and white copies, and $0.2169 for

colour copies (see para. 56). In that case, the applicant had provided a price list from Staples Canada indicating that organization charges $0.03 for black and white copies and $0.19 for colour copies (see para. 58).

[para 59] I asked the Public Body to explain why its actual costs for photocopying are significantly higher than the costs assessed by other public bodies. In its February 1, 2019 submission, the Public Body responded (emphasis in original):

> We submit here that the phrase "***any other items involved in photocopying***" should be interpreted to mean items that are "***necessary***" in order for photocopying to happen (of course, these would be items over and above the consumable costs of paper & toner specifically acknowledged in those two Orders). It is not clear from the phrase "any other items involved in photocopying" whether other "cosmetic" or "value-added" costs (please see the table I below) can be included. This is even made the worse as the "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" as admitted even at **para 44 of Order F2011-015**. However, since "**actual costs**" are what should be charged then it is our argument that even these "value-added" costs should be included and charged by public bodies along with the "necessary" costs as they are costs "***actually***" incurred by them and are not expressly prohibited by either the Act or the Regulation.

[para 60] The "value added" costs presented by the Public Body include networking costs such as cables and servers, copier maintenance costs, supplies such as paper clips and staples, and transportation costs for "getting the other consumables delivered to our office."

[para 61] The Public Body further states (emphasis in original):

> Assuming that all the above items are good for "actual costs" that may be charged to a FOIP applicant, then the question arises; how does a public body calculate, in a consistently fair and accurate manner, specifically how much costs are attributable to the processing of an individual case? We are not sure how — and are not aware of any Commissioner's Orders that have specifically addressed this aspect of calculating the "actual costs" in relation to incalculable or variable costs.
>
> We acknowledge that as a public body we do have the onus or burden of proving that we have charged an applicant the "actual cost" of producing record. We contend, however, that that is not possible or practical to do! We have therefore adopted a *standard of "Reasonableness"* in situations where actual costs are not calculable. We contend that a fee of $0.25 is a reasonable charge for printing/photocopying service with respect to processing FOIP requests (please see the table 1 above). We charge a standard rate of 25 cents per page because it is reasonable and still the clearest basis for calculating printing/photocopying costs in a manner that is consistently fair and unbiased to every applicant and because the "actual costs are incalculable" based on the arguments we provided above.
>
> With regard to the lower costs charged by other public bodies, we contend that the costs used by the other public bodies quoted in the Commissioner's Orders <u>were not "actual" costs but were simply "arbitrary estimates".</u> In those Orders it is fairly clear that the other public bodies did not calculate all of the applicable costs possible as laid out in our Table 1 above — or, for that matter, provided a reasonable "scientific" or logical formula used in arriving at their computation. What about the actual per page costs to transport and store the paper used for copying? What about the

> networking costs per page involved in sending print jobs to the printers (network cabling costs, network server/hardware costs, network maintenance costs)?
>
> In those Orders mentioned above, the Commissioner's Office merely "looked the other way" from the points raised here and did not challenge the public bodies to prove they used "actual costs" because their quoted costs were so much lower than the regulated 25 cents a page cost.
>
> In summary, the Municipality is not challenging the Act's requirement to charge "actual costs" but contends it's impossible to 100% accurately determine all **actual costs** involved. The Municipality contends that any costs to provide photocopies or computer printouts that a public body comes up with is an "arbitrary cost" if they aren't using the regulated $0.25 cents a page.

[para 62] As noted in paragraph 58 above, the public bodies involved in the files resulting in Orders F2013-10, F2012-16 and F2013-54 explained the factors they took into consideration in estimating their costs for photocopying. Pembina Hills Regional Division No. 7 (F2013-10) included paper, leasing costs and power. Alberta Health Services (F2012-16) included paper and "other related supplies" and the cost of the photocopier rental fee. The Workers' Compensation Board (F2013-54) included the cost of the paper, photocopier, toner, parts, maintenance, machine lease, occupancy costs for the photocopier room and power (see para. 55). The Public Body's contention that these costs are arbitrary and were arrived at absent any logical formula seems inaccurate and unfair. In fact, these public bodies clearly factored in many of the items the Public Body has listed in its table of costs. In each case, the adjudicator accepted the costs estimated by the public body as 'reasonable'.

[para 63] The Public Body also provided a table of costs charged by Staples, noting that 50% of the fees were above $0.25 per page. However, only the "full-service" fees and/or colour copies have fees over $0.25 per page. Public bodies cannot include labour costs into the fee for photocopying (see Orders F2013-10 at paras. 79-86 and F2013-27 at para. 42); in this case, the Public Body has not argued that labour costs should be included. Staples apparently charges $0.11 per page for black and white self-serve copies. Presumably, as Staples is a for-profit business, $0.11 per page is higher than its actual costs.

[para 64] The Public Body argues that it cannot comply with an order to charge fees based on actual costs (February 1, 2019, emphasis in original):

> **If the Commissioner's Office orders us to charge "actual costs", the Municipality contends that we could not 100% fully comply with a Commissioner Order to charge "actual costs" and that whatever cost we could even calculate would truly not be 100% accurate to account for the impossible to calculate factors (the amount of toner droplets per page is just an obvious example).**

[para 65] The Public Body is not required to charge *the* actual costs for processing an access request. It is prohibited from charging *more than* the actual costs. While the latter undoubtedly requires a public body to estimate its actual costs (to ensure it is not over charging), the Public Body is permitted to omit incidental (or "value added") cost items if they are "incalculable". That is not a contravention of the Act. Further, omitting such incidental costs (such as the miniscule percentage of network cables that can be attributed to individual access requests) will help ensure that the cost arrived at is less than the actual cost.

[para 66] The Public Body argues that because the actual costs of producing a photocopy are "incalculable", it is reasonable to simply charge applicants $0.25 per page. It indicates that this approach is consistently fair and unbiased to every applicant. Regarding this last point, if the Public Body calculates an actual cost for photocopying and applies that to every access request, that approach would also be consistently fair and unbiased. I understand the Public Body's point that different records will have different amounts of toner and therefore different costs associated. It seems likely that the cost difference in toner between a full page and partial page is a small fraction of a cent such that it may not affect the actual cost per page. Perhaps the Public Body could enquire to the company from whom it purchases or leases its equipment on this point. Perhaps the Public Body could simply calculate its costs based on a partial page rather than a full page (to ensure that the fees charged to applicants are less than or equal to the actual costs).

[para 67] In any event, there are options available to the Public Body that would allow it to charge fees and comply with section 93(6). Ignoring the prohibition in section 93 of the Act against charging more than actual costs, and instead charging the maximum allowable fee set out in Schedule 2, is not a reasonable alternative. In part because it contravenes the Act, and in part because by all accounts, $0.25 per page is several times higher than an actual cost. It is 5.5 time higher than the actual costs of two public bodies discussed above (at paragraph 58) and 3.9 times higher than the third public body's. It is also 2.3 times higher than the fee charged by a for-profit business.

[para 68] The range of costs given by other public bodies for black and white copies ranges from $0.045 per page to $0.0635 per page. I do not know any of the costs of the Public Body associated with making copies in response to an access request. If at least one public body (also a municipality) can produce a copy for $0.045 per page then it seems possible that the Public Body can as well. It may be that the Public Body's costs are closer to $0.0635 per page, similar to Alberta Health Service's costs, but that might be an overestimate (since at least two public bodies estimated costs almost 2 cents lower). The Public Body can charge its costs but not more. Therefore, I will allow the Public Body to calculate the fees for photocopying based on the lowest number: $0.045 per page.

[para 69] For future access requests, the Public Body should undertake its own calculation of its costs, taking into account the factors that it can reasonably calculate and keeping in mind that the number it arrives at needn't be *the* actual cost but must be no higher than the actual cost.

[para 70] The Applicant also pointed to a statement in one of the Public Body employee's search for records forms. One of these forms notes that "some of the training records were too extensive to print and were saved to a USB stick." The Applicant asks (at page 2 of his rebuttal submission):

> Why then was this reasoning not used to the hundreds of pages of a training manual that was printed out at 25 cents a page when others were left out? I believe this is punitive.

[para 71] The Public Body states in its initial submission that "It is of note, that the applicant received 2,107 pages in both hardcopy and electronic but he was not charged twice. We did not

even charge for the cost of the USB Drive! All pages had to be scanned to be provided electronically and were also printed for the applicant" (at page 3). The Public Body's decision not to charge the Applicant for the USB stick does not permit the Public Body to overcharge for photocopying.

[para 72] The Public Body provided me with a copy of a letter from the Applicant, in which he agrees to the estimate and paid the deposit. The Applicant argues that he didn't have a choice not to pay the fee.

[para 73] With respect to the Public Body's point that the Applicant agree to the fees, the FOIP Act limits the fees that can be charged. An applicant's agreement to a fee does not authorize the public body to charge more than is permitted under the Act.

[para 74] With respect to the Applicant's point, he could have requested a review of the fees estimated by the Public Body, before he agreed to pay them. However, agreeing to pay the fee to obtain the records does not negate the right to request a review of the fees at a later date, as the Applicant has done.

[para 75] The route taken by the Applicant ensures he has the records the Public Body located and can review them while this Office assesses the Public Body's fees. I also note that this Order is being issued over three years after the Applicant's initial request for review. Had the Applicant requested a review of the fees at the time he received the fee estimate from the Public Body (October 29, 2015), and assuming that the file underwent both the review and an inquiry as it has here, the Applicant would have waited over three years before receiving any responsive records.

[para 76] Having reviewed the records, the Applicant also had the opportunity to raise concerns about the adequacy of the Public Body's search, at the same time he requested the review of fees. Had the Applicant not paid the fees, he would have waited several years for this Office to review the fees (including an inquiry), then would have had to file a new request for review once he paid the fees and obtained the records.

[para 77] The above highlights the reason that the Act permits an applicant to pay a fee to obtain records, and later request a review of those fees.

[para 78] I will order the Public Body to refund the difference between $0.25 per page and $0.045 per page. As noted above, the fees charged by the Public Body for photocopying came to $526.75 for 2107 pages; I have already determined that the Public Body must refund the fees associated with the 209-page PowerPoint presentation. The remaining number pages after that subtraction is 1898. At a rate of $0.045 per page, the fee associated with the Applicant's request is $85.41. I will order the Public Body to refund the Applicant the difference between the fees charged ($526.75) and $85.41.

V. ORDER

[para 79] I make this Order under section 72 of the Act.

[para 80] I find that the Public Body performed an adequate search with the exception of the search performed by one employee. I order the Public Body to conduct a further search for responsive records, to the extent possible as described in paragraph 20. The Public Body is to provide the Applicant with a description of the additional search and/or the reasons additional records were not located (as described in paragraph 20).

[para 81] I order the Public Body to refund the difference between the fees paid by the Applicant and the calculations in this Order, per paragraph 78.

[para 82] 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.

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Amanda Swanek
Adjudicator