

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-21

June 19, 2019

COUNTY OF TWO HILLS NO. 21

Case File Number F8205

Office URL: www.oipc.ab.ca

Summary: An individual (the Applicant) made a request to the County of Two Hills No. 21 (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for “all records related to expense claims made by members of the County of Two Hills council”. The Applicant requested supporting documentation for each claim. The time period for the requested records was October 1, 2007 to March 15, 2013.

The Public Body provided the Applicant with a fee estimate in the amount of \$1,000.00. The Applicant requested that the Public Body waive the fee on the basis that the records were in the public interest. The Public Body declined to waive the fee.

The Applicant paid the fee but requested a review of the Public Body’s decision and subsequently an inquiry. The Commissioner agreed to hold the inquiry, adding the issue of whether the fees were properly estimated and did not exceed the Public Body’s actual costs of the services.

The Adjudicator found the Public Body failed to substantiate that the \$0.25 per page that it charged to the Applicant for photocopying did not exceed the Public Body’s actual costs as required by the FOIP Act. The Public Body also did not provide sufficient information or evidence on how it calculated the estimated or actual cost of any of the additional items it charged the Applicant for. As a result, the Adjudicator ordered the Public Body to refund all fees that were paid by the Applicant.

Consequently, it was not necessary for the Adjudicator to determine whether payment of any of the fee should be refunded on the basis that the records related to a matter of public interest.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 72, 93, 95; *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 186/2008, s. 13, Schedule 2 - Fees Schedule

Authorities Cited: AB: Orders F2011-015, F2012-06, F2016-39, F2019-18

I. BACKGROUND

[para 1] An individual (the Applicant) made a request dated March 15, 2013 to the County of Two Hills No. 21 (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for “all records related to expense claims made by the members of the County of Two Hills council”. The Applicant requested supporting documentation for each claim. The time period for the requested records was October 1, 2007 to March 15, 2013.

[para 2] The Public Body responded to the Applicant, asking questions to clarify the Applicant’s request. The Applicant advised the Public Body that he wanted all the expense claims submitted by the councillors for each of the years he identified and that he did not want a summary of the claims, and that he wanted the supporting documents.

[para 3] The Public Body then provided the Applicant with a fee estimate. It stated:

Supporting documents regarding all expense claims by Council Members from October 2007 to March 15, 2013 under the Freedom of Information and Protection of Privacy Act: Fees Schedule are as follows: 1. For searching for, locating and retrieving a record - \$6.75 per ¼ hour. 3. For producing a paper copy of a record: a) photocopies and computer printouts: i) black and white up to 8 ½ x 14” - \$0.25 per page.

Under the Freedom of Information and Protection of Privacy (FOIP) Act (the Act) Payment of fees – Section 13(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on receipt of an agreement to pay the fee, and on the receipt

a) of at least 50% of any estimated fee that exceeds \$150.00

Our estimation is approximately \$1,000.00, of which \$500.00 will be required immediately. When we received [sic] a payment of \$500.00 the FOIP request will recommence.

[para 4] The Applicant responded to the Public Body, explaining why he believed the Public Body should waive the fee on the basis that the information was in the public interest.

[para 5] The Public Body refused to waive the fee for the request.

[para 6] The Applicant paid the fee, but requested a review of the Public Body’s decision by this Office. The Commissioner authorized an investigation to attempt to settle the matter but this

was not successful. The Applicant then requested an inquiry. The Commissioner agreed to hold the inquiry, adding the issue of whether the fees were properly estimated and did not exceed the Public Body's actual costs of the services.

II. ISSUES

[para 7] The Notice for Inquiry dated October 26, 2017, states the issues for this inquiry as follows:

1. Should the Applicant be excused from paying all or part of a fee, as provided by section 93(4) of the Act (fees)?
2. Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?

III. DISCUSSION OF ISSUES

[para 8] In this case, I have decided to first address the second issue set out above: Did the Public Body properly estimate the amount of fees in accordance with sections 93(1) and 93(6) of the Act, and the Regulation?

[para 9] I must determine if, based on the information before me, the Public Body's fees are reasonable and done in accordance with the FOIP Act and the *Freedom of Information and Protection of Privacy Regulation*, Alberta Regulation 186/2008 (the Regulation).

[para 10] Section 93 of the FOIP Act authorizes public bodies to charge fees. It states:

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

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

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

(3.1) An applicant may, in writing, request that the head of a public body excuse the applicant from paying all or part of a fee for services under subsection (1).

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

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

(b) the record relates to a matter of public interest, including the environment or public health or safety.

(4.1) If an applicant has, under subsection (3.1), requested the head of a public body to excuse the applicant from paying all or part of a fee, the head must give written notice of the head's decision to grant or refuse the request to the applicant within 30 days after receiving the request.

(5) If the head of a public body refuses an applicant's request under subsection (3.1), the notice referred to in subsection (4.1) must state that the applicant may ask for a review under Part 5.

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

[para 11] As noted by the Adjudicator in Order F2012-06 at para. 183:

[para 183] Section 93(1), permits the head of a public body to require fees for services as provided for in the regulations, while section 93(6) prohibits a public body from charging fees in excess of the actual costs for providing the services. Consequently, a public body must be in a position to calculate its actual costs for providing services if it intends to require payment of fees. [my emphasis]

[para 12] As noted above, the Public Body provided the Applicant with a fee estimate for responding to his access request, quoting the maximum amounts public bodies are permitted to charge applicants under Schedule 2 of the Regulation for searching for, locating and retrieving a record, and for black and white photocopies. The Public Body advised the Applicant that its estimate to provide him with the records requested was \$1,000.00, of which he was required to pay \$500.00 immediately.

[para 13] Section 13(1) of the Regulation stipulates that an estimate provided under section 93(3) of the FOIP Act must set out, as applicable:

- (a) the time and cost to search for, locate and retrieve a record,*
- (b) the cost of computer processing and related charges to produce the record from an electronic record,*
- (c) the time and cost for computer programming to produce the record from an electronic record,*
- (d) the cost to produce a copy of the record,*
- (e) the time and cost for preparing and handling the record for disclosure,*
- (f) the time and cost to supervise an applicant who wishes to examine the original record, and*
- (g) the cost of shipping the record or a copy of the record.*

[para 14] The Public Body's fee estimate did not provide any breakdown of its fee. There was no indication what portion of the \$1,000.00 was allocated to, or how much time was estimated, for searching for, locating and retrieving a record, and what portion was attributed to photocopying.

[para 15] By way of letter dated July 19, 2018, the Public Body was asked by the former Adjudicator delegated to hear this inquiry to provide details of its fee estimate and submissions regarding whether it properly estimated the amount of fees in accordance with the FOIP Act and the Regulation.

[para 16] On July 31, 2018, the Public Body responded to the former Adjudicator stating:

The County of Two Hills No. 21 did properly estimate the fees in accordance with Sections 93(1) and 93(6) of the Freedom of Information and Protection of Privacy Act.

The County had numerous personnel and spent many hours (days) preparing the information that was requested, a full 20lb box was provided to [the Applicant].

The information had to be gathered from filed boxes, as the request went back many years.

[para 17] On November 19, 2018, I wrote to the Public Body and informed it that its assertion that it properly estimated the fees, and that it had numerous personnel and spent many hours (days) preparing the information that was requested, and had provided a full 20lb box to the Applicant, was insufficient for me to determine whether it had in fact, properly estimated the fees and did not charge more than its actual costs.

[para 18] I requested that the Public Body:

- inform me how it calculated the cost per page for photocopying and whether the cost charged per page reflected the Public Body's actual cost;
- provide evidence regarding the Public Body's actual costs for making photocopies and for its printing costs;
- inform me how it arrived at the rate of \$27 per hour (or \$6.75 per ¼ hour) as its actual cost for searching for and locating records, as well as for preparing and handling the records; and
- advise me what activities were included in calculating the time spent "searching for records" and how many hours it took to locate and retrieve responsive records.

[para 19] I asked the Public Body to provide me with the above information and to provide me with a breakdown of the estimated cost it provided to the Applicant to process the access request, as well as a breakdown of the actual cost incurred by the Public Body to process the access request. I requested that the Public Body identify the item number the Public Body had allocated the fee to under Schedule 2 of the Regulation. I asked the Public Body to respond to me by December 10, 2018 and to provide a copy of its response to the Applicant.

[para 20] The Public Body responded by letter dated January 31, 2019, which was not copied to the Applicant. I informed the Public Body that as its response was late, and was not copied to the Applicant, it would need to provide me with reasons why it missed the deadline, and would need to provide a copy to the Applicant. I would then consider whether to accept its late response.

[para 21] On February 13, 2019, the Public Body responded to me, copying its response and its letter of January 31, 2019, to the Applicant, and explaining why it had missed the deadline.

[para 22] On February 15, 2019, I notified the parties that in light of the Public Body's explanation, I would accept the Public Body's response dated January 31, 2019. I informed the Applicant that if he wished, he could provide a reply response to the Public Body's letter. I specified that the deadline for the Applicant to submit a reply response was March 4, 2019. On February 22, 2019 the Applicant advised he had no further submission.

[para 23] On May 10, 2019, I wrote to the parties and gave the Public Body the opportunity to provide the Applicant and me with the attachment it had referred to in its January 31, 2019 letter, but failed to enclose. Additionally, I noted the Public Body had stated in its January 31, 2019 letter that its Fee Bylaw permitted it to charge \$0.25 per copy. I requested that the Public Body provide the Applicant and me with a copy of the Fee Bylaw that was in force at the time the Public Body prepared its fee estimate in 2013. I gave the Applicant the opportunity to provide a response to me and to the Public Body, should it provide the attachment and Bylaw to the Applicant and to me.

[para 24] On May 13, 2019, the Public Body provided the Applicant and me with the attachment, as well as a copy of its Policy No. ADM-FEE-1, Administration Fees, dated August 1, 1995, and Bylaw No. 5-56, "being the Bylaw of the County of Two Hills to provide for the setting of fees for various Administrative Services, that was in force at the time the Public Body prepared its fee estimate in 2013". No further response was received from the Applicant.

[para 25] In its letter of January 31, 2019, the Public Body provided the following response to my request for additional information regarding its calculation of fees:

Our County has also had numerous staffing changes since 2013, when a case of photocopy paper was mailed, there are far more copies than 500, there are approximately 5,000 sheets in a case. The County's Fee Bylaw, charges \$.25 per copy.

In previous correspondence we had described the process to provide the information and I have answered the Fee Waiver request questions in prior correspondence (attached).

You are requesting that we provide a breakdown from 2013, this being over five years ago, I cannot accurately provide anything more than was provided[.]

The County of Two Hills No. 21 did properly estimate the fees in accordance with Sections 93(1) and 93(6) of the Freedom of Information and Protection of Privacy Act.

The County had numerous personnel and spent many hours (days) preparing the information that was requested, a full 20lb box of copies was provided to [the Applicant].

The information had to be gathered from filed boxes, as the request went back many years.

[para 26] The attachment which the Public Body referred to in its January 31, 2019 letter, was a letter dated March 11, 2015 it sent to the Senior Information and Privacy Manager during the mediation stage of this matter. In the letter, the Public Body provided the reasons why it

declined the Applicant's request for a fee waiver. It did not contain any information responsive to my specific questions regarding the Public Body's calculation of its fee estimate or its actual costs.

[para 27] Previous Orders of this Office have addressed whether it is appropriate for a public body to use the maximum amounts set out in the Regulation in determining a fee estimate, or to charge an applicant to provide records.

[para 28] In Order F2016-39, the Adjudicator made the following comments about this:

[para 7] In Order F2011-015, I reviewed previous orders of this office regarding section 93 and said:

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

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

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.

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.

[...]

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

charge or estimate the maximums set out in Schedule 2 regardless of the actual costs incurred, or that it expects to incur.

[...]

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

[emphasis in original]

[para 8] In Orders F2012-06, F2012-16, F2013-10, F2013-27, and F2013-54, the Adjudicators followed the reasoning in Order F2011-015 and reduced the fees charged or estimated on the basis that the public bodies in those cases had not established that the fees reflected the public bodies’ actual costs within the terms of section 93(6). In those orders, it was held that the schedule in the Regulation establishes the maximums that may be charged for services. However, if the actual costs to a public body are less than the statutory maximum, then the public body may not charge the statutory maximum.

[para 9] In addition to being restricted to charging amounts reflecting their actual costs of providing services, public bodies may only charge fees for providing services that a public body is authorized or required by the FOIP Act to provide. As an example, in Order F2013-35, the Adjudicator determined that fees could not be charged for obtaining a record responsive to an access request that was not in the custody or control of a public body. The public body in that case had obtained a record for the price of \$550 from the contractor that had created, and had custody and control over, the record. The Applicant requested review of the fees, and the Adjudicator disallowed the \$550 fee on the basis that the FOIP Act did not require or contemplate the Public Body’s performing such a service or charging for it.

[para 10] I turn now to the question of whether the Public Body has demonstrated that it has properly calculated the fees for processing the Applicant’s access request, bearing in mind that a public body may not charge for services not contemplated by the FOIP Act and must demonstrate that the fees reflect its actual costs for providing services.

[para 29] With respect to the photocopying costs charged by the public body, the Adjudicator in Order F2016-39 made the following determination:

[para 31] The Public Body has not provided evidence to support the costs it charged for staff time and photocopying. While I accept that the hourly rate of the employees who searched for responsive records and prepared them was likely to be at least the statutory maximum, which is the rate the Public Body charged, there is no evidence before me that the \$.25 per page it charged the Applicant for photocopying reflected its actual costs for providing this service.

[para 32] As discussed above, previous orders of this office have held that a public body may charge only its actual costs for providing services. Previous orders have also taken notice that \$.25 per page is a rate that is likely to be in excess of a public body’s actual costs for

photocopying. In this case, the Public Body has not established that the costs to it for photocopying are properly reflected by the statutory maximum. I must therefore disallow its costs for photocopying, on the basis that it has submitted no evidence as to how it arrived at this fee.

This Order was upheld on judicial review.

[para 30] The issue was also recently considered by the Adjudicator in Order F2019-18. I note the following comments of the Adjudicator:

[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.

...

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

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

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

...

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.

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.

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 cents 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 31] The Adjudicator in Order F2019-18 made the following determination regarding the photocopying costs charged by the public body:

[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 32] In summary, the Regulation sets out the maximum amount a public body may charge for a particular service. However, section 93(6) of the FOIP Act permits a public body to charge an applicant no more than the actual cost to the public body for the particular service. Accordingly, a public body must be able to establish what its actual costs are for each of the services specified in Schedule 2 of the Regulation it includes in a fee estimate, and should not create a fee estimate using the maximum amounts set out in the Regulation if its actual cost for the particular service is lower than the maximum amount permitted.

[para 33] In its response to me dated January 31, 2019, the Public Body asserted that its Fee Bylaw authorized it to charge \$0.25 per copy.

[para 34] Section 95 of the FOIP Act authorizes a public body, such as the Public Body, to create bylaws setting the fees it requires to be paid. It 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 35] The Public Body did not refer to a particular section of the Fee Bylaw on which it was relying. In reviewing the Bylaw, I note that Schedule "A", the Schedule of Fees to the Bylaw, indicates that the Public Body may charge \$0.25 per reproduced page or portion thereof with respect to sections 4.1 and 4.2 of the Bylaw. These sections state:

- 4.1 That upon written request from any elector or owner or purchaser of lands within the County of Two Hills No. 21 and upon receipt of a fee set out in Schedule “A” the Administrator shall within a reasonable time provide copies of:
- a) any contract approved by Council or an Executive Committee and any By-Law or account after it has been submitted to the Council,
 - b) any report of the commissioners or of any Committee or of any official of the County after it has been submitted to the Council, other than an opinion or report of any Counsel engaged by the County,
 - c) the minutes of Council, after they have been adopted by the Council.
- 4.2 Notwithstanding Subsection 4.1, the charge for the copy of a By-Law furnished by the Administrator under that Subsection shall not exceed \$25.00.

[para 36] In Order F2019-18 the Adjudicator considered a public body’s argument that it was permitted to charge \$0.25 a copy, as its municipal council adopted the FOIP Regulation’s fee schedule in its Municipal FOIP Bylaw. The following comments of the Adjudicator are particularly relevant to the case before me:

[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 37] I am not entirely convinced that the language of section 4.1 of the Public Body’s Fee Bylaw applies to all of the information requested by the Applicant in this access request. Possibly the language “or account” in section 4.1(a) may be interpreted to encompass the information requested by the Applicant. Whether section 4.1 applies or not though, section 93(6) of the FOIP Act does not allow the Public Body to charge more than its actual costs for photocopying, and the Public Body’s Bylaw cannot override this.

[para 38] The FOIP Act and the Regulation contemplate that public bodies prepare a fee estimate using their actual costs (which cannot exceed the maximums set out in the Regulation) for the services listed in the Regulation; keep track of the actual time spent for providing each service; and reconcile their final actual costs (again, which cannot exceed the maximums set out in the Regulation), with their estimated costs at the end of the process.

[para 39] I specifically requested the Public Body provide me with its actual costs for providing the services it listed in its fee estimate to the Applicant, and tell me how it allocated its fee estimate among the services it listed.

[para 40] In its response, the Public Body did not provide me with any evidence to support it charging \$0.25 per page for photocopying as its actual cost, or \$6.75 per ¼ hr as its actual cost for searching for, locating and retrieving a record. It stated that as this was over five years ago, it could not accurately provide anything more than it had already provided.

[para 41] It appears in this case that the Public Body did not keep track of the actual time and cost to search for, locate and retrieve the records requested, or the actual number of pages it photocopied. The final fee it charged the Applicant was the same as its estimated fee.

[para 42] I find it highly unlikely that the Public Body perfectly estimated what its final actual costs would be to provide the requested records to the Applicant. Its final actual costs may have been more, or less, than what it charged the Applicant.

[para 43] As the Public Body did not give me any information about the number of hours or days spent searching for, locating and retrieving responsive records, or the hourly rate of the employee(s) who performed the services, I have no way to determine if the fee it charged the Applicant for this service complied with the FOIP Act and the Regulation, and was reasonable.

[para 44] I accept the Public Body's submission that it provided a 20lb box of records to the Applicant and that there are approximately 5,000 pages in a 20lb box. However, as I have stated, it did not provide me with any information regarding its actual photocopying costs. There would be a significant difference if the Public Body's actual cost to make a copy was, for example, \$0.045 per page (\$225.00 for 5,000 pages) instead of \$0.25 per page (\$1,250.00 for 5,000 pages).

[para 45] It is clear that the Public Body expended time and resources to respond to the Applicant's access request; however, it has not provided me with sufficient information or evidence to conclude that it properly estimated the fees, and that the fees did not exceed the actual costs of the services in accordance with sections 93(1) and 93(6) of the FOIP Act, and the Regulation.

[para 46] Given that the Public Body in this case has said it relied on its Fee ByLaw as its authority to charge \$0.25 per page for photocopying; that it did not provide me with any information about its actual costs for photocopying; that it did not provide me with any information as to how many hours or days it spent searching for, locating and retrieving the records; that it did not provide me with any information about the hourly rate of the employee(s) who performed the services; and that it said it could not accurately provide me with any further

information, I do not think this is an appropriate situation to order the Public Body to recalculate its fees using its actual costs to provide these services.

[para 47] As mentioned, section 93(6) of the FOIP Act provides that a public body may charge no more than its actual costs for the services. I have no information to indicate what the Public Body's actual costs for photocopying are. I do not know whether the Public Body could produce a copy for \$0.045 per page. As I cannot rule out the possibility that the Public Body's actual costs for photocopying may be less than \$0.045 per page, I have decided not to make an order that permits the Public Body to calculate its fees for photocopying using \$0.045 as its cost per page, since such an order may place it in contravention of section 93(6) of the FOIP Act.

[para 48] Accordingly, given the lack of evidence provided by the Public Body to support that the fee it estimated and charged the Applicant complied with the FOIP Act and the Regulation, I have decided the appropriate result in this case is to order the Public Body to refund all fees to the Applicant that were paid by the Applicant in relation to his access request.

[para 49] I would make the same recommendation to the Public Body in this case as the Adjudicator did in Order F2019-18 at para. 69:

[para 69] For future access requests, the Public Body should undertake its own calculation of 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 50] I agree with and would reiterate the comments of the Adjudicator in Order F2019-18 at para. 57:

[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 51] As I have determined the Public Body should refund the Applicant all fees it required him to pay in relation to his access request, it is not necessary for me to determine whether any or all of the fee should be excused under section 93(4) of the FOIP Act.

IV. ORDER

[para 52] I make this Order under section 72 of the Act.

[para 53] I order the Public Body to refund all fees to the Applicant that were paid by the Applicant in relation to his access request.

[para 54] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Carmen Mann
Adjudicator