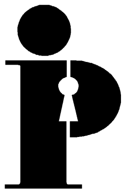

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1610

Appeal MA-020185-1

District Municipality of Muskoka

NATURE OF THE APPEAL:

The District Municipality of Muskoka (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following records for the period December 30, 2000 to April 23, 2002:

> . . . all records in any way referring to, relating to, or possibly relating or referring to [a named construction company] that [the company] has not already received for the period between December 30, 2000 to date. Please exclude documents identified in Muskoka's affidavit of documents produced in litigation with [the company].
>
> This would include, but not be limited to, records that relate in any way to the contract between the District and [the company] for the Ferndale Road Water Treatment Plant and Minto Street Water Treatment Plant.
>
> This request is for written documents, as well as e-mail, hand written notes, phone messages, personal diary entries, etc., of any individual and each member of council.
>
> An example of typical individuals are [three named individuals] and each of their piers (sic), subordinates, superiors and agents. Include also individuals in similar levels in other departments or divisions of the District.

This request is a continuation of an earlier request (MA-010034-3) which was resolved by Order MO-1530-R.

The Municipality issued a decision refusing to process the request on the basis that is was frivolous and vexatious within the meaning of section 4(1)(b) of the *Act,* arguing that the requested records were either created by the appellant's company; were correspondence between the appellant's counsel and the Municipality, or other parties involved in litigation against the appellant's company; were the subject of other FOI requests; were produced in litigation or in the process of being produced in litigation; or, are subject to litigation privilege. The Municipality also stated that any records responsive to this request would be withheld under sections 12 (solicitor-client privilege) or 15(b) (relations with other governments) of the *Act*.

The requester, now the appellant, appealed this decision.

During the mediation stage of the appeal, the Municipality reconsidered its position, and issued a decision letter withdrawing its claim that the request was frivolous and vexatious under section 4(1)(b). It noted that the search for responsive records was likely to be extensive, and expensive, and that it would yield very few records, some of which would be exempt under section 12. The Municipality also issued a fee estimate in the amount of $1,950.00 plus minimal photocopying costs (to be determined).

The appellant then revised his request as follows, asking the Municipality to:

> . . . review all records within the cabinets of the Solicitor's office and disclose all records which comprise Schedule B documents, i.e., 'records that Muskoka is not willing to produce' for whatever reason.

The appellant stated that he had narrowed the search to a specific office of an individual and to documents that have already been identified for refusal in another matter, and believed that the solicitor would maintain a specific file for such records. Upon receipt of the revised request, the Municipality issued a new fee estimate for $1,800 plus minimal photocopying costs (to be determined). The appellant indicated that he wished to appeal the revised fee estimate.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. I provided the Municipality with a Notice of Inquiry setting out the facts and issues in dispute in this appeal, seeking its representations. The Municipality responded with submissions, which were then shared in their entirety with the appellant, along with a Notice of Inquiry. The appellant also made representations which were, in turn, shared with the Municipality. It then chose to submit further representations by way of reply.

DISCUSSION:

Introduction

The sole issue for determination in this appeal is whether the fee estimate provided by the Municipality to the appellant is reasonable in the circumstances. Section 45(1) of the *Act* requires an institution to charge a fee for requests under the *Act*. This section 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) 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.

More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 823 under the *Act*. Those sections read:

Section 6

The following are the fees that shall be charged for the purposes of subsection 57(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.

O. Reg. 516/90, s. 6; O. Reg. 21/96, s. 2, part.

Section 7

(1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request. O. Reg. 517/90, s. 7(1); O. Reg. 22/96, s. 3.

(2) A head shall refund any amount paid under Subsection (1) that is subsequently waived. O. Reg. 517/90, s. 7(2).

Section 9

If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

O. Reg. 517/90, s. 9.

The Municipality's Representations

In support of its position that the fee estimate provided to the appellant is reasonable, the Municipality submits that the individual who conducted the search for responsive records did so under the direction of the Municipality's solicitor, as the records are located in the solicitor's office and he is personally familiar with them. The Municipality submits that the search time calculated is based on a "review of the documents in the cabinets [maintained by the Municipality's solicitor] multiplied by the time required to view a few actual files." It goes on to indicate that the "records consist of documents referred to in 'Schedule B' of a Affidavit of Documents" filed in an action in the Superior Court of Justice involving a claim under the *Construction Lien Act* by the appellant against the Municipality. It adds that the Schedule B documents represent those which it objects to producing on the basis that they are privileged or "without prejudice" communications relating to the action. The documents listed in Schedule A to the Affidavit of Documents are those records which it produced to the appellant in the action in accordance with its disclosure obligations under the *Rules of Practice*.

The Municipality then explains that:

> Although the requester believes that the 'Schedule B' documents have been separated from other documents and are maintained in a separate file, that is not the case. At the time of the preparation of the Affidavit of Documents, all documents were reviewed by Muskoka's Solicitor in their various locations. Copies were made of all 'Schedule A' documents to facilitate their subsequent release. Those copies are all numbered and categorized so they can easily be retrieved and a list of the documents, which is approximately 40 pages long, was provided to [the appellant]. The original documents were then returned to their individual files. Most of those files are currently located within the cabinets within Muskoka's Solicitor's office.
>
> While the 'Schedule B' documents were reviewed and identified for refusal in another matter, lists to identify those documents were not prepared and no copies were made since there was no need to do so for Muskoka's purposes within the litigation. Those documents remain in the individual files mixed in with all other information in the files, including the 'Schedule A' documents.
>
> In order to locate the requested records within the cabinets in the solicitor's office, it will be necessary to search through all documents in the cabinets and locate the ones which would fall within the 'Schedule B' category. Due to the nature of the request, the search will have to be conducted by Muskoka's solicitor since he is the only person able to identify the classification of the documents. Since, by definition in the Affidavit, these are documents that Muskoka is not prepared to release, we assume that the requester anticipates receiving a list of the documents, similar to the list prepared for the 'Schedule A' documents in the Affidavit.
>
> We estimate that there are approximately 1800 documents (many with several pages) to be reviewed within the cabinets and we have allowed 2 minutes per

> document which gives a total of 60 hours of search time to locate the responsive documents and record them (60 hours X $30.00/hour =$1,800.00). No costs for secretarial time to prepare the actual list have been included in the estimate, though that would represent a cost to Muskoka.

The appellant takes the position that:

> The current request stands for only those records which Muskoka's solicitor has already identified for refusal in preparing the affidavit of documents and retained in his office. This likely involves less that a hundred pages in magnitude.
>
> I believe the process of producing an affidavit of documents would generally involve Muskoka staff providing its solicitor with all relevant documents to the dispute (in this case tens of thousands of pages). The solicitor reviews each document to determine if production should be refused on any of them. The affidavit is then prepared and sworn under oath, (less the refused documents) as was done in this case some time ago.
>
> The solicitor's claim that it did not segregate any of the documents that it refuses to produce from those that it will produce, is just simply not credible. To have remixed, (at most a hundred) pages haphazardly together with several tens of thousands of pages of documents for production is a blatant falsehood crafted to bolster an onerous and unreasonable fee. There is no reasonable reason for a solicitor mixing them. There is every reason to keep them separate and maintain them separate during litigation.

In its reply representations, the Municipality reiterates that:

> At present, Muskoka is involved in a number of legal actions dealing with the documents that are maintained in the cabinets located within the Muskoka's Solicitor's office. Since these are the solicitor's files and constitute the 'solicitor's brief', they are maintained in a manner and order required for the solicitor's own use. The fact that these documents are stored in the solicitor's cabinets means that they are required for the litigation and each file consists of copies of the documentation related to that file.
>
> While it is important to keep copies and a list of the documents that *can* be released, in order to facilitate any future release, the Solicitor has no need for a list of the documents that will not be released, since such documents are subject to solicitor client privilege and litigation privilege and cannot be used in the litigation in any event. For the purposes of the litigation there is also no need to maintain a separate file containing extra copies of such documents. Muskoka understands that solicitors routinely use general language in Schedule 'B' to the Affidavit of Documents and note that this some practice was followed in the Affidavit of [the requester].

The Municipality also points out that the Affidavit of Documents was prepared some weeks before its receipt of the present request and was not intended to "bolster its fee".

Findings

The Municipality has provided an explanation as to how the documents referred to in Schedule A to the Affidavit of Documents came to be reviewed and copied in order to comply with its disclosure obligations under the *Rules of Practice.* The Municipality refused to provide the appellant with copies of those records which it claimed to be "privileged", as described in Schedule B to the Affidavit of Documents. Presumably, such documents were in fact located and identified during the course of counsel's review of the entire record-holdings relating to the dispute. The Municipality indicates that these records were then re-integrated back into its record-holdings after the delivery of the Affidavit of Documents in the action.

I have not been provided with a copy of the Affidavit of Documents or either of the Schedules appended to it which are referred to by both parties in their representations. This would have assisted me greatly in making a determination as to the validity of the appellant's submissions.

I accept the Municipality's submission that the records which comprise those referred to in Schedule B have, in fact, been re-integrated into its record-holdings and were not segregated at the time the Affidavit of Documents was prepared. As a result, in order to locate those records, a search of all of the files relating to this project will be required, as the Municipality contends.

In its submissions, the Municipality takes the position that it will require two minutes to review each of the 1800 records contained in the solicitor's files in order to determine whether they fall within the records described in Schedule A or Schedule B to the Affidavit of Documents. I note, however, that Schedule A, comprising a forty-page list of documents, has been prepared and could be used to separate out the documents already disclosed to the appellant. The search could, in my view, be considerably less onerous if the Municipality was able to identify and separate the Schedule A records from the documents which fall within the ambit of the request.

I find that the amount of time claimed by the Municipality to search through its record-holdings for the Schedule B records is, accordingly, unreasonably high. By making use of the list which comprises Schedule A to the Affidavit of Documents, the Municipality could shorten considerably the amount of time required to locate only the Schedule B records, which the appellant maintains comprise only a hundred pages of documents.

I will, accordingly, allow the Municipality a fee for search time which is more in keeping with the time actually required to conduct the search, using the documents listed in Schedule A to narrow the focus of the search. In my view, although the Municipality will still be required to conduct a search of some 1800 documents, I find that a reasonable amount of time to identify the responsive records described in Schedule B to the Affidavit of Documents from the remaining documents would be 15 hours, for a total search fee of $450.00.

In my view, this finding more accurately reflects the amount of time actually required for the Municipality to conduct the searches necessary to locate and identify the Schedule B documents sought by the appellant.

ORDER:

1. I do not uphold the Municipality's fee estimate of $1800.00.

2. I uphold the Municipality's entitlement to charge the appellant a fee of up to $450.00 for the conduct of its search for responsive records.

Original signed by: February 11, 2003
Donald Hale
Adjudicator