ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2025-18

May 9, 2025

MUNICIPAL DISTRICT OF RANCHLAND NO. 66

Case File Number 027082

Office URL: www.oipc.ab.ca

Summary: The Applicant submitted a request under the *Freedom of Information and Protection Privacy Act* (the FOIP Act or the Act) to the Municipal District of Ranchland No. 66 (the Public Body). The Public Body provided the Applicant with a fee estimate of $23,135. The Public Body said the reason for the high fee estimate was because an external IT consultant was required to search for records.

The Applicant requested a review of the Public Body's fee estimate. After the review, the Applicant requested an Inquiry, which the Commissioner agreed to.

The Adjudicator found that the Public Body had charged fees for the work to be performed by the IT consultant under the wrong provisions of the FOIP Regulation. She ordered the Public Body to charge fees under Schedule 2 Item 1 (fees for searching for, locating and retrieving a record) rather than Schedule 2 Item 2 (fees for producing a record from an electronic record) of the Regulation when calculating fees.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (FOIP Act/the Act), ss. 10, 12, 13, 72, 93; *Freedom of Information and Protection of Privacy Regulation*, Alta Reg 186/2008 ("Regulations"), s. 13, Schedule 2 - Fees Schedule

Authorities Cited: AB: Orders 99-014, 2001-016, F2009-009, F2011-R-001, F2013-10, F2016-40, F2019-34, and F2022-04

I. BACKGROUND

[para 1] On July 14, 2021, the Applicant submitted an access request under the *Freedom of Information and Protection Privacy Act* (the FOIP Act or the Act) to the Municipal District of Ranchland No. 66 (the Public Body). which was amended on December 14, 2021 to state the following:

> We write pursuant to section 7 of the Freedom of Information and Protection of Privacy Act, RSA 2000, c-F-25 ("FOIP") to request electronic copies of certain records (whether written, electronic, or in any other form, including physical or electronic backups) of communications including (but not limited to) emails, text messages, social media platform messages (such as Signal, Telegram, WhatsApp, Facebook, Instagram) physical mail, attachments, memoranda, notes, call logs, voicemail messages, transcriptions, and related metadata under the custody or control of the Municipal District of Ranchland No. 66.
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> Please note that certain records which are in the custody of the Municipal District of Ranchland No. 66 advisors remain under the control of the Municipal District of Ranchland No. 66. Accordingly, and in keeping with the obligation under section 6(1) of FOIP, Service Alberta must conduct a search of any such records where they remain under the Municipal District of Ranchland No. 66's control, even where such records are not presently in the Municipal District of Ranchland No. 66's custody.
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> 1. Communications dated after May 15, 2020 between the Public Body and the Alberta Energy Regulator ("AER") in which draft or final versions of the "Report of the Joint Review Panel" identified in Appendix "A" are attached or referenced.
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> 2. Communications dated after May 15, 2020 between the Public Body and the Alberta Energy Regulator (AER) which include the Keywords identified in Appendix "B". Record holders are Council members, and assisting staff of the Municipal District of Ranchland No. 66, including but not limited to a. R.S. (Chief Administrative Officer); b. C.M. (Executive Assistant); c. R.N. (Agriculture Fieldman); d. S.C. (Administrative Support); e. G.B. (Accountant); f. R.L. (Public Works Manager); g. S.S (Council Liaison); h. R.D. (Councillor); i. H.S. (Councillor); and j. C.G. (Councillor) (together, the "Ranchland Personnel").
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> 3. Social media platform messages dated after May 15, 2020 from mobile device applications including but not limited to Signal, Telegram, WhatsApp, Facebook and Instagram between any of the

Ranchland Personnel and any of the following members of the AER: a. L.P., Chief Executive Officer; b. Hearing Commissioners; i. A.B.; ii. D.G.; iii. H.M. c. C.I., Executive Liaison and Chief of Staff; d. M.D., Vice President, Finance and Chief Financial Officer; e. C.P., Vice President, Engagement and Communication; f. J.B., Vice President, Information Management and Technology; g. E.K., Vice President, People, Culture and Learning; h. M.F., Chief Operations Officer; i. S.Y., Vice President, Regulatory Enhancement; j. M.S., Vice President, Compliance & Liability Management; k. A.B., Vice President, Alberta Geological Survey; l. B.T., Vice President, Regulatory Applications; and m. J.W., Vice President, Technical Science & External Innovation (together, the "AER Personnel").

4. Social media platform messages dated after May 15, 2020 from mobile device applications including but not limited to Signal, Telegram, WhatsApp, Facebook and Instagram which include any of the Keywords identified at Appendix "B".

5. Text messages dated after May 15, 2020 between any Ranchland Personnel and AER Personnel.

6. Text messages dated after May 15, 2020 which include any of the Keywords identified at Appendix "B".

7. Emails, including all attachments dated after May 15, 2020 between any Ranchland Personnel and AER Personnel.

8. Physical or electronic calendar appointments between any Ranchland Personnel and AER Personnel dated after May 15, 2020.

9. Phone logs or records, including the date, time and duration of any phone calls after May 15, 2020 between any Ranchland Personnel and AER Personnel.

10. Call logs, chats, video or audio recordings or other records from any video calling or office messaging platforms (including but not limited to Microsoft Teams, Skype and Zoom) dated after May 15, 2020 between any Ranchland Personnel and AER Personnel.

11. Voicemail messages, from phone, outlook, or video calling applications dated after May 15, 2020 between any Ranchland Personnel and AER Personnel.

12. Physical mail dated after May 15, 2020 between any Ranchland Personnel and AER Personnel.

13. Background information, materials, transcriptions, briefing notes or minutes relating to any communication between any Ranchland Personnel and AER Personnel occurring after May 15, 2020.

14. All communications, and internal records related to such communications, which include the Keywords identified in Appendix "B" between Ranchland Personnel and the Alberta Energy Regulator from May 15, 2020 to present.

15. All metadata from electronic records identified in response to Requests #1 through # 14 above.

[para 2] The Public Body confirmed receipt of the amended request on December 23, 2021 and extended the deadline for response to February 9, 2022.

[para 3] The Public Body received the initial $25 administration fee from the Applicant on August 3, 2021 and acknowledged and sought clarification of the request on the same date.

[para 4] On March 18, 2022, the Public Body provided the Applicant with a fee estimate of $23,135, consisting of the following:

- Searching for, locating and retrieving records: 40 hours x $6.75 per ¼ hours = $1,080.00;
- For producing a record from an electronic record – computer processing and related charges (based on actual costs): 150 hours x $136.50 per hour = $20,475.00;
- Preparing and handling records for disclosure: 40 hours x $6.75 per ¼ hours = $1,080.00;
- Producing paper copies of records: estimated 5,000 pages at $0.10 per page = $500.00.

[para 5] The Applicant submitted a request for review of the Public Body's fee calculation to this Office on June 23, 2022.

[para 6] The Applicant submitted a Request for Inquiry to this Office on August 11, 2023.

[para 7] In its initial submission dated May 6, 2024, the Public Body stated at paragraph 17:

> The Public Body submits that there is an unresolved preliminary issue in this matter that

> was not addressed at the request for review – mediation stage – being that the Applicant filed the request for review outside of the 60-day statutory window provided for in section 66 of the *FOIP Act*.

[para 8] In its rebuttal submission, dated June 5, 2024, at paragraph 10, the Public Body wrote:

> In raising the preliminary issue of whether the Applicant filed the request for review that preceded this Inquiry in accordance with the statutory timeline set out in section 66 of the FOIP Act, the Public Body is seeking an acknowledgment of the issue from the Commissioner as to whether they have exercised their discretion in accordance with the FOIP Act.

[para 9] On August 16, 2024, I wrote to the parties and confirmed that the matter of the late application for review was considered and approved for intake on September 14, 2022. I further stated that this was not an issue that I would deal with in this Order.

II. ISSUES

[para 10] The issue as stated in the Notice of Inquiry is:

> Did the Public Body properly estimate the amount of fees in accordance with section 93(1) and 93(6) of the Act, and the Regulations?

III. DISCUSSION OF ISSUE

Did the Public Body properly estimate the amount of fees in accordance with section 93(1) and 93(6) of the Act, and the Regulations?

Duty to Assist

Applicant's Submissions

[para 11] The Applicant submits that the Public Body has failed in its duty to assist under section 10(1) of the FOIP Act, by providing a high fee estimate. The Applicant further submits that the fee estimate is being used to "unnecessarily delay or otherwise obstruct the Applicant's right to access information responsive to the Request, which undermines one of the primary purposes of the *Act*: "…to allow any person a right of access to the records in the custody or under the control of a public body…".

[para 12] The Applicant further submits that by refusing to comply with the recommendations made by the OIPC, the Public Body has further delayed the processing of the request.

[para 13] The Applicant further submits that as per Order F2019-34, public bodies must make "every reasonable effort to assist applicants and to respond to each applicant

openly, accurately and completely…the lack of a searchable backup file should not absolve the Municipal District of its duty to the Applicant or thwart the Applicant's right to access the information."

Public Body's Submissions

[para 14] The Public Body denies that it has attempted to delay or obstruct the Applicant's right of access, and that it has fulfilled its duty to assist the Applicant pursuant to section 10(1) of the FOIP Act. It points to the history of the request and that its actions have consistently demonstrated its attempts to assist.

[para 15] The Public Body further submits that recommendations made by the Senior Information and Privacy Manager (SIPM) at the mediation stage are not binding on the parties. It submits that the only duty to comply is under the inquiry process, once the Commissioner issues an Order following an inquiry.

Analysis

[para 16] This inquiry is a *de novo* process and not a review of the SIPM's process or their findings. I will not be relying on or considering the SIPM's analysis or findings and will come to my own conclusions in this matter.

[para 17] The Applicant has accused the Public Body of failing in its duty to assist the Applicant by charging a high fee estimate and disregarding the recommendations that came out of the mediation.

[para 18] Section 10 of the FOIP Act outlines the duty to assist applicants:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*
>
> *(2) The head of a public body must create a record for an applicant if*
>
> *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
>
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 19] Previous orders of this office (see Orders 2001-016 and F2022-04) have established that the duty to assist includes a duty to conduct an adequate search.

[para 20] The Applicant has not taken issue with the way the Public Body has responded to it in terms of searching for the records; rather, their issue is the fee estimate.

[para 21] In this case, the search for records has not yet commenced. A fee estimate has been generated. The fee estimate is based on an eight-hour test search conducted by the Public Body's IT contractor.

[para 22] The Public Body is willing to search for the requested records. It made an attempt to clarify the request with the Applicant and then instructed its IT contractor to conduct a test search. I find the actions taken by the Public Body to be reasonable and that it has met its duty to assist the Applicant. I do not find that the Public Body's high fee calculation is an attempt to avoid its duty to assist the Applicant.

[para 23] I was unable to find any Orders that interpreted the issuing of a fee estimate as a failure on part of the Public Body of its duty to assist. When deciding an issue under section 10, the legislation states that a Public Body must respond to the Applicant "openly, accurately and completely."

[para 24] The Public Body responded to the Applicant, clarified the request, and proceeded to investigate its options on how to locate records and provide the Applicant with a response. The efforts culminated in providing a fee estimate.

[para 25] The Applicant also argued that the Public Body failed in its duty to assist by not accepting the recommendations that came out of the mediation. There is nothing in the legislation that obligates a party to accept recommendations made at mediation. Parties are obligated to comply with the Orders that are made by the Commissioner. I find that while accepting the recommendations would have more quickly resolved the issue, the Public Body was under no obligation to accept them. I will re-state that the Inquiry process is *de novo* and that I have not considered the SIPM's findings at all in my decision.

The Fee

Applicant's Submissions

[para 26] The Applicant submits that the bulk of the fee portion (150 hours x $136.50/hour = $20,475) is "attributed to computer processing and related charges for producing a record from an electronic record."

[para 27] The Applicant submits that Schedule 2 sets out the activities that the Public Body can charge for as well as maximum amounts. The Applicant further submits that the scope of the search falls within Schedule 2, Item 1 of the Regulation, not Item 2 as submitted by the Public Body.

[para 28] The Applicant submits that the Public Body has mischaracterized routine data retrieval as "computer processing activities", just because an external IT consultant is required to perform the tasks.

[para 29] The Applicant submits that the work primarily involves searching for existing emails and records and that the Schedule 2 of the Regulation outlines the correct rate for searching, locating, and retrieving a record, which is not to exceed $6.75 per ¼ hour.

[para 30] The Applicant submits that the request involves retrieving the records; there is no need to create, recreate or manipulate the records into a new record, and therefore the Public Body's fee estimate calculated at 150 hours x $136.50/hour is unjustifiable.

[para 31] The Applicant also submits its concerns over the estimate of the number of responsive records, which is that there could be 5000 pages of records located. It states that the estimate lacks details as to the number of records found in the initial search by the Public Body and what the relevance of those results are.

[para 32] In support of its position the Applicant states at paragraph 31 of its submission:

> It is significant for all Albertans that the Municipal District, and by analogy all public bodies, not be allowed to construct artificial barriers to avoid complying with a freedom of information request. While the Applicant, in this case, may be well-resourced and able to challenge the public body, many applicants lack the financial resources to challenge or comply with such extravagant demands. Public bodies should not be able to outsource significant portions of their responsibilities under the *Act* to third party contractors, and then demand an applicant fund the outsourcing before an applicant may have access to information that it is the applicant's right to obtain. That is exactly what will happen, it is respectfully submitted, if the Municipal District's $23,135 estimate is allowed.

Public Body's Submissions

[para 33] The Public Body submits that its fee estimate was reasonable and made in accordance with the principles of the FOIP Act and the Regulations.

External IT Consultant

[para 34] The Public Body submits that it is a small municipality with an estimated 110 residents; there are only three full-time and 2 part-time staff; and there are no IT employees with the expertise to respond to the Applicant's request. It states that for this reason it must hire an outside consultant to respond to the request.

[para 35] The Public Body further adds that the search for records is not a simple task of searching a program like Outlook. It submits that the Applicant's request entails the search and production of records from all its servers; additionally, the servers are not maintained internally. The Public Body submits that the IT consultant is in the best position to search and produce the records "in a manner that is open, accurate, and complete".

Section 13(1)(b) of the Regulation

[para 36] The Public Body submits that section 13(1)(b) of the Regulation allows it to charge actual costs "of computer processing and related charges to produce the record from an electronic record".

[para 37] The Public Body submits that while the terms "producing" and "computer processing and related charges" are not defined terms in the FOIP Act or the Regulations, dictionary definitions of the terms are helpful. The Public Body submits, "…producing a record from an electronic record involves bringing forward responsive records from an electronic source (e.g. computer servers and back-up records) to show or to allow an applicant to view such a record. Where that act of producing a record from an electronic record requires the use of computer operations to access that information, a public body is authorized to charge a fee equal to the actual cost of the computer processing."

[para 38] The Public Body submits that the $20,475 includes the actual cost to produce the records from the electronic sources. It states that an IT consultant is required as the backup records are not readily available and must be searched for. The Public Body states that it is in a similar situation as described in Order F2019-34:

> [para 23] … maintaining a backup file that is not readily searchable is not a poor records management system. Backups are often maintained to restore records in the event of a catastrophic event; such backups are often not readily available and are not meant tobe accessed for regular operational purposes (in contrast to Order F2007-028, in which the public body acknowledged it used backup files for its own operational purposes)."

[para 39] As a response to the Applicant's argument that new records are not being created, the Public Body submits, that while it is not creating a new record, related charges can apply in the production of records. At paragraph 37, it states:

> While Order F2011-R-01 discusses the difference between creating a record under section 10(2) and "producing a record" in the context of section 13 of the *FOIP Act*, there is an explicit recognition creating and producing are distinct actions. Section 13 of the *FOIP Act* speaks to producing a record in a similar manner as section 13 of the Regulations. This further supports the conclusion that a new record need not be created in order for the computer processing and related charges fee to apply.

[para 40] The Public Body's submissions at paragraphs 40-42 state:

> 40. This approach is supported by the decision of the Adjudicator in Order F2021-22:
>
> "[para 83] The Applicant has questioned why the Public Body does not have a tracking system for the type of records he has requested. While a tracking system may have decreased the amount of time required to

search for, locate and retrieve responsive records, **I cannot judge the Public Body's fee estimate based on technology it does not have**." [emphasis added]

41. To interpret section 13(1)(b) and Schedule 2, item 2 of the Regulations in a narrow manner that only means to require the creation of a new record is to ignore the explicit language of the Regulations, which allows for computer processing and relate charges in relation to the production of documents, and has the effect of judging the Public Body based on its technical capabilities. While such a search and production of records may be more easily done by a large public body with more resources and technical skills, it may not be reasonably feasible for a small Public Body with limited resources, staff, and technology.

42. The Public Body submits the Commissioner should interpret producing a record from an electronic record in a broad and purposive manner to allow for instances where computer operations are necessary for the production of the information, but in a way that is distinct from creating a record given the explicitly different language in the Regulations from that of section 10(2) of the *FOIP Act*.

[para 41] The Public Body submits that given the broad and extensive request for information, the FOIP Act and the Regulation support the fee estimate of $23,135.00.

Section 13(1)(d) of the Regulation

[para 42] The Public Body submits that in the event that charging actual costs is not allowed using section 13(1)(b) of the Regulation then, in the alternative, it should be allowed to charge actual costs relying on section 13(1)(d) of the Regulation. It recognizes that the Regulations treat producing a record using a computer process and producing a copy of the record differently. The Public Body is requesting that the fee estimate remain the same as what they have already quoted.

[para 43] The Public Body submits at paragraphs 45 and 46:

45. As noted section 13(1)(d) of Regulations permits a fee for the cost to produce a copy of the record, which is subsequently expanded on in Schedule 2, items 3 to 6. While items 3 and 5 concern paper copies, item 4 explicitly refers to electronic copies and item 6 acts as a general provision where items 3 to 5 do not provide for how a copy is to be produced:

> 6 For producing a copy of a record by any process or in any medium or format not listed in sections 3 to 5 above.

46. Where item 6 of Schedule 2 is engaged, the Public Body may charge in the fee to the Applicant the actual cost in producing a copy of a record **by any process** or in any medium not listed.

[para 44] The Public Body submits that regardless of whether the record is produced pursuant to section 13(1)(b) or section 13(1)(d), the cost incurred in doing so are allowable:

> 50. Should the Commissioner determine that the charges of $20,475.00 do not fall within section 13(1)(b) of the Regulations and are instead fees that would be incurred by the Public Body in producing copies of electronic records, the actual costs to the Public Body of doing so may be included in a fee to the Applicant pursuant to section 13(1)(d) and item 6 of Schedule 2 of the Regulations.

[para 45] Furthermore, the Public Body submits at paragraph 65 of its submissions:

> Should the Public Body's fee estimate for the use of its external IT consultant to aid in the production of certain electronic records be amended by the Commissioner, the Public Body will adhere to any Order issued by the Commission, including re-estimating the fees on the basis of the Public Body's internal employees performing reasonable searches for records and limited ability to produce records from any electronic records. Similar to the decision in Order F2019-34, there may be operational limitations in producing records from servers and back-up storage that are not internally maintained by the Public Body.

[para 46] The Public Body argues that its fee estimate is reasonable and cites Order F2009-009, paragraph 32:

> Accuracy is not required in the formulation of what is intended to be an estimate. Only reasonableness is required, and the Public Body's method of estimating the fees for services in the Applicant's case was reasonable. Overestimates and overpayments are expected to sometimes occur, given that section 14(4) of the Regulation states that fees will be refunded if the amount paid is higher than that actual fees required to be paid.

Analysis

The Fee Estimate

[para 47] The Applicant has not taken issue with the entire fee estimate. The two elements that it has contested are:

- For producing a record from an electronic record – computer processing and related charges (based on actual costs): 150 hours x $136.50 per hour = $20,475.00;
- Producing paper copies of records: estimated 5,000 pages at $0.10 per page = $500.00.

[para 48] I will focus on these two aspects in my discussion of the fee estimate.

Estimate Re: producing a record from an electronic record

[para 49] Section 93(1) and (6) of the FOIP Act read as follows:

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.

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

[para 50] Sections 10, 11 and 13 of the Regulation discuss fees and fee estimates.

Fees
10 Where an applicant is required to pay a fee for services, the fee is payable in accordance with sections 11, 12, 13 and 14.

Fees for non-personal information
11(1) This section applies to a request for access to a record that is not a record of the personal information of the applicant.

(2) An applicant is required to pay
- *(a) an initial fee of $25 when a non-continuing request is made, or*
- *(b) an initial fee of $50 when a continuing request is made.*

(3) Processing of a request will not commence until the initial fee has been paid.

(4) In addition to the initial fee, fees in accordance with Schedule 2 may be charged if the amount of the fees, as estimated by the public body to which the request has been made, exceeds $150.

(5) Where the amount estimated exceeds $150, the total amount is to be charged.

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

Estimate of fees
13(1) An estimate provided under section 93(3) of the 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 51] Schedule 2 of the Regulation provides the fee schedule and sets out the maximum amounts that can be charged to Applicants. Items 1, 2 and 6 are the relevant provisions that will be discussed:

1	*For searching for, locating and retrieving a record*	*$6.75 per 1/4 hr.*
2	*For producing a record from an electronic record:*	
	(a) Computer processing and related charges	*Actual cost to public body*
	(b) Computer programming	*Actual cost to public body up to $20.00 per 1/4 hr.*
[…]		
6	*For producing a copy of a record by any process or in any medium or format not listed in sections 3 to 5 above*	*Actual cost to public body*

[para 52] For the reasons given below, and in accordance with earlier decisions of this office, I find that section 13 of the Regulation (which corresponds with Schedule 2) is to be interpreted as follows:

- fees payable under section 13(1)(a) for searching for, locating and retrieving records corresponds with the duty under section 10(1) of the Act to search for records;
- fees payable under sections 13(1)(b) and (c) correspond with the duty under section 10(2) of the Act to create records from an electronic record;
- and fees payable under section 13(1)(d) to produce copies correspond with the duty to reproduce records in order to provide them to the Applicant under section 13 of the Act.

[para 53] With regard to section 10(2) of the Act, previous decisions of this office (for example Order F2011-R-01) have held that section 10(2) relates to manipulating existing data to create a new record that did not previously exist, in order to present data in a format that better meets the needs of the requestor or is less costly, than by, for example, providing multiple disparate records containing the data.

[para 54] In the present case, the Public Body is not suggesting that it has a duty, for which fees are chargeable, to create a record from an electronic record in the sense in

which section 10(2) has been interpreted in past decisions of this office – that is, to create records that did not exist before.

[para 55] Rather, the Public Body takes the position that even though section 10(2) does not apply, section 13(1)(b) of the Regulations does apply to permit the Public Body to charge fees not for creating a new record, but for engaging in computer processing in order to locate and retrieve records that already exist in electronic format, and to make them available to – or "produce" them to - the requestor. This position involves the contention that section 10(2) of the Act and section 13(1)(b) of the Regulation are not tied. The Public Body bases this view on the fact that the former uses the word "create" whereas the latter speaks of "producing". The Public Body says:

> "…the Commissioner should interpret producing a record from an electronic record [in the context of section 13(1)(b)] in a broad and purposive manner to allow for instances where computer operations are necessary for the production of the information, but in a way that is distinct from creating a record given the explicitly different language in the Regulations from that of section 10(2) of the *FOIP Act*."

[para 56] I agree that standing alone, section 13(1)(b) of the Regulation might be open to such an interpretation. However, I do not agree it can be interpreted in that way in the context in which it is found. As explained below, I believe that my interpretation as set out in paragraph 52 is the more reasonable.

[para 57] First, while the Public Body asserts that the IT contractor was "producing" the records, the Public Body also clearly states at various points in its submission that he was searching for them. Fees for searching for, locating and retrieving a record pursuant to the duty to search contained in section 10(1) of the Act are covered by section 13(1)(a) of the Regulation. This would include, for example, giving a computer instructions, and the computer executing instructions, such as to place the data to be searched in a searchable format, and running specified electronic searches, so as to identify and locate requested records.[1] (It is not clear what "retrieving" in section 13(1)(a) means in the electronic context, especially as section 13(1)(d) refers to making copies. Regardless, if this is a meaningful step in a given process, it falls within section 13(1)(a).)

[para 58] Second, fees for producing a copy of a record are covered by section 13(1)(d) of the Regulation. In this context it is clear that the word "produce" is used in the Regulation in the sense of "creating" rather than providing (not a new record, but a copy of an existing one). In the electronic context this might include placing the records

[1] Such a process would entail both human activity and computer activity, and one or both of these could be fairly described as "computer processing" or in the Public Body's words, "computer operations". "Computer processing" is not, in contrast to section 13(1)(b), specifically mentioned in 13(1)(a). However, I do not believe this indicates that computer processing is excluded from section 13(1)(a). I believe "computer processing" is specifically mentioned in section 13(1)(b) to distinguish the activity in that provision from computer programming for the same purpose in section 13(1)(c).

on an electronic storage device or in an electronic file that would enable them to be transferred to the requestor.

[para 59] Put more simply, sections 13(1)(a) and 13(1)(d), and possibly sections 13(1)(e) and 13(1)(g) of the Regulation already cover what the Public Body is saying should be covered in the present case by section 13(1)(b) of the Regulation. Accordingly, in my view, despite the use of the term "produce" in section 13(1)(b) instead of "create" as in section 10(2) of the Act, I believe section 13(1)(b) must be interpreted as referable to the creation of new records from electronic records under section 10(2).

[para 60] There do not appear to be decisions of this Office that directly discuss the relationship between sections 10 and 13 of the Act and section 13 of the Regulation and associated Schedule. However, Order F2011-R-001 supports the idea that section 13(1)(a) of the Regulation is referable to the duty to assist/search under section 10(1) even in circumstances in which searching involves computer processing activities. In that Order, the Adjudicator stated: "… I would take the view that once a public body determines that it may have responsive records located on its backup tapes, and it determines that there is no other means of locating and reproducing these records in order to provide them to an applicant, it must take all reasonable steps, including any necessary and reasonable steps to convert them into a searchable format so as to locate responsive records, as well as all reasonable steps to reproduce copies so as to provide them to the applicant. The Public Body may charge the fees established by the Regulation to offset the costs incurred for doing these things." That Order also tied the duty to search under section 10(1) to the process of "[c]onverting records into a different electronic format (but with the same content and organization) (e.g. decompressing or unencrypting) in order to locate or obtain particular records or to see if they exist." While the Adjudicator did not discuss the fee portions of the Regulation, she clearly contemplated that searching, locating and retrieving records could involve computer processing activities. It would follow that the "fees established by the Regulation" for conducting such activities would be those under section 13(1)(a) of the Regulation (and section 13(1)(d) for the reproduction; activity), and the associated parts of Schedule 2.

[para 61] This conclusion is further supported by the fact that unless section 13(1)(b) and (c) (and the corresponding entries in Schedule 2) were not referable to section 10(2) of the Act, there would be no Regulation provision for charging fees for creating new records when required by section 10(2). It follows that neither of these subsections are engaged in the present case.

[para 62] It is also notable that under section 13(1)(a) fees are chargeable for both time and cost whereas under section 13(1)(b) only the cost can be charged. This possibly suggests a dichotomy between human activity, for which time can be charged, and computer activity, for which a "cost" can be charged. The same observation and the same suggested dichotomy arises from the ability to charge for 'time' for computer programming under section 13(1)(c) and the fact that 'time' cannot be charged for "computer processing" under section 13(1)(b). This same distinction might also mean that a fee cannot be charged under section 13(1)(b) for time spent by the IT contractor.

[para 63] However, I do not need to decide this question for the present purpose since I find these provisions are referable to section 10(2) of the Act, and so do not apply in this case.

[para 64] A further point is support of the interpretation of sections 13(1)(b) and (c) of the Regulations as corresponding to section 10(2) is that understood in the manner I am putting forward, fees charged under sections 13(1)(b) and (c) of the Regulation are inherently limited by the limitation in section 10(2)(b) that a public body is to undertake such (record-creation) activities only if it can do so using its normal computer hardware and software and its technical expertise. This makes sense where the creation of a record is optional and is done to meet the needs of requestors, beyond the more basic duty of providing responsive records. This limitation creates a complete system for the charging of fees at "actual cost" for computer processing and programming for this purpose. If sections 13(1)(a) and (b) were taken as provisions that could alternately be used for searching for, locating and retrieving records where this required "computer processing" *as the public body interprets this term,* the associated fees would be limitless. Such high fees could be used by public bodies to dissuade access requestors by hiring costly technical experts, and this could conceivably be done even if the public body had sufficient in-house expertise to do the work.

[para 65] The Public Body has also argued that because it is a smaller municipality with only three full-time and 2 part-time staff with an estimated 110 residents; there are no IT employees with the expertise to respond to the Applicant's request. It states that for this reason it must hire an outside consultant to respond to the request, whereas a larger municipality may not have to.

[para 66] The Act and the Regulations should be applied consistently, which means that public bodies are not to be treated differently based on their size, unless the Act specifically provides for this, (as in section 10(2)(b)).

[para 67] Finally, I turn to the Public Body's argument that section 13(1)(b) of the Regulation is referable to section 13 of the Act. The Public Body compares the wording in section 13 of the Act to that of section 13 of the Regulation, noting that "[s]ection 13 of the *FOIP Act* speaks to producing a record in a similar manner as section 13 of the Regulations. This further supports the conclusion that a new record need not be created in order for the computer processing and related charges fee to apply."

[para 68] In my view, section 13 of the Act cannot be engaged for this broad purpose given its use of the term "reproduce" and not "produce"; section 13 of the Act is concerned only with making copies, and the fee for this is set out in section 13(1)(d) of the Regulation. That is a component of the permissible fees, but only a part.

Section 13(1)(d) of the Regulations and Schedule 2 Item 6 fees

[para 69] The Public Body also seems to think that if it cannot charge the Applicant actual costs under Item 2(a) of Schedule 2, then it can rely on charging its actual costs incurred under Item 6. It states at paragraphs 47-49 of its submission:

> Just as the Public Body may charge up to a specified amount to make photocopies of a record or produce a copy of a computer or video tape at the actual cost to the Public Body, item 6 provides that in producing a copy of a record by any process or in any medium not already provided for, the Public Body can issue a fee estimate at the actual cost to the Public Body. The use of the terms "any process" and "any medium" suggest a legislative intent as to allow for fees in a broad range of instances where a public body has to produce a copy of a record.
>
> In this context, any process should be taken to mean any "series of actions that you take in order to achieve a result." The reference to any medium or format should include producing copies of electronic records in formats not explicitly mentioned in the Act, and should encompass other forms of digital storage and backup of information, emails, messages, and documents akin to computer disks, computer tapes, and audio and video tapes.
>
> Accordingly, where the Public Body uses a process or series of actions, such as extracting information from digital storage or accessing messaging platforms containing text and video messages, to produce a copy of a record in an electronic format – section 13(1)(d) and Schedule 2, item 6 of the Regulations explicitly provide that the Public Body may issue a fee to the Applicant for both the process and the medium.

[para 70] This interpretation is faulty, as concluded by the adjudicator in Order F2013-10. The adjudicator held that the authorized charges in relation to producing a copy of a record – in whatever format or medium – may account for the costs to create the physical or material object only.[2] Item 6 of Schedule 2 is a forward-thinking section and is meant to be a catch all section, as described by the adjudicator in Order F2016-40:

> [para 25] Line 6 of the Fee Schedule authorizes a public body to charge its actual costs for producing a record by any process or any medium not otherwise referred to in the Fee Schedule. While this provision allows a public body to charge its actual costs for producing a copy of a record, "actual costs" in this context refers to the cost of creating the physical or material copy only. Line 6 is clearly intended as a "catch all" to include copies that are made of records not specifically listed in sections 3 – 5, for which only the costs of making the physical record are included, exclusive of the labour involved in doing so. There is nothing in Line 6 to suggest that Cabinet intended to expand the types of fees that may be charged in relation to records not listed in sections 3 – 5, such that a public body may charge its labour costs for records falling within line 6, when it cannot for any of the other types of records it might produce from different media.

[2] I recognize that a copy can be produced by placing a record into a new electronic file, which could then be emailed or drop-boxed to the requestor. In that case, there would be no "physical or material object" other than electronic signals. Even so, there would presumably be no meaningful fee that could be charged, as only cost, and not time, can be charged for producing a copy under section 13(1)(d) of the Regulation.

> [para 26] In addition, Line 6 of the Fee Schedule refers to the costs of "producing a copy of a record *by any process or in any medium*" [my emphasis]. In my view, the fees to which provision refers are those relating to the process followed or the medium. In this case, the cost for the flash drive, which the Public Body billed at $8.00, is the total amount that can be billed for scanning copies of records to put them on a flash drive or preparing them for scanning.

[para 71] I find that Schedule 2 Item 1 fees are the correct fees to apply in this case. Fees applied to producing a physical copy of the records are intended to be covered by Items 3-6, but only after the records have been located and retrieved. The "process" of bringing the information forward has already occurred; Items 3-6 contemplate how the records would be made available (produced) to the applicant once located.

[para 72] The Public Body has already informed the Applicant that it is making the records available in paper form, hence the inclusion of the 5000-page estimate.

[para 73] I find that the Public Body's interpretation of the purpose of Items 3-6 of Schedule 2 is incorrect, and it would be improper for the Public Body to issue a fee estimate for searching, locating and retrieving the records under Item 6.

Estimate of 5000 pages

[para 74] In Order F2013-10, the Adjudicator stated:

> [para 65] When an applicant requests a review of a fee estimate, the public body has the burden of proof, as it is in the best position to explain the processes and standards that it used to calculate the fees for services; at the same time, it is in the applicant's best interest to provide arguments and evidence regarding the appropriateness of the fee estimate (Order 99-014 at paras. 9-11).

[para 75] I agree with Adjudicator Raaflaub that the public body is in the best position to explain how it calculated the fee estimate. In this instance, the Public Body conducted a test search of the records and made its estimates on the basis of that test. The scope of the Applicant's request is quite broad, in that it asks for records of policy, background material, communications made by various people and from a variety of sources, and spans over one year.

[para 76] The Applicant offered no evidence to show that the 5000-page estimate is unreasonable, and as the Public Body stated, if the actual fee is less than the amount paid, the Applicant will be refunded the difference as per section 14(4) of the Regulation:

> *Fees, other than an initial fee, or any part of those fees will be refunded if the amount paid is higher than the actual fees required to be paid.*

The final bill for the fees should detail how many pages are being provided.

[para 77] Finally, I find that the Applicant's request for records is quite detailed and broad. I encourage the parties to try to narrow the scope of the request to reduce the associated fees.

IV. ORDER

[para 78] I make this Order under section 72 of the Act.

[para 79] I order the Public Body to recalculate its fee estimate, per paragraph 71 of this Order and provide a new fee estimate to the Applicant.

[para 80] I find that the 5000-page estimate is reasonable; however, in the final disposition of the matter, the fees charged should reflect the actual pages provided.

[para 81] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Pam Gill
Adjudicator
/kh