

Cost Estimates

Charging of Costs

Section 25 of the *Access to Information and Protection of Privacy, 2015 (ATIPPA, 2015)* allows a public body to charge an applicant a modest cost in relation to certain services associated with the processing of an access request:

1. locating the records responsive to the access request (the first 10 hours for locating the records are not to be charged for where the request is made to a local government body; the first 15 hours for locating the record are not to be charged for where the request is made to another public body);

Note: Responsive records are **all** records that fit within the scope of the applicant's access request - these are the records the applicant has described on the *Access to Information Request Form*. A record is responsive to an applicant's access request if it contains some information that is reasonably related to the request.

Note: Locating involves the direct searching for records in places where the records in question might reasonably be located. In relation to paper records, locating would include searching through a filing cabinet for a particular file folder which is reasonably believed to contain a

responsive record. Locating would also include searching through that particular file folder (once it has been located) for a responsive record and searching through a particular record to determine that it contains information responsive to the access request.

In relation to electronic records, locating may involve the searching of electronic information management systems, business applications, shared directories, email systems, and websites. Electronic devices such as laptops, Blackberries, tablets, flash drives and other portable devices may need to be searched as well. Locating would also include such activities as searching through the records in an individual's email account for information responsive to the access request.

2. copying or printing a record, where the records are to be provided in hard copy format, the allowable cost has been set at 25 cents per page (**Note:** there cannot be any cost claimed for the time it takes staff to complete the actual task of photocopying the records);
3. actual cost of reproducing or providing a record that cannot be reproduced or printed on conventional equipment then being used by the public body; and



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4. actual cost of shipping a record using the method of shipment chosen by the applicant.

Note: A public body cannot charge an applicant any cost where the request is for access to the personal information of the applicant.

Note: The cost charged for services cannot exceed either:

- (a) The estimate of cost given to the applicant under section 26, or
- (b) The actual cost of the services.

Section 25 prohibits a public body from charging for the following:

- 1. making an access request;
- 2. identifying the records responsive to an access request;

Note: Identifying includes discussions with an applicant regarding the formulating, clarifying, modifying, or narrowing of an access request. These discussions may occur in the initial stage of the access to information process, following the applicant's receipt of a Cost Estimate or at any other stage of the process.

- 3. retrieving the responsive records;

Note: Retrieving involves such activities as walking from one area to another to find responsive records or driving to an off-site storage area to retrieve responsive records.

- 4. reviewing the responsive records; or
- 5. severing or redacting a record (Note: There cannot be any cost claimed for the time spent reviewing records to determine whether or not any of the exceptions to disclosure apply or the subsequent redaction of the records, as there was under the former Fee Schedule).

Section 25(6) provides that the minister responsible for the *Act* may set the amount of cost that may be charged in accordance with the *Act*.

Estimate of Cost

Section 26 requires a public body to give the applicant an estimate of the total cost where a applicant is to be charged a cost in relation to the processing of the access request. An estimate of cost sent to an applicant should include a notice to the applicant advising of the following:

- (a) the applicant has 20 business days from the date the estimate is sent to accept the estimate or modify the request in order to change the amount of the cost, and if there is no response from the applicant within that period of 20 business days then the applicant is considered to have abandoned the request, unless the applicant has during that time

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period applied to the public body for a waiver of costs or applied to the Commissioner to revise the estimate;

- (b) the applicant may within 20 business days apply to the public body requesting a waiver of the payment of all or part of the cost on the grounds that either
 - (i) payment of the cost would impose an unreasonable financial hardship on the applicant; or
 - (ii) it would be in the public interest to disclose the requested records without cost to the applicant;
- (c) the applicant may within 20 business days apply to the Commissioner to revise the estimate of cost. This should include the contact information for the Commissioner's Office.

Where an estimate has been given to an applicant, the 20 business day time period within which a public body is required to respond to an access request in accordance with section 16(1) is suspended until the applicant notifies the public body to proceed with the request.

Waiver of Cost by Public Body

A public body has the authority under section 26 to waive the payment of all or part of a cost upon receipt of an application from an applicant who has received a cost estimate. An estimate of cost sent to the applicant by a public body should include a notification advising the applicant of the right to request a waiver of the payment of costs. In order to allow a waiver the public body must be satisfied that either payment of the cost would impose an unreasonable financial hardship on the applicant, or it would be in the public interest to disclose the record.

Waiver Due to Financial Hardship

A public body will consider waiving the payment of costs if it receives an application requesting such a waiver within 20 business days from the day the estimate is sent to the applicant.

The applicant has the burden of proving that payment of the cost would impose an unreasonable financial burden on the applicant. Therefore, the applicant must provide detailed information regarding the applicant's financial circumstances, including income and other relevant financial information. The fact that the cost is large does not necessarily mean that payment of this amount will cause the applicant unreasonable financial hardship.

Waiver Where in Public Interest to Disclose Records

In determining whether the cost should be waived because it would be in the public interest to disclose the record, the public body has to determine if release of the requested information would promote the stated purpose of the *ATIPPA, 2015* "to facilitate democracy" as set out in section 3 of the *ATIPPA, 2015*. Section 3(1) provides that the facilitation of democracy will be encouraged by ensuring that citizens have the information required to participate meaningfully in the democratic process and by

increasing transparency in government and public bodies so that officials, officers and employees of public bodies remain accountable.

To decide whether the public interest in facilitating the democratic process is being served by release of the information, a public body should consider all of the factors supporting release of the information without cost, including but not limited to the following:

1. General public interest in transparency – there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. Since the purpose of the *ATIPPA, 2015* is to promote democracy, general public interest is always given weight when deciding whether to waive payment of cost.
2. Public interest in the issue – for example, if a policy decision has a widespread or significant impact on the public, or if there is public interest in informing the debate on the issue (recognizing that there is still a need for a safe space in which to formulate and develop policy as contemplated by the advice and recommendations exception).
3. Public interest in the specific information – for example, to help people understand their legal rights and obligations.
4. Suspicion of wrongdoing by public body – disclosure must serve the wider public interest rather than the private interests of the Applicant and the suspicion must be more than a mere allegation. There must be a plausible basis for the suspicion. This can be assessed by considering whether one or more of the following are applicable:
 - a. facts suggest the basis of the actions are unclear or open to question;
 - b. there has been an independent investigation;
 - c. the content of the information may refute the suspicion or may be a ‘smoking gun’, both of which favour disclosure;
 - d. evidence of public concern regarding the issue; or
 - e. there is a public interest in disproving suspicions in that release would restore confidence in the public body. Note - the OIPC cannot assess wrongdoing, it can only assess whether there is public interest in releasing the information.
5. Presenting a full picture – to aid the public in fully understanding the reasons for a public body’s decisions, to remove any suspicion of misrepresentation or misinformation. Present the full picture and let people reach their own view. Also, if the information that underpinned the decision was limited or if information that is already public is misleading, there is value in the public knowing that. Public bodies should be careful not to choose to only release information which is favorable to them, as this would amount to a misuse of the override.

A public body is required to inform an applicant in writing of its decision regarding waiver of costs within 20 business days from the day the estimate was sent to the applicant. The public body should advise the applicant of the right to apply to the Commissioner to review the decision of the public body not to waive all or part of the costs.

Applications to the Commissioner

Section 26 of the *ATIPPA, 2015* allows an applicant to apply to the Commissioner’s Office for a revision of a cost estimate received from a public body, and a review of a decision of a public body not to waive payment of all or part of the costs.

Application to Revise Estimate

On an application, the Commissioner has the discretion to either:

- (i) where the Commissioner considers it necessary and reasonable in the circumstances, revise the estimate and set an appropriate amount of cost or a refund, if any; or
- (ii) confirm the cost as estimated by the public body.

On an application to revise an estimate, the public body has the burden of establishing that the cost is reasonable and is calculated in accordance with the relevant provisions of the *ATIPPA, 2015* and the regulations made under it. Therefore, the public body will be required to provide the Commissioner's Office with a detailed breakdown of the cost and a detailed description of how the cost was calculated, including;

1. specific steps taken by the public body to locate the responsive records and how much time was involved;
2. scope of the search for responsive records, for example: physical sites, program areas, specific databases and off-site storage areas;
3. who was responsible for locating the records and when were they located;
4. the number of pages of information copied or printed;
5. documentation (invoices, etc.) in relation to the actual cost of reproducing or providing a record that could not be using public body equipment; and
6. documentation (invoices, etc.) in relation to actual cost of shipping the records.

Also, the public body should provide the Commissioner's Office with the following:

1. a copy of the estimate of cost sent to the applicant;
2. a copy of any correspondence between the public body and the applicant;
3. a copy of the access request; and
4. any other relevant documents requested by the Commissioner's Office.

Note: The Commissioner's Office when assessing the appropriateness of a Cost Estimate will take into account whether the public body has implemented proper records management policies and procedures. The provincial *Management of Information Act* provides guidance on the type of records management policies that public bodies should develop, in section 2(g) it provides: "record management means a program of record and information management instituted to provide an economical and efficient system for the creation, maintenance, retrieval and disposal of government

records.” If a deficient records management program has resulted in a higher Cost Estimate, then the resulting higher costs will not be considered as necessary or reasonable. The importance of sound records management in relation to the cost of responding to an access request was highlighted in the *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act* when it referenced on page 309 the *Code of Practice on Records Management by Scottish Public Authorities* by stating:

It has become clear that good records management is essential for the effective and efficient answering of FOI requests. Indeed, the cost of answering a request under FOI in terms of time and resources will often be determined by the quality of information management within the authority.

Application to Review Decision on Waiver of Payment

The decision of a public body not to waive payment of cost is reviewable by the Commissioner upon an application from the applicant. After examining the circumstances, the Commissioner may waive the payment of the costs or part of the costs in the manner and amount the Commissioner considers appropriate, if the Commissioner is satisfied that either of the following is applicable:

- (a) payment of the cost would impose an unreasonable financial hardship on the applicant;
or
- (b) it would be in the public interest to disclose the record.

The Commissioner has authority under section 26 to confirm the decision of the public body not to waive the cost as estimated by the public body.

On an application to review a decision on waiver, the Commissioner’s Office will require:

1. a copy of the estimate of cost sent to the applicant;
2. a copy of the application sent to the public body by the applicant requesting the payment waiver and any documentation enclosed with the application;
3. a copy of the public body’s decision in relation to the applicant’s request for waiver;
4. a copy of the access request;
5. a copy of any correspondence between the public body and the applicant; and
6. a copy of any other relevant documents requested by the Commissioner’s office.

Section 26(9) provides that a public body shall comply with any decision of the Commissioner made under section 26. The *ATIPPA, 2015* does not provide for any appeal of a decision of the Commissioner in relation to revising a cost estimate or reviewing a refusal of a public body to waive the cost.

Note: Where an applicant applies to the Commissioner to revise an estimate of cost or to review a refusal of a public body to waive the costs, the 20 business day time period during which an applicant is to accept an estimate or modify the request is suspended until the application has been considered by the Commissioner.

Resource

Fee Schedule: <http://www.atipp.gov.nl.ca/info/CostSchedule-Jun1-%202015.pdf>

