Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-994

Appeals M_9600263 and M_9600300

Townships of Belmont and Methuen

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NATURE OF THE APPEALS:

The Townships of Belmont and Methuen (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to its general accounts and budget status reports for two specific months. The Township relied on sections 14(1) (invasion of privacy) and 6(1)(b) (closed meeting) of the Act to withhold access to some of the records. The requester appealed the denial of access and Appeal Number M-9500675 was opened. This appeal was resolved by Order M-784 in which I ordered the Township to disclose the records to the appellant. The Township then issued a fee estimate of $30 which the requester appealed and Appeal Number M-9600263 was opened.

The Township also received a request for copies of submissions pertaining to the passage of By_law 1995-42 and copies of the Budget Status Reports for six months. The Township provided the requester with a summary of the Budget Status Report of July, 1996 and a two-page letter relating to the by-law. The Township also issued a fee estimate of $25.75 in respect of the above records. The remaining records requested were not provided. The requester appealed the fee estimate and indicated his belief that additional records exist. Appeal Number M-9600300 was opened.

In both appeals, the Township has provided no information as to how the fee estimate was calculated other than to indicate that the fees were in accordance with its By-law 1994-10 and Schedule "A" thereto. In these cases, the Township has charged fees in connection with requests under the Act, based on a schedule of fees attached to a 1994 municipal by-law, rather than the fees specified in the Act and Ontario Regulation 823 (the Regulation). The by-law and accompanying schedule do not refer specifically to requests under the Act, nor to freedom of information requests; rather, they refer to items such as "tax certificates" and "photocopies".

Because the parties in both Appeals M-9600263 and M-9600300 are the same and the issues are similar, this order will address and dispose of the issues in both appeals.

This office provided a Notice of Inquiry to the Township and the appellant. Due to the nature of the issues on appeal, Management Board Secretariat was also invited to make representations. Representations were received from the Township only.

The issues to be addressed in this order are:

(1) Whether the Township is entitled to charge fees under its by-law rather than the fee scheme in the Act and the Regulation;

(2) whether the fees charged in the two appeals are in accordance with the applicable provisions of the Act and the Regulation; and

(3) whether the search for additional records in Appeal Number M-9600300 was reasonable.

DISCUSSION:

1. Whether the Township is entitled to charge fees under its by-law rather than the fee scheme in the Act and the Regulation.

As I have indicated previously, the Township has relied on its by-law to charges fees for costs related to requests made under the Act. I will outline the statutory provisions that need to be considered in analysing this issue.

The Savings and Restructuring Act, 1996 (the SRA) which came into force on January 30, 1996 amended the fee section of the Act in section 45(1), which now reads as follows:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations...

The SRA added section 47(2) to the Act, which reads:

> A regulation made under clause 1(f) may prescribe a different amount, manner of payment, manner of allocation or time of payment of fees for different categories of records or persons requesting access to a record.

The SRA also amended the Municipal Act by adding section 220.1(2), which states:

> Despite any Act, a municipality and a local board may pass by-laws imposing fees or charges on any class of persons,
>
> (a) for services or activities provided or done by or on behalf of it;
>
> (b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or local board; and
>
> (c) for the use of its property including property under its control.

The words "despite any Act" in the Municipal Act above would indicate a possible conflict with the scheme imposed by the Act and the regulations. However, under the principles of statutory interpretation, only actual conflict requires resolution. This arises where compliance with one provision causes a breach of another.

In Driedger on the Construction of Statutes, 3rd ed. by Ruth Sullivan, the author indicates that for this purpose, the courts have defined conflict narrowly. She cites Toronto Railway Co. v. Paget (1909), 42 S.C.R. 488 (S.C.C.), where the Court (dealing with an argument relating to general and specific provisions) states:

> It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject matter. It is not "inconsistent" unless the two provisions cannot stand together.
>
> Driedger goes on to refer to Friends of Oldman River Society v. Canada (Minister of Transport) [1992] 1 S.C.R. 3 (S.C.C.), where LaForest J. noted the similarity between this approach and defining conflict in the constitutional law context:
>
> There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where inconsistency has also been defined in terms of contradiction - i.e "compliance with one law involves breach of another; see Smith v. The Queen, [1960] S.C.R. 776, at 800...

In these appeals, compliance with the fee schedule in the by-law would result in different fees being charged in connection with a request than those enacted by regulation under the Act. Moreover, given the wording of section 45(1), relying on section 220.1(2) of the Municipal Act as a basis for applying the fee schedule in the by-law would result in the breach of the mandatory provision of the Act. In my view, therefore, a situation of actual conflict exists which requires a resolution.

I will discuss the issue in two parts:

1. Is the hierarchical wording of section 220.1(2) of the Municipal Act (i.e the use of the phrase "despite any Act") determinative, and if not,

2. which of the two provisions would apply based on the general law relating to conflicting statutory provisions.

Part One:
Is the hierarchical wording of section 220.1(2) of the Municipal Act determinative?

The effect of specific language intended to resolve conflicts between legislative provisions (e.g. the words "despite any Act" in section 220.1(2) in the Municipal Act) is discussed in The Interpretation of Legislation in Canada, 2nd edition by Pierre-Andre Cote. Mr. Cote states (at pages 299-300):

> Because the legislator is aware of possible inconsistencies, he sometimes adopts explicit rules establishing an order of priority between different enactments.
>
> A variety of well-known terms is used. The statute will declare that it applies "notwithstanding" provisions to the contrary. ...
>
> There is no doubt that provisions serving to establish a hierarchy between statutes refer to earlier legislation. "Notwithstanding any inconsistent statute" certainly applies to legislation that already exists. But may it be construed as prevailing over future legislation?

> *Prima facie*, it would appear that the hierarchy is established only in relation to prior legislation. Parliament is sovereign and, by a later enactment, it can depart from the earlier statute without having to say so specifically. The will of Parliament should be educed from its most recent legislation, according to the usual rules of interpretation. The legislature presumably does not intend to pass laws which will become instantly inoperative because of a "notwithstanding" clause in an earlier enactment.

The Cote text then gives an example of a case where an exclusion was found to apply to subsequent legislation. In Re Thompson v. Lambton County Board of Education (1973), 30 D.L.R. (3rd.) 38 (H.C.J), Van Camp J. considered a provision in the Statutory Powers Procedure Act, 1971 (the SPPA), which stated as follows:

> Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply notwithstanding anything in this Act, the provisions of this Act and of rules made under section 33 prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

In the Thompson case, the "other Act" was the Schools Administration Act, and in particular, a procedural rule added after the passage of the SPPA. Van Camp J. analysed the wording of the SPPA and concluded that it was intended to apply to later enactments, because of the requirement that, in order to qualify as an exception, express reference must be made to the SPPA itself.

On this basis, I conclude that in order to uphold a departure from the view that hierarchic statements only apply to previous legislation, the hierarchical wording would have to justify such departure. Section 220.1(2) of the Municipal Act does not contain such wording and, therefore, it must be interpreted as applying to prior legislation only.

Further, the SRA not only added section 220.1(2) to the Municipal Act but also repealed the former version of section 45(1) of the Act in its entirety, and substituted the current wording. Therefore, these two enactments occurred at the same time, and as a result, section 45(1) of the Act is not "prior" legislation, and the presumption would be that the hierarchy established in section 220.1(2) of the Municipal Act does not apply to it. This interpretation is supported by the wording in the Driedger text as follows:

> It is presumed that the provisions of legislation are intended to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together to form a rational, **internally consistent** framework; and because the framework has a purpose the parts are also presumed to work together dynamically, each contributing something towards accomplishing the intended goal. [emphasis added]

The author of the Driedger text then cites a passage from J.A. MacKeigan v. Royal Comm. (Marshall Inquiry) (1989) 61 D.L.R. (4th) 688 (S.C.C.), at page 718:

> I start from the fundamental principle of construction that provisions of a statute dealing with the same subject matter should be read together, where possible, so as to avoid conflict... In this way, the true intention of the Legislature is more likely to be ascertained.

In my view, the provisions of the SRA, while appearing to deal with diverse areas, contain a common theme: enhanced cost recovery and reduced expenditure for the public sector. This presumption is particularly compelling since the amendments being addressed in this order were both enacted within the SRA.

Accordingly, I find that the hierarchical wording in section 220.1(2) of the Municipal Act does not apply to section 45(1) of the Act.

Part Two:
Which of the two provisions would apply based on the general law relating to conflicting statutory provisions?

There are two principles of statutory interpretation that must be considered. The first of these is the principle of "implied exception" which is explained in the Driedger text as follows:

> Where two provisions are in conflict and one of them deals specifically with the matter in question while the other is of general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

In my view, the Act is clearly specialized legislation dealing with access and privacy matters and contains detailed and specific provisions for fees related to these matters. While the Municipal Act may be defined as specialized legislation, section 220.1(2) cannot be described as specialized legislation regarding access under the Act. Compared to the provisions of the Act, it is extremely general. Therefore, in my view, section 45(1) of the Act is the applicable provision.

The second principle also supports the view that section 45(1) prevails. The Driedger text explains this principle as follows:

> Where provisions overlap without conflict, it is presumed that each is meant to apply. However, this presumption is rebutted by showing that in the circumstances one of the provisions constitutes an exhaustive declaration of the applicable law. If one provision is exhaustive, the other cannot apply.

In my view, the comprehensive nature of the fee scheme in the Act and regulation is sufficient to indicate an intention to enact an exhaustive fee regime for requests under the Act. This is evidenced by section 47(2) of the Act which contemplates different fee structures for different classes of records or requesters. In my view, it is even more strongly buttressed by the fact, that in repealing the old section 45(1) and replacing it with the new one, the legislature removed the words "where no provision is made for a charge or fee under any other Act" and replaced them with "[A] head shall require the person who makes a request for access to a record to pay...".

This provides a strong indicator that the legislature intended fees for requests under the Act to be governed by section 45 and the related regulations.

Therefore, based on the foregoing, I find that section 45(1) applies and the Township cannot charge fees under its by-law when granting access under the Act. I will therefore now address the second issue in this appeal.

2. Whether the fees charged in the two appeals are in accordance with the applicable provisions of the Act and the Regulation.

I will begin this discussion by setting out the relevant provisions of the Act and the Regulation. Section 45(1) of the Act states:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) the computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of the Regulation states:

> The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

APPEAL NUMBER M-9600263:

As I have indicated previously, the request was for access to copies of the General Accounts and Budget Status reports for two specific months. The appellant received the reports for July and August, 1995, totalling 10 pages and was charged $30.

The Township states that $10 was charged for each of the two computer reports for a total of $20. The Township has charged $5 for photocopying 10 pages which it has apparently calculated on the basis of $0.25 per page. A fee of $5 was charged for search and preparation time. These charges were calculated by the Township under its by-law. I have previously determined that the Township cannot charge fees under its by-law when granting access under the Act.

Under the Act and the Regulation, the Township is only permitted to charge photocopying charges of $0.20 for each of the 10 pages. With respect to the computer costs, the Township has not indicated the amount of time that was required to generate the two reports from its computer database nor the basis on which it arrived at a charge of $10 per report. Item 5 of section 6 of the Regulation states that $15 may be charged for each 15 minutes spent to **develop** a computer program or other method of producing a record from machine readable record. In the absence of any representations from the Township on this issue, I am not prepared to allow computer costs for printing the two reports. The Township has charged a fee of $5 for search and preparation time but has not indicated the actual time spent. The two reports do not contain any severances. However, I am prepared to allow the search time of $5.

In my view, the following are the proper amounts which the Township is allowed to charge under the Act and the Regulation:

Photocopying charges (10 pages @ $0.20 per page)	$2.00
Computer costs	$nil
Search and preparation costs	$5.00
Total Allowable Charge	**$7.00**

APPEAL NUMBER M-9600300:

The request was for copies of submissions pertaining to the passage of By-law 1995-42 and for copies of budget status reports for a period of six months. The appellant received a three-page report for July, 1996 and a letter from the Township explaining the rationale for the zoning and the passage of the by-law.

The Township has charged $0.25 for each page of photocopying and $10 computer costs for the budget status report. The Township has also charged $15 for search and preparation time of 33 minutes. I allow photocopy costs of $0.60 @ $0.20 per page. In the absence of any representations on the calculation of computer costs, I do not allow the Township to charge for this item. I note that the report does not contain any severances. I do not accept that it would take Township personnel 33 minutes to search for and print the three-page report. In my view, a maximum of 15 minutes is more reasonable and I allow $7.50 for search time. With respect to the Township's letter to the appellant regarding zoning, it is my view that the search and preparation time provided for under the legislation does not include the administrative time involved in considering whether a particular exemption applies or providing requesters with contextual or background information.

Therefore, the charges allowed are as follows:

Photocopying charges (3 pages @ $0.20 per page)	$0.60
Computer costs	$nil
Search and preparation time	$7.50
Total Allowable Charge	**$8.10**

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records he or she is seeking, and the Township indicates that such a record does not exist, it is my responsibility to ensure that the Township has conducted a reasonable search to identify any records which are responsive to the request. The Act does not require the Township to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly meet its obligations under the Act, the Township must provide me with sufficient evidence to show that they have made a reasonable effort to identify and locate records responsive to the request.

The Township states that the Township files and the office of the Clerk Treasurer were searched for budget status reports for the period between February and June, 1996 and none were found. The Clerk Treasurer for the Township states that he conducted the search for the records and that to the best of his knowledge, no reports were prepared for the relevant period and therefore, no such records exist.

I am satisfied that the Township conducted a reasonable search for the records.

ORDER:

1. With respect to Appeal Number M-9600263, I uphold total fees of $7 and order the Township to return any additional fees that it has received from the appellant by sending him a refund on or before **September 22, 1997**.

2. With respect to Appeal Number M-9600300, I uphold total fees of $8.10 and order the Township to return any additional fees that it has received from the appellant by sending him a refund on or before **September 22, 1997**.

3. I find that the Township's search for records was reasonable and I dismiss this part of the appeal.

Original signed by: August 29, 1997
Mumtaz Jiwan
Inquiry Officer