

MANAGING FEE WAIVER REQUESTS

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KEY POINTS

- [The Freedom of Information and Protection of Privacy Act](#) (the Act or FOIP) establishes that an applicant is generally expected to pay fees to process their access to information request before they are granted access to records.
- In some circumstances, an applicant can request to have these fees waived.
- To be eligible for a fee waiver, an applicant must meet one of the criteria outlined in section 9 of [The Freedom of Information and Protection of Privacy Regulations](#) (the Regulations).
- Even if the applicant meets one of these criteria, under section 9(5) of the Act, the head of the government institution has the discretion to decide whether or not to waive fees or any part of them.
- Before considering a fee waiver request, the government institution should work with the applicant to narrow the access request and reduce the fees.
- If the applicant has requested a waiver based on financial hardship, they will need to provide additional information.
- The government institution should notify the applicant of the head's decision regarding a fee waiver request as soon as possible in the process.

RELEVANT LEGISLATION

- Section 9 of *The Freedom of Information and Protection of Privacy Act*
- Sections 6 through 9 of *The Freedom of Information and Protection of Privacy Regulations*

WHAT ARE THE CIRCUMSTANCES WHERE A HEAD CAN CONSIDER WAIVING FEES?

Subsection 9(5) of the Act and subsection 9(1) of the Regulations provides that payment of all or any part of the prescribed fee may be waived in the following circumstances:

- (a) if payment of the prescribed fees will cause a substantial financial hardship for the applicant, and, in the opinion of the head, giving access to the record is in the public interest;
- (b) if the application involves the personal information of the applicant;
- (c) if the prescribed fee or actual cost for the service is \$100 or less.

Even if one or more of these circumstances exists, the decision to waive fees still remains at the discretion of the head pursuant to subsection 9(5) of the Act.

Subsection 9(1)(a) of the Regulations

In order for an applicant to be eligible for a fee waiver under subsection 9(1)(a) of the Regulations, two criteria must be satisfied:

- Payments of the fees will cause substantial financial hardship to the applicant; **and**
- Giving access to the record is in the public interest.

In order to avoid the unnecessary collection of personal information, government institutions should start with the public interest portion of this two part test. If it is determined there is no public interest in giving access to the record, the waiver would not be considered, regardless of a substantial financial hardship. If the government institution determines that there is a public interest in giving access to the record, steps should be taken to gather information from the applicant to demonstrate that payment of the fees will cause substantial financial hardship.

1. Substantial Financial Hardship to the Applicant

The head needs to be satisfied that an applicant's claim of substantial financial hardship is valid. Subsection 9(2) of the Regulations states that substantial financial hardship includes circumstances where the applicant is receiving assistance pursuant to *The Saskatchewan Assistance Act*, *The Training Allowance Regulations*, or is receiving legal assistance or representation from the Saskatchewan Legal Aid Commission, Pro Bono Law Saskatchewan, or Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC). Use of the word "includes" indicates that this is not an exhaustive list and that there may be other circumstances in which financial hardship may be found.

The Office of the Saskatchewan Information and Privacy Commissioner (IPC), [*IPC Guide to Exemptions*](#) (Section 9, fee Waivers), indicates that "public bodies should have established criteria to apply for determining when payment of fees may be waived (i.e. policy or form to be completed by applicants)." The Guide also provides the following guidance:

Substantial financial hardship is where any money spent outside of life sustaining requirements (food, water, clothing and shelter) is cause for financial difficulties (ON IPC Order PO-2464). For example, one can consider whether an applicant's expenses exceed their income and the value of their assets.

How the claim is validated is up to the head to decide. The government institution will need to obtain sufficient information from the applicant to determine whether substantial financial hardship exists. To demonstrate substantial financial hardship, applicants may have to provide the government institution with some information about income, expenses, assets and liabilities. For example, a government institution may consider whether an applicant's expenses exceed their income and the value of their assets as proof of substantial financial hardship.

If the criteria in subsection 9(2) of the Regulations do not apply, it will be up to each government institution to determine what information is required to process the fee waiver request, but criteria and processes for substantial financial hardship should be established and made available to applicants. This ensures that applicants receive consistent treatment and it enables them to decide whether they wish to proceed with the application and provide their personal financial information to the government institution.

Under subsection 24(1) of the FOIP Act, “information that describes an individual’s finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness”, as well as information obtained on a tax return, is “personal information” subject to the Act and the protections under Part IV. Financial information collected for the purpose of determining whether fees will be waived needs to be protected accordingly; it should be securely stored, accessed on a need to know basis related to processing the fee waiver, kept separate from the general access request file, not used or disclosed for any unauthorized purposes and disposed of as soon as possible in accordance with <https://publications.saskatchewan.ca:443/api/v1/products/73809/formats/83000/download>.

2. Access to the Record is in the Public Interest

In order for an applicant to be eligible for a fee waiver under section 9(1)(a), the applicant must prove substantial financial hardship **and** that access to the record is in the public interest.

There is no standard definition of what constitutes the “public interest”. The Supreme Court of Canada has found that there is no single test for determining whether something is in the public interest, but that the subject matter as a whole must be considered. Generally speaking, to be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”.¹

The *IPC Guide to Exemptions* (Section 9, Fee Waivers) has offered the following factors for government institutions to consider when determining whether a fee waiver is in the public interest:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
 - Have others besides the applicant sought or expressed an interest in the records?
 - Are there other indicators that the public has or would have an interest in the records?
2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:

¹ Grant v. Torstar Corp., [2009] 3 SCR 640, 2009 SCC 61 (CanLII), at paragraphs 103-105 <<http://canlii.ca/t/27430>>

- Do the records relate to a personal conflict between the applicant and the public body?
 - What is the likelihood the applicant will disseminate the contents of the records in a manner that will benefit the public?
3. If the records are about the process or functioning of the public body, will they contribute to open, transparent and accountable government? The following may be relevant:
- Do the records contain information that will show how the public body reached or will reach a decision?
 - Are the records desirable for the purpose of subjecting the activities of the public body to scrutiny?
 - Will the records shed light on an activity of the public body that have been called into question?

This is not an exhaustive list and a government institution or applicant may be able to provide other relevant information outside of these criteria for consideration. As the circumstances of each request will vary, not all of the above criteria need to be met to determine if release of the records would be in the public interest. However, if an applicant requests a review of the head's decision not to grant a fee waiver, the IPC will consider the criteria or process used by the government institution, so decisions are not made arbitrarily. As with any exercise of discretionary authority under the Act, the government institution should be able to explain in detail how it arrived at its decision on a fee waiver request.

Subsection 9(1)(b) of the Regulations

In order for an applicant to be eligible for a fee waiver under 9(1)(b) of the Regulations, the application must involve the personal information of the applicant. It is important for government institutions to be open with individuals regarding their own personal information. Where the head is satisfied the applicant is seeking their own personal information, the head may exercise discretion to waive the fees.

If the applicant has requested access to a large number of records containing their personal information and it will take the government institution a large amount of time to search for and/or prepare for disclosure, attempts should be made to work with the applicant to narrow the scope of the access request.

Subsection 9(1)(c) of the Regulations

Under subsection 9(1)(c) of the Regulations, fees may be waived when the actual cost of processing the request is \$100 or less. In view of the administrative costs involved to collect \$100 for processing fees from an applicant, the head may determine that for fees of \$100 or less, it is more cost effective to waive the fees in all such circumstances.

Once a policy for this section of the Regulations is adopted, it should be applied consistently for all access requests.

STEPS FOR ADDRESSING A FEE WAIVER REQUEST

There are five main steps a government institution should follow when considering the appropriateness of granting a fee waiver:

1. Recognize the fee waiver request

Upon receiving an Access to Information Request Form, check to see if the applicant has requested a fee waiver in writing. If not, consider if the language used by the applicant elsewhere indicates that a fee waiver is being requested. When it is not clear, confirm the fee waiver request with the applicant.

2. Determine if fees are necessary to process the application, prepare a cost estimate and acknowledge the fee waiver request

Determine whether fees would be under \$100 and if a fee waiver for all or part of the fee will be provided on that basis, in accordance with the policy established by the government institution.

Determine whether the information requested is the personal information of the applicant, and whether a waiver of all or part of the fee will be provided on that basis.

If fees over \$100 will be necessary to process the access request, prepare a fee estimate and letter to the applicant. Provision of a fee estimate is not required if fees are under \$100.

If the applicant has requested a fee waiver, or if the government institution is prepared to consider a fee waiver on the basis of substantial financial hardship, the letter to the applicant should outline the information that will be required from the applicant to substantiate the need for a fee waiver. The letter should describe the safeguarding measures in place to protect the information the applicant provides. It should also invite the applicant to work with the government institution to narrow the request so that the fees are lessened or reduced to the point where they will not cause substantial financial hardship.

The 30 day response period is suspended when a fee estimate is provided to the applicant, until the applicant notifies the head that they wish to proceed with the application.

If the government institution anticipates it may take some time to prepare the fee estimate, but the applicant has requested a fee waiver, the government institution should contact the applicant immediately to request the information required to substantiate the need for a fee waiver, rather than wait for the fee estimate to be completed. The fee waiver does not have to be included in the fee estimate letter. However, the time would not be suspended until the fee estimate is provided to the applicant.

3. Receive details from the applicant that substantiate the fee waiver claim

Once the fee estimate and letter have been sent to the applicant, wait to receive the information required from the applicant to substantiate the fee waiver claim. The 30-day clock is stopped until the applicant responds to the fee estimate by notifying the government institution that the applicant wishes to proceed with the application.

4. Applicant provides information to support the fee waiver request claim and a decision is made

Review the information received from the applicant to substantiate the fee waiver claim. Based upon what has been provided by the applicant, determine if the fee waiver claim is appropriate. Document the decision and supporting arguments and information.

5. Applicant is notified of the Head's decision on the fee waiver request:

- a. **Fee Waiver is appropriate:** If the government institution determines that the fee waiver claim is appropriate, advise the applicant that the fee waiver has been granted and continue processing the access request. The 30-day response time resumes at this point (when the applicant responds to the fee estimate by indicating that they wish to proceed with the application).
- b. **Fee Waiver is not appropriate:** If the government institution determines that the fee waiver claim is not appropriate, contact the applicant to advise of the decision. If appropriate, attempt to narrow the scope of the access request with the applicant to see if access to some of the records can be provided at a lesser charge.

Determine if the applicant wishes to proceed with the access request. If they wish to proceed, the 30-day response time resumes. Collect the necessary deposit and continue processing the request. If they do not wish to proceed, ask them to confirm that in writing for your file.

The applicant must be informed of their right to request a review of a fee estimate. [See s. 7(3) of the Act.]

ROLE OF THE IPC

Subsections 49(1)(a.1),(a.2) of the Act provides the Commissioner with the authority to review fee estimates upon a request from an applicant in the event the applicant:

- is not satisfied that a reasonable fee estimate was provided pursuant to subsection 9(2);
- believes that all or part of the fee estimate should be waived pursuant to subsection 9(5) of the Act.