OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2010-006

May 7, 2010

Town of Logy Bay-Middle Cove-Outer Cove

Summary: The Applicant applied to the Town of Logy Bay-Middle Cove-Outer Cove (the "Town") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to all records pertaining to the development of O'Leary Estates located off Snow's Lane and to the transfer of a public right-of-way known as Vincent's Lane. The Town provided a number of records but the Applicant complained to this Office that further records were missing, that an index should have been provided with the records, that the fee assessed for the initial search was too high and that a series of engineering drawings originally withheld from the Applicant should have been disclosed to him without charge. The Commissioner determined that the Town was not required by section 9 (duty to assist applicant) of the *ATIPPA* to provide an index to or explanation of all disclosed records, but that the Town must follow through on any commitments made at the informal resolution stage. The Commissioner further determined that the Town cannot charge a fee for the time taken to photocopy records and that the Applicant should pay a fee to obtain some of the records that were not disclosed. Finally, the Commissioner determined that all responsive records must be chronologically numbered to facilitate the proper conduct of a Request for Review by this Office.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, ss. 3(1), 5(1), 9, 11(1), 12(1), 15(b), 46(1) and (2), 68(1), (2), (3) and (5); *Freedom of Information and Protection of Privacy Regulations*, R.R.S. c. F-22.01 Reg. 1, s. 6(1).

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-010, A-2009-011 and A-2010-003; Investigation and Results Analysis, C-2009-001; Minister of Justice and Attorney General, *Establishment of Fees and Forms for the Access to Information and Protection of Privacy Act* (17 January 2005), ss. 1(1)(b), (c), (e) and (f); British Columbia OIPC Order No. 328-1999; Saskatchewan OIPC Report 2005-005.

Other Resources: Newfoundland and Labrador, Access to Information and Protection of Privacy Office, *Access to Information ATIPP Act: Part I-III, Policy and Procedures Manual* (St. John's: Department of Justice, 2008), online: <http://www.justice.gov.nl.ca/just/info/access_policy_and_procedures_manual.pdf>; Alberta, Information Management, Access and Privacy, *Freedom of Information and Protection of Privacy: Contract Manager's Guide* (Edmonton: Department of Government Services, 2003).

I BACKGROUND

[1] In accordance with the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*" or "*Act*") the Applicant submitted an access to information request on October 30, 2009 to the Town of Logy Bay-Middle Cove-Outer Cove (the "Town"), in which he requested disclosure of records as follows:

> *Any and all records including minutes of Council, correspondence, agendas, e-mails, minutes retained by Council members, applications, forms, plans, surveys, environmental assessments, regulatory documents, deeds, title searches, grants, etc. pertaining to the development of O'Leary Estates located off Snow's Lane in the Town of Logy Bay-Middle Cove-Outer Cove.*
>
> *All documents pertaining to the transfer of a public right-of-way known as Vincent's Lane in the Town of Logy Bay-Middle Cove-Outer Cove.*
>
> *These documents are to also include any contractual employees retained under contract to perform services for the Town of Logy Bay-Middle Cove-Outer Cove in reference to the above requests.*

[2] Having received no correspondence from the Town in relation to his access to information request before November 30, 2009, the Applicant visited the Town office on that day to ask about the status of his request. The Applicant was handed an Estimate of Costs letter in the amount of $132.00 for processing his access to information request. The Applicant paid the Estimate of Costs in full and was given records in response to his request. Subsequently, the Applicant received a letter from the Town acknowledging receipt of the access to information request and providing the Estimate of Costs already paid by the Applicant on November 30, 2009.

[3] In a Request for Review dated December 27, 2009 and received in this Office on December 31, the Applicant asked for a review of the actions taken by the Town in response to his access to information request to determine whether the search should have disclosed more records.

[4] Efforts by an investigator from this Office to facilitate an informal resolution of the Applicant's Request for Review led to the Town searching for and finding additional records. A few of those additional records were disclosed to the Applicant, but a significant number were not. All but a very small number of the records not disclosed to the Applicant during the informal resolution stage were earlier versions of engineering drawings that were no longer in the Town's files because they had been destroyed. Copies of these revisions had to be obtained by the Town from its contracted engineer, who charged the Town according to his professional schedule of fees. The Town paid the

invoice, but could not come to an agreement with the Applicant regarding which party should be responsible for paying what proportion of the cost of making the revised drawings available for disclosure. Further efforts at informal resolution were unsuccessful.

[5] By letters dated February 24, 2010, both the Applicant and the Town were advised that the Request for Review had been referred for formal investigation, in keeping with section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office. The Town declined to make a formal submission, choosing instead to rely on the positions it had already taken during attempts to resolve the Applicant's complaint informally.

II APPLICANT'S FORMAL SUBMISSION

[6] In his formal submission the Applicant raised three specific outstanding issues regarding the Town's handling of his access to information request. He also alleged that the Town failed to fulfill statutory duties specified in the *ATIPPA* and failed to follow the policies and procedures identified in the Department of Justice ATTIP Office's *Access to Information ATIPP Act: Part I-III, Policy and Procedures Manual* (the "ATIPP Manual").

[7] The first specific outstanding issue raised by the Applicant was the Town's failure to provide an index to or explanation of the records to help determine whether all the records he requested had been provided. The Applicant referred to the ATIPP Manual specifically, arguing that

> *[t]he policies and procedures manual indicates each page of the records should be numbered consecutively and a list of all records prepared. The applicant has not received any such documentation and is unable to verify if all the requested information has been provided …*

[8] The second specific outstanding issue raised by the Applicant was the cost of the initial search for records. While this issue was not raised in his Request for Review, the Applicant subsequently questioned the reasonableness of the Town taking six hours to search for and prepare records for

disclosure when in the Applicant's estimation the Town did little more than photocopy 288 pages found in a single file folder dedicated to the subdivision.

[9] The third specific outstanding issue raised by the Applicant was the assignment of costs for obtaining copies of the engineering drawing revisions for disclosure. In explaining why he should not be expected to pay any of the cost incurred by the Town in obtaining copies of the revisions, the Applicant noted that he specifically asked for "any and all records" relating to the subdivision in question. The Applicant argued that this should have left no doubt as to whether the engineering drawing revisions were responsive records. While he did not make the point in his formal submission, the Applicant had already stated his position by e-mail and telephone that he should not be expected to pay for records disclosed to him as a result of the intervention of this Office.

[10] More generally, the Applicant identified failings on the part of the Town both to fulfill its duties under the *ATIPPA* and to follow the policies and procedures prescribed by the ATIPP Office. For example, the Applicant quoted directly from page 3 - 4 of the ATIPP Manual in arguing that the Town failed to fulfill its statutory duty to assist an applicant:

> *The* Act *requires that public bodies try to respond quickly, accurately and fully to applicants and to help them to as reasonable an extent as possible.*
>
> *9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*
>
> ***The duty to assist the applicant is an important, underlying provision of the Act.*** *It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.*
>
> *Both the applicant and the public body will benefit from a cooperative, respectful relationship.*
>
> [emphasis in original]

[11] The Applicant also alleged specific failures on the part of the Town to fulfill its duty to assist an applicant, including the Town's failure to communicate adequately with him during its handling of his access to information request and "to accurately and fully provide a complete response as evidenced in the quantity of information missing from the original request." The Applicant further

alleged that an adequate e-mail search was not conducted, nor was adequate care taken to ensure that the photocopies he did receive were legibly copied. The Applicant questioned whether the Town conducted an adequate line-by-line review of the records, noting that if it had done so the Town might have discovered that it had gaps in its records and then proceeded to search for them. In turn, the Applicant alleged that the Town failed to provide a fee estimate prior to providing service in response to his access to information request as required by section 68(2) of the *ATIPPA*. The Applicant also alleged that the Town failed to inform him that its written response to his request would not be completed within the 30 day time limit specified in section 11(1) of the *ATIPPA*. The Applicant further itemized numerous allegations of failure on the part of the Town to adhere to the ATIPP Manual in responding to his request:

> *The municipality's response failed to inform whether access to the record, or part of the record was granted or refused. The municipality failed to inform the applicant that access was refused because the record did not exist or could not be located and should have explained briefly the steps taken to locate the record. This procedure was not followed in any attempt, the municipality made no effort to explain how they tried to locate any of the requested or missing documentation. The municipality also failed to provide a numbering or indexed response, which would aid in the task of ensuring all the requested documentation had been provided. The municipality did not make any attempt in either of their responses to provide a clear and concise methodology of how the response could be followed.*

III DISCUSSION

[12] The issues to be decided are as follows:

1. Whether the Town must provide an index to or explanation of the records received by the Applicant to help determine whether all the records requested have been provided.

2. The reasonableness of the fee for the initial search for records.

3. The assignment of costs for reproducing the engineering drawing revisions for disclosure.

Preliminary Discussion of the Town's Handling of the Access to Information Request

[13] During attempts to resolve the Applicant's complaint informally, it came to light that the Town's employees tasked with responding to the access to information request had never processed a request before and were unfamiliar with the *ATIPPA*. While this unfamiliarity clearly placed an

added burden on busy Town employees who had to respond to a broad access to information request, unfamiliarity with the *Act* does not excuse any failing on the part of the Town to fulfill its statutory duties under the *ATIPPA*. The handling of the Applicant's request in this case provides a useful reminder of the importance of ensuring that municipal employees are properly informed of their duties under the *ATIPPA* and that they are encouraged to carefully follow the ATIPP Manual as an integral part of their efforts to ensure conformity with the *Act*.

(a) Duty to Assist

[14] Again, in his formal submission the Applicant alleged that the Town failed to fulfill its duty to assist him in responding to his access to information request. Section 9 of the *ATIPPA* reads:

> *9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*

[15] In paragraph 80 of my Report A-2009-011, I elaborated on this duty as follows:

> *The duty to assist … may be understood as having three separate components. First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.*

[16] In paragraph 79 of that same Report I reiterated my position that the standard to be used to measure whether a public body has fulfilled its duty to assist an applicant is "reasonableness, not perfection." Using this standard, I will address as necessary any failure on the part of the Town to fulfill its duty to assist the Applicant in the context of the three outstanding issues. I will also point out several aspects of the Town's handling of the Applicant's access to information request did not adhere to the policies and procedures laid out in the ATIPP Manual.

(b) Adherence to the ATIPP Office's policies and procedures

[17] For example, the Town did not provide the Applicant with timely written acknowledgement of receipt of his access to information request. This acknowledgement should have outlined the conditions under which the 30 day time limit may be extended and should have indicated that a fee estimate may be assessed (ATIPP Manual, page 3-9). Nor did the Town communicate with the Applicant early in the process to discuss his request and seek any needed clarification (pages 3-4 and

3-7). It is worth pointing out that good communication between applicant and public body is important to ensure that the parties agree on the terms and scope of a request. While an applicant does *not* have a statutory duty to assist a public body respond to his or her request under the *ATIPPA*, he or she should make a reasonable effort to assist the public body in responding accurately and completely to the request. This expectation of an applicant has indeed been recognized by my counterpart Commissioner in British Columbia in his Order No. 328-1999:

> *Specific and precise access requests enable public bodies to respond much more quickly and cost-effectively. This avoids the delay often entailed when all-encompassing or imprecise access requests are made. Applicants therefore have an incentive, in my view, to cooperate with public bodies by, whenever it is reasonably possible to do so, making clear, specific and not unnecessarily broad access requests. They also have an incentive to cooperate, when reasonably asked to do so, by clarifying requests and, in some cases, by narrowing requests. To be clear, the Act does not impose any legal duty on applicants to cooperate in the ways I have just described. But a responsible applicant will recognize that his or her request will be handled more quickly and cheaply if some effort is made to cooperate with a public body. A responsible applicant will also recognize that cooperation with the public body will reduce the overall costs, in times of restraint, of complying with the Act generally.*

Without suggesting that the Applicant in the present case should be faulted for the Town's handling of his access to information request, open communication between an applicant and a public body is to be recommended, particularly when the access to information request is all encompassing.

[18] After locating and photocopying the requested records, the Town neither numbered the records consecutively nor prepared a list of them (ATIPP Manual, page 3-11). The Town also did not provide the Applicant with any further information to explain the records he received (page 3-23). (In the next section I will discuss whether the Town had a duty under the *ATIPPA* to provide an index to or similar clarification of the records sent to the Applicant.) The Town did not provide an Estimate of Costs to the Applicant before completing the search and preparing the records for disclosure as required by section 68(2) of the *ATIPPA* (page 3-29). Finally, when the requested records were disclosed to the Applicant, he did not receive a decision letter from the public body (page 3-18) worded to ensure that the Town was in conformity with the requirements of section 12(1) of the *ATIPPA*. This provision requires that public bodies indicate 1) whether access to a record or part of a record has been granted or refused, 2) reasons for the refusal including the sections of the *Act* on which any refusal is based, 3) the name and contact information of a member of the public body who can answer questions about the refusal, and 4) that an applicant may appeal a refusal to the Trial division or ask that this Office review it. In the present case, the Applicant may

have preempted the Town's provision of a decision letter by his visit to the Town office at the end of the 30 day time limit to inquire about his access to information request.

[19] Having focused attention on some of the ways in which the Town failed to adhere to the ATIPP Manual, it should be acknowledged that the Town did disclose a large number of responsive records to the Applicant. The Town also engaged constructively with this Office in efforts to resolve the Applicant's Request for Review informally, responding to queries promptly, courteously and in my view openly.

(c) Adequacy of the Town's original search for records

[20] As part our response to the Applicant's Request for Review, an investigator from this Office inquired into the adequacy of the initial search for responsive records. Recently, in paragraph 21 of my Report A-2010-003, I affirmed the standard which a public body must meet in order for its search for records to be considered adequate. The search

> *…must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.*

The Town stated that its search was conducted both by the Town's access to information and protection of privacy coordinator and the Town manager, and its efforts were focussed on Town files related to the subdivision. A separate search of Town employees' e-mail records was conducted. Here I note that follow-up discussions between an investigator from this Office and the Town regarding its search provided a clear indication that a thorough effort was undertaken. I am satisfied that the Town's search met the standard of adequacy just quoted. The records disclosed to the Applicant were organized in the same manner in which the Town itself filed and stored them – in rough chronological order. I will now address the three outstanding issues identified by the Applicant in his formal submission.

1. Whether the Town must provide an index or explanation of the records to help determine whether all the records requested have been provided.

[21] In response to the Applicant's access to information request, the Town provided 288 pages of records, including letter and fax correspondence, e-mails, minutes of council, development applications and supporting documentation, aerial photographs, surveys, plans and a variety of

engineering drawings related to the subdivision in question. However, the Applicant was not given an accompanying letter or index itemizing or explaining the material he received. The records were not numbered, nor were they organized according to type of document.

[22] When the Applicant examined the records he received from the Town he noted that they contained references to a number of documents that appeared not to have been included. The Applicant also told this Office that he believed other records were missing, including an e-mail and attached digital photograph that the Applicant was aware had been sent to the Town by a third party.

[23] The Applicant argued that the Town should have provided him with an index to or explanation of the records he received to facilitate the process of determining whether he received all the records he requested. As the Applicant himself pointed out, the ATIPP Manual indicates on page 3-11 that

> *[a]fter the requested records have been located, the next step usually is to make photocopies of the requested records and to prepare a list of them … Each page of the records should be numbered consecutively and a list of all records prepared …* ***The Access and Privacy Coordinator will develop a system best suited to his/her needs and the needs of their public body.*** *Should the Commissioner be required to undertake an investigation, then careful and thorough documentation at this stage will be especially helpful for the Access and Privacy Coordinator.*
>
> [emphasis added]

[24] In my view, this elaboration of the ATIPP Office's policies and procedures is aimed at the efficient processing of an access to information request *by a public body* and is not obviously directed at making it easier for applicants to determine whether they have received all the records to which they are entitled. Rather, the careful and thorough documentation of the records recommended on page 3-11 of the ATIPP Manual refers to a public body's internal handling of a request and to the proper handling of any subsequent review by this Office.

[25] Nevertheless, provision of an index to or explanation of the records disclosed to an applicant might on occasion be a requirement of the duty of a public body under section 9 of the *ATIPPA* to assist an applicant "in an open, accurate and complete manner." Indeed, the ATIPP Manual itself provides support for this position where it states on page 3-23 that:

> *[t]the head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it. This is in keeping with section 9 … and the underlying philosophy of ATIPP.*

While public bodies are reminded here that they may provide additional information necessary to explain the records received by an applicant and that doing so is in keeping with the "philosophy of ATIPP," this clearly expressed recommendation is not articulated as a mandatory policy or procedure in the ATIPP Manual. Nor is provision of such information necessarily required by section 9 of the *ATIPPA*, although there may be circumstances in which the duty to assist an applicant *does* require provision of an index to or explanation of responsive records. (Here I offer a reminder of a public body's duty under section 12(1)(c)(i) of the *Act* to give reasons if access to a record or part of a record is refused.)

[26] In the present case, I find that provision of an index to or explanation of the records is not required of the Town by section 9 of the *ATIPPA*. Indeed, I wholeheartedly encourage public bodies to take heed of the recommendation in the ATTIP Manual to explain as fully as possible the records disclosed to an applicant in response to an access to information request. Nevertheless, the ATIPP Office's policies and procedures regarding indexing or otherwise explaining records before disclosure are not *necessarily* directed at aiding an applicant's understanding of records received in response to an access to information request. The Town's statutory duty to assist the Applicant was reasonably accomplished without an index to or explanation of the records. Indeed, the contents of the records in question were such that they could be understood by an Applicant without the necessity of an index or other aid.

[27] An applicant has an obvious interest in making sure that all responsive records are obtained and a public body has a duty under section 9 of the *Act* to assist an applicant in this regard. Nevertheless, as I indicated in paragraph 39 of my Report 2007-010, the onus is on an applicant to determine whether all requested records have been received as this is "the only practical way for this detection to occur." This onus on the applicant in no way absolves a public body from fulfilling its statutory duty under section 9. Nevertheless, if a public body explicitly agrees to provide an index to or explanation of some or all of the records it discloses to an applicant before, during or even in the absence of a review of the handling of an access to information request by this Office, it would be a failure to fulfill its duty to assist an applicant *not* to follow through and provide the index or

explanation. This position is in keeping with my statement in paragraph 42 of the Report I just quoted where I take the position that

> *[t]he duty to assist, in my view, involves dealing with applicants with due care and diligence, even when those dealings may occur after a Request for Review has been filed, and this Office is involved in brokering an informal resolution. It is essential to the basic purpose of the* ATIPPA *that applicants can count on public bodies to fulfill their commitments …*

[28] While the Town did not provide the Applicant with a numbered set of records, it did provide this Office with a copy of the records for the purpose of conducting a review of the Applicant's access to information request that were numbered consecutively. During efforts to resolve the Applicant's complaint informally, the Town produced a written clarification of the apparent gaps in the set of records received by the Applicant and disclosed a small number of additional records. In its written clarification of the records, the Town indicated where the Applicant was mistaken in believing that he had not already received many of the records in question. In doing so, the Town made numerous references to the set of numbered records provided to an investigator during the review process. Because this Office cannot disclose to an applicant any records it receives from a public body, the Applicant was left with a clarification of his records that referred to a numbering system that he did not have. This made it difficult for the Applicant to benefit from the Town's considerable efforts during informal resolution to address the list of questions regarding the records submitted to it for response.

[29] When the Town agreed to provide some sort of index to or explanation of the records that would address the Applicant's allegations of missing records, but then failed to do so in a way that was understandable to the Applicant, the Town failed to fulfill its duty to respond to the Applicant in an "open, accurate and complete manner." To fulfill its duty to assist the Applicant, the Town should have provided him with photocopies of the numbered copies of the correspondence referred to in the Town's written clarification addressing the Applicant's allegation of missing records.

[30] It is important to point out that while I have determined that a public body might not fail to fulfill its duty to assist an applicant by neglecting to provide an applicant with a chronologically numbered set of responsive records, this is not the end of the matter. In order to respond accurately and thoroughly to an applicant's Request for Review, this Office must receive all responsive records

from the public body *in the same order and form* they were received by the applicant. Particularly where there is a significant number of records at stake, the best way for us to be satisfied that we have received all responsive records disclosed to an applicant is for both the applicant and this Office to receive responsive records from the same chronologically numbered set. Without this ability, this Office cannot properly engage in attempts at informal resolution of a Request for Review under section 46(1) of the *ATIPPA* or fulfill its duty to "review the decision, act or failure to act of the head of the public body" under section 46(2). Therefore, I find that public bodies must chronologically number a copy of all responsive records. Obviously, if all responsive records are withheld from an Applicant under one or more of the exceptions in the *ATIPPA*, there will be no numbered copy of the records to disclose to that applicant. Nevertheless, the records provided to this Office must be numbered. Furthermore, if an applicant is to be provided with records in which entire pages are to be redacted, the public body should make clear how many pages have been withheld and what exceptions have been claimed for those pages, as required by the ATIPPA Office's policies and procedures.

2. The reasonableness of the fee for the initial search for records.

[31] For processing the access to information request, the Town charged the Applicant four hours of time at a rate of $15.00 per hour ($60.00) and for 288 photocopies at a rate of 25 cents a page ($72.00), for a total cost of $132.00.

[32] The *Establishment of Fees and Forms for the Access to Information and Protection of Privacy Act* (the "Fee Schedule") stipulates in sections 1(1)(b), (c), (e) and (f) that an applicant must pay to the public body:

> *1(1)(b) for locating, retrieving, providing and manually producing a record, $15.00 for each hour of person time after the first two hours, rounded down to the nearest hour;*
>
> *(c) producing a record from information in electronic form, the actual cost of producing the record;*
>
> …
>
> *(e) where the record is stored or recorded in printed form and can be copied or printed using conventional equipment, 25 cents a page for providing a copy or print of the record*;

> *(f) where the record is stored or recorded in a manner other than that referred to in paragraph (e) or cannot be reproduced or printed on conventional equipment, the actual cost of reproduction for providing a copy of the record.*

In the course of our investigation of the Town's initial search for records, the Town indicated that it spent six hours processing the Applicant's access to information request. Over four of the six hours that it calculated had been spent on processing the Applicant's access to information request were dedicated to photocopying records for disclosure. The remainder of the six hours were spent searching for e-mails, reviewing the file and making follow-up queries with employees. (In accordance with section 1(1)(b) of the Fee Schedule, the Town did not charge the Applicant for the first two hours of processing time.)

[33] My inquiry into the reasonableness of the fee for the initial search begins with an examination of the Fee Schedule to determine whether the Town may charge $15.00 per hour for photocopying records in addition to the per page copy fee. It should first be observed that section 1(1)(e) of the Fee Schedule permits the Town to charge 25 cents per page for "providing a copy or print of a record." This phrase clearly captures the act of photocopying a record but the word "providing" also appears in section 1(1)(b) of the Fee Schedule, which permits a public body to charge $15.00 for every person hour spent "locating, retrieving, **providing** and manually producing a record" after the first two (emphasis added). I find that the phrase "providing … a record" in section 1(1)*(b)* has a meaning distinct from the phrase "providing a copy or print of a record" in section 1(1)*(e)*, and that only the latter refers to the act of photocopying. I also find that a reasonable interpretation of the verbs "locating" or "retrieving," also included in section 1(1)(b) of the Fee Schedule, do not cover the act of photocopying records. On the other hand, the phrase "manually producing a record" could conceivably be interpreted to reasonably include the time taken to make photocopies. I find, however, that this is not the case.

[34] To support my finding that the phrase "manually producing a record" in section 1(1)(b) of the Fee Schedule excludes the act of photocopying a record, I begin by pointing out that section 1(1)(c) of the Fee Schedule states that an applicant must pay the public body "for producing a record from information in electronic form, the actual cost of producing the record." Page 3-29 of the ATIPP Manual elaborates on section 1(1)(c) of the Fee Schedule by identifying computer programming and data processing costs incurred by a public body for producing a record as examples of activities for

which a fee may be charged under that provision. I agree with the ATIPP Office that under the Fee Schedule the phrase "producing a record" in section 1(1)(c) contemplates a public body recovering the actual costs associated with any intermediary steps required to make an electronic record available to be reproduced for disclosure to an applicant. Applying the same interpretation to section 1(1)(b) of the Fee Schedule, I find that the phrase "manually producing a record" includes only those costs incurred in making a record available to be reproduced for disclosure to an applicant. (In the case of the manual production of a record, a fee can only be assessed by a public body at an hourly rate of $15.00.) This finding emphasizes a distinction in the Fee Schedule between a fee for *producing* a record, identified in sections 1(1)(b) and 1(1)(c), and a fee for *providing* a copy or print of a record, identified in sections 1(1)(e) and 1(1)(f). Only the latter two sections relating to providing a copy or print of a record allow a fee to be levied for the act of photocopying records. This position is consistent with the *ATIPPA* itself which stipulates in section 68(1) that an applicant may be made to pay a fee "…for search, preparation, copying and delivery services in accordance with a fee schedule…" This section of the *Act* clearly separates the act of photocopying from the preparation of records, placing them into different categories of activity for which a fee may be assessed. I have adopted the same logic in my analysis of the Fee Schedule.

[35] In the present case, the 25 cents that a public body may charge an applicant for providing a record using the normal equipment for this purpose *includes* the time taken to make the photocopy itself. A public body, therefore, may not charge a fee under 1(1)(b) of the Fee Schedule for the time taken to photocopy a record because that time is already covered by the 25 cents per page a public body may charge an applicant under section 1(1)(e). This finding – that a public body cannot charge an applicant for the time taken to copy a record other than the per page copy charge – is consistent, for example, with the position taken by the Saskatchewan Information and Privacy Commissioner in paragraph 51 of his Report 2005-005. There the Saskatchewan Commissioner reasoned that a public body may not charge a fee for the time taken to photocopy a record (in addition to the per page photocopy charge) because the act of photocopying is not considered an aspect of "preparing the record for disclosure," identified in section 6(1) of Saskatchewan's *Freedom of Information and Protection of Privacy Regulations*. In concluding that the Town may not charge the $15.00 per hour fee for the time taken to photocopy records, it is not necessary in the present case to determine the reasonableness of the amount of time spent by the Town making photocopies.

[36] The Applicant also alleged that some of the records he received were illegibly photocopied by the Town. In fact, an investigator from this Office also received photocopies of records that were dark and difficult to make out. The investigator raised this issue with the Town and was informed that the original records are themselves dark and difficult to photocopy legibly. I do not have any difficulty considering the accurate reproduction of records for disclosure to be an integral component of the Town's duty to assist an applicant under section 9 of the *ATIPPA*. Nevertheless, if the photocopies of the original records in question are difficult to make out because the originals are difficult to reproduce using a normally available office photocopier, then the Applicant's proper recourse is to view the originals in the Town's offices as permitted by section 15(b) of the *ATIPPA*. That said, in keeping with its duty to assist an applicant, the Town should have informed the Applicant that a few of the photocopied records were dark and difficult to make out and explained why. Nevertheless, the difficult-to-view photocopies should have been included in the records disclosed to the Applicant as they respond to the access to information request regardless of their legibility. Thus, in examining the reasonableness of the fee for the initial search for records I find that the Town should not have charged the Applicant for any of the time spent in the act of photocopying records for disclosure. However, the Town properly charged the Applicant a fee for the disclosed photocopies.

3. The assignment of costs for reproducing the engineering drawing revisions for disclosure.

[37] A significant point of disagreement between the Applicant and the Town in this case came to light during efforts to resolve the Applicant's complaint informally. Quite early in this process the Town noted that many of the records the Applicant alleged were missing consisted of a series of seven old revisions to engineering drawings prepared for the Town by its contracted engineer. Upon inquiry by an investigator from this Office the Town took the position that the Applicant was provided with the most current version of the drawings and that it seemed illogical that the Applicant's broad request for "[a]ny and all records … pertaining to the development" would include old revisions as they are not applicable to the development during the actual construction phase. Because the previous versions of the drawings were old, had been revised and were therefore potentially *conceptual* (and so did not pertain to the development actually being constructed), the Town did not consider them to be responsive records. In discussion with an investigator from this Office, the Town also argued that it did not consider the engineering drawing revisions responsive

to the Applicant's access to information request because its informal records retention policy is to destroy engineering drawings when a revision is received. This ensures that the Town works with only the most recent and up-to-date materials in its files.

[38] Nevertheless, in the course of efforts to achieve informal resolution of the Applicant's complaint the Town agreed to obtain the engineering drawing revisions and to share equally the $363.63 cost of obtaining them from its contracted engineer. The Applicant refused to accept the Town's proposal, arguing that the engineering drawing revisions should have been included with the records he had already received and that he should not have to pay for them.

(a) Do the records respond to the Applicant's request?

[39] Before discussing the assignment of costs for obtaining the engineering drawing revisions, it is necessary to address the Town's position that the revisions were not responsive records. I begin by pointing out, again, that the Applicant's access to information request was for "[a]ny and all records … pertaining to the development" in question. There is no qualification or narrowing in the broadly worded request that would lead the Town to reasonably conclude that it was meant to capture only those engineering drawings pertaining to the construction phase of the project. While the Town may have considered it logical to exclude the old drawings from the records disclosed to the Applicant, the access to information request should not have been interpreted by the Town to exclude those records. Only if the Town had withheld the engineering drawing revisions in accordance with the limited and specific mandatory or discretionary exceptions identified in the *ATIPPA* would it have been justified in excluding those records without first consulting the Applicant. Again, if the Town had been uncertain of the scope of the access to information request, it should have contacted the Applicant for clarification.

[40] Before disposing of the question of whether the Town should have considered the revisions responsive to the Applicant's access to information request, however, the fact that the Town had destroyed the revisions must be addressed. While I am concerned that the Town neglected to inform the Applicant of its informal records retention policy for the revisions and, indeed, I consider this omission to be an instance of the Town failing to fulfill its duty to assist the Applicant, I find that the Town's policy of destroying all but the latest of the engineering drawing revisions is a reasonable step taken to avoid confusion as to which drawing is the applicable one for its purposes. I commend the Town for having recently initiated a review of its records retention policy and remind all public

bodies that records should *only* be destroyed according to a retention policy that has met the requirements laid out in section 5(2) of the *ATIPPA*.

[41] Although the Town destroyed old versions of the engineering drawing revisions, it was nevertheless still able to obtain copies from its contracted engineer for a fee. A situation in which a public body no longer has a record in its files, but is still obliged to disclose a copy of it to an applicant is addressed in section 5(1) of the *ATIPPA*, which states that the *Act* "applies to all records in the custody of or under the control of a public body…" Page 2 of Alberta's *Freedom of Information and Protection of Privacy: Contract Manager's Guide* provides an elaboration of the terms custody of or control over a record that is useful to paraphrase here:

> a record is under the custody of a public body when it possesses the record. Control of a record, on the other hand, need not entail possession but is present when a public body can make decisions regarding management of the record or its disclosure to an applicant.

[42] In the present case, the Town did not have *custody* of the revisions but nevertheless still had *control* over them. The Town's ongoing control over the destroyed engineering drawing revisions can be explained by the fact that the Town's contracted engineer still had the revisions in his own office files. Indeed, for purposes of the *ATIPPA*, the Town's contracted engineer falls under the definition of an employee of the Town under section 2(e), which states that an "'employee', in relation to a public body, includes a person retained under a contract to perform services for the public body." Thus, even though the Town had destroyed its engineering drawing revisions, it was still obliged by the *ATIPPA* (within the confines of the limited and specific exceptions to access identified in the *Act*) to disclose them to the Applicant as long as the Town's engineer still had custody of or control over them. The engineer did still possess the revisions and no exceptions to access were claimed by the Town or applied to the revisions. Therefore, the engineering drawing revisions should have been disclosed to the Applicant because they were responsive to the Applicant's request. Notably, these points were not refuted by the Town during efforts to resolve the Applicant's complaint informally. Indeed, the Town refused to disclose the revisions to the Applicant only because the two parties disagreed over who should pay what proportion of the cost incurred by the Town to obtain the revisions for disclosure.

(b) Who should bear the cost of obtaining the engineering drawing revisions?

[43] The crux of the Applicant's argument regarding the assignment of costs for the engineering drawing revisions was that the Town should be responsible for paying the cost of obtaining them from its contracted engineer. The Applicant argued that his access to information request clearly captured the revisions and that he should not have to pay for additional records disclosed as a result of the intervention of this Office; these records should have already been disclosed to him and any appropriate fee included in the Estimate of Costs already paid by the Applicant.

[44] Section 68 of the *ATIPPA* states:

> *(1) The head of a public body may require an applicant to pay a fee to make a request under this Act, and for search, preparation, copying and delivery services in accordance with a fee schedule set by the minister responsible for this Act.*
>
> *(2) Where an applicant is required to pay a fee other than a request fee, the head of the public body shall give the applicant an estimate of the total fee before providing the services.*
>
> *(3) The applicant has 30 days from the day the estimate is sent to accept the estimate or modify the request in order to change the amount of the fees, after which time the applicant is considered to have abandoned the request.*
>
> *(4) Where an estimate is given to an applicant under this section, the time within which the head is required to respond to the request is suspended until the applicant notifies the head to proceed with the request.*
>
> *(5) The head of a public body may waive the payment of all or part of a fee in accordance with the regulations.*
>
> *(6) The fee charged for services under this section shall not exceed the actual cost of the services.*

[45] Section 68(2) of the *ATIPPA* clearly requires a public body to give an applicant a fee estimate before providing service in relation to an access to information request and section 68(3) obliges a public body to give an applicant 30 days to accept the request or modify it. The rationale for these provisions is straightforward if implicit. Where a public body does not exercise its discretion under section 68(5) of the *ATIPPA* to waive fees in relation to an access to information request, it may assess fees to an applicant according to the terms of the Fee Schedule. However, in doing so the *Act* also mandates that a public body give an applicant a chance, in the form of a fee estimate, to

consider whether to continue with the request in light of any assessed fees or alter or abandon the request accordingly.

[46] In a 2009 Investigation and Results Analysis, C-2009-001, an investigator from this Office points out on pages 3 and 4 that:

> *[W]e must recognize that the principles of accountability and transparency in the conduct of public administration may require that certain costs have to be incurred in order to provide statutory services, and not all of those costs are intended to be recovered from individual citizens. In the result, public bodies should exercise great care to keep fee estimates reasonable, and especially be careful not to over-estimate, in keeping with their duty to assist applicants.*
>
> *[I]t is the view of this Office that fee estimates under ATIPPA are intended to be binding, that where the actual cost of a request turns out to be less than the estimate, the public body should refund any excess paid by the applicant, but where the actual cost exceeds the estimate, the applicant should not be required to pay more than the estimated amount.*

[47] This Office has adopted the position that fee estimates are binding on the public bodies that issue them: 1) to help ensure that public bodies do a thorough job of estimating the cost of processing access to information requests, and 2) to help ensure that applicants are not penalized financially for the poor records management practices of public bodies that might later find and disclose additional records. Thus, the position that fee estimates are binding is designed to minimize barriers to access to records and so is in keeping with the purpose of the *ATIPPA* identified in section 3(1)(a): "to make public bodies more accountable to the public" by "giving the public a right of access to records." I do not, however, take the view that a fee estimate is automatically binding if neither points 1) nor 2) are at issue.

[48] In the present case, the Applicant was not provided with an Estimate of Costs prior to the Town processing his access to information request; in fact, the Applicant received and paid the Estimate of Costs at the same time that he picked up the responsive records. This situation exemplifies a clear breach of section 68(2) of the *ATIPPA*, which states that where a fee other than the initial $5.00 request fee is assessed, "the head of the public body shall give the applicant an estimate of the total fee **before** providing the services" (emphasis added). Nevertheless, the Town's failure to account for the engineering drawing revisions in its fee estimate is not a result of a sloppy estimate of search time and photocopy costs associated with the request. Nor is it the result of poor records

management on the part of the Town. Instead, it is the result of the Town coming to the conclusion that the destroyed revisions were not responsive to the Applicant's access to information request.

[49] I have disagreed with the Town's position that the revisions were not responsive to the Applicant's access to information request and I have found that the Town acted unreasonably when it narrowed the scope of the Applicant's access to information request. Nevertheless, the Town *did* act reasonably when it destroyed all but the most recent engineering drawing revisions and its decision to exclude the revisions from the records disclosed to the Applicant was at least in part the result of a reasonable disagreement regarding the proper application of section 5(1) of the *ATIPPA* ("This Act applies to all records in the custody or under the control of a public body…").

[50] As I expect of all public bodies involved in a Review by this Office, the Town spent a considerable amount of time responding to the queries of an investigator from this Office regarding the records received by the Applicant and further records were disclosed without any expectation of cost recovery on the part of the Town. With respect to the engineering drawing revisions, I find that the Town may charge the Applicant a fee in excess of its estimate; therefore, the Applicant should pay the cost of obtaining the engineering drawing revisions from the Town according to the terms of the Fee Schedule.

(c) Assessing the fee for disclosure of the records under the Fee Schedule

[51] Any fee paid by the Applicant to obtain the revisions must be assessed in accordance with the provisions of the Fee Schedule, which in most cases does not provide full recovery to the public body of the costs related to processing an access to information request. For providing the Town with the missing engineering drawing revisions, the Town's contracted engineer charged $363.63. The engineer took 4.5 hours to assemble the drawing revisions, billed at different rates depending on the personnel involved, for a total of $259.75. Printing and labeling charges amounted to $55.80.

[52] As already indicated above, the Fee Schedule specifies that an applicant must pay to the public body:

> *1(1) An applicant who makes a request for access to a record pursuant to the* Access to Information and Protection of Privacy Act *must pay to the public body*
>
> …

> *(b) for locating, retrieving, providing and manually producing a record, $15.00 for each hour of person time after the first two hours, rounded down to the nearest hour;*
>
> *(c) producing a record from information in electronic form, the actual cost of producing the record;*
>
> *(d) for shipping a record, the actual costs of shipping using the method chosen by the applicant;*
>
> *(e) where the record is stored or recorded in printed form and can be copied or printed using conventional equipment, 25 cents a page for providing a copy or print of the record;*
>
> *(f) where the record is stored or recorded in a manner other than that referred to in paragraph (e) or cannot be reproduced or printed on conventional equipment, the actual cost of reproduction for providing a copy of the record. …*

[53] While the Town was charged $259.75 for the 4.5 hours it took to assemble the drawings, section 1(b) of the Fee Schedule permits the Town to charge the Applicant only $15.00 per hour for the same length of time. Considering that the Town has already spent well in excess of 2 hours on the access to information request, I consider it reasonable to charge the Applicant the full 4.5 hours at a rate of $15.00 per hour for a total of $67.50. It should be noted here that during efforts to resolve the Applicant's complaint informally the Town tried unsuccessfully to obtain electronic copies of the drawing in hopes that doing so would allow it to disclose them to the Applicant quickly and at minimal cost to him. Thus, it came to light that the drawings were neither stored nor recorded in a printed form that could permit photocopying with conventional equipment. This means that the fee for reproducing the drawings must be determined with reference to section 1(f) of the Fee Schedule. Therefore, the Applicant must be assessed the "actual cost of reproduction for providing a copy of the record." The actual cost to the Town was $63.05. This cost, in addition to the $67.50 already noted, must be borne by the Applicant for a total of $130.55.

IV CONCLUSION

[54] As Information and Privacy Commissioner, I provide oversight of and guidance to the proper administration of the *ATIPPA*. Nevertheless, I will comment on public bodies' adherence to the policies and procedures in the ATIPP Manual insofar as doing so ensures that public bodies fulfill their obligations under the *Act*. In the present case, I encourage the Town to carefully follow the

ATIPP Manual as good administrative practice that will help it ensure that it carries out its duties under the *ATIPPA*.

[55] In reviewing the Town's handling of the Applicant's access to information request, I have noted failings on the part of the Town to fulfill its duties under the *ATIPPA*, including those duties specified in section 9 (duty to assist applicant), section 11(1) (time limit for response), section 12(1) (content of response), 46(1) and (2) (informal resolution) and section 68(2) (fees). I have focused in particular on the Town's failure to fulfill its duty to assist the Applicant in the early stages of the its handling of an access to information request.

[56] In response to the three specific outstanding issues raised by the Applicant, I conclude that the Town was not required by the *ATIPPA* to provide an index to or explanation of all the records disclosed to the Applicant, although I heartily encourage public bodies to do so. Nevertheless, the Town failed to fulfill its duty to assist the Applicant during efforts at informal resolution when it agreed to, but then did not provide him with some form of index or explanation that would allow the Applicant to make sense of the Town's response to queries raised by the Applicant during efforts at informal resolution.

[57] In turn, the Town should not have charged the Applicant a fee for time spent photocopying records for disclosure, although they may charge the per page fee for copying records. While an applicant may indeed be charged a fee under the Fee Schedule for time spent preparing records for disclosure, that time cannot include the act of photocopying itself.

[58] Finally, the Applicant should be assessed a fee related to disclosure of the engineering drawing revisions, although that fee must be in keeping with the Fee schedule.

V RECOMMENDATIONS

[59] Under the authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Town:

(1) Give the Applicant photocopies of the *numbered* version of records identified under the subheading "Town Correspondence" in the list of queries e-mailed to the Town by this Office on January 29, 2010 and in the response provided on February 19, 2010. These are the records that the Town has already disclosed to the Applicant, but subsequently agreed to provide to the Applicant, this time with the numbering system the Town provided to this Office during the informal resolution stage. This list includes the following records:

352, 379, 383-84, 374, 220, 383, 59, 66, 309, 342, 351-55, 358, 359, 374, 381, 383-4

(2) Return to the Applicant the $60.00 fee assessed for photocopying records.

(3) Disclose the engineering drawing revisions to the Applicant after receiving a fee of $130.55.

(4) Be mindful of its duties under sections 9 (duty to assist applicant), 11(1) (time limit for response), 12(1) (content of response) and 68(2) (fees) of the *ATIPPA*, as well the necessity of public bodies chronologically numbering responsive records.

(5) Take steps to ensure that the Town's access to information and protection of privacy coordinator is properly trained to comply with the *ATIPPA* and to apply the policies and procedures specified in the ATIPP Manual.

[60] Under authority of section 50 of the *ATIPPA* I direct the head of the Town to write to this Office and to the Applicant within 15 days after receiving this Report to indicate its final decision with respect to this Report.

[61] Please note that within 30 days of receiving a decision of the Department under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[62] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of May, 2010.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador