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

ORDER MO-1854

Appeal MA-030108-2

The Regional Municipality of Niagara

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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) the Regional Municipality of Niagara (the municipality) received a request for a copy of all email correspondence, incoming and outgoing, both deleted and archived, containing the requester's surname in the text from the email files of nine named individuals and their assistants. The request asked that the search be done by performing a software search for the requester's surname in the email accounts of these individuals, including archived and deleted email sections, and the list of emails generated by such a search. The requester asked that the responsive records be emailed to him.

Prior Appeal MA-030108-1

The municipality issued an interim access decision, with a fee estimate of $65 and indicated that access to most of the records would be denied under section 12. It also noted that it would not search in archived and deleted email sections, under section 1 of Regulation 823 (definition of a "record").

The requester (now the appellant) appealed this decision and appeal MA-030108-1 was opened and eventually resolved by Order MO-1726. In that order, adjudicator Liang upheld the municipality's decision relating to section 12, but did not accept the municipality's contention that archived and deleted emails are not "records" as defined by section 1 of the *Act*. Adjudicator Liang ordered the municipality to issue an access decision on the archived and deleted emails. She also noted in that Order that, if the municipality had concerns about the costs of performing such a search, it could issue an interim access decision and request a deposit.

Current Appeal MA-030108-2

As a result of Order MO-1726, the municipality issued an interim access decision, which read, in part:

> [Section 45(1)] of the *Act* authorize[s] charging fees in connection with requests for government held information. In this case, fees are estimated for search time:
>
> - Search time 27 hours $810.00
>
> This is an interim decision letter. It is anticipated that the records, if found, will fall into one of the categories of records found in the search of the active email system. If you are a party to the correspondence, it will be released. If you are not, it is likely that the record will fall under section 12 (solicitor-client privilege).

The appellant appealed the municipality's fee estimate decision, and this appeal (MA-030108-2) was opened.

During the mediation process, the appellant confirmed that he was not pursuing access to emails sent to him or from him. The municipality identified that this did not affect the fee estimate. No other mediation was possible, and the file was transferred to the inquiry stage of the process.

I sent a Notice of Inquiry to the municipality, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the municipality's representations, to the appellant, who also provided representations in response. I decided to seek reply representations from the municipality on two specific matters raised by the appellant. The municipality provided reply representations in response.

DISCUSSION:

The *Act* requires an institution to charge a fee for responding to requests. The relevant section states:

> 45. (1) 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.

Sections 6, 7 and 9 of Regulation 823 provide more specific requirements for the calculation and payment of these fees. Section 6 reads:

> 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.

This office may review the amount of the fee estimate, and may uphold the decision or vary it.

The Parties' Representations

The municipality's initial representations identify how its fee estimate was calculated. The representations state:

> The main issue in this appeal is the fee estimate of $810.00. The Region estimated 27 hours to search for the requested information. This fee estimate was based on a review of a representative sample of the records as well as the advice of an individual who is familiar with the type of record.
>
> The fee was calculated as follows. Information technology (IT) staff restored a sample of the files from the 2001 year end back-up tape. In order to complete this task, IT staff had to:
>
> - Upgrade a standard PC with a server size hard drive 0.5 hours
> - Install server operating system and exchange server 4.5 hours
> - Retrieve tape media from offsite location 0.5 hours
> - Restore tape from 2001 year end 3.0 hours
>
> This came to a total of 11.5 hours. Once the mailboxes were restored, we ran a text search for the surname of the requester. This took an average of 0.5 hours per mailbox, bringing the total estimated search time to 20.5 hours for the 2001 files only.
>
> To restore the 2002 files, we would have to:
>
> - Restore tape from 2002 year end 3.0 hours
> - Export 18 mailboxes to .PST format and reload to client 3.0 hours
> - Store tape media in offsite location 0.5 hours
>
> The additional 6.5 hours brings the total fee estimate to 27 hours.

The appellant disputed the fee estimate on a number of grounds.

As a preliminary matter, the appellant takes the position that the requested records are about him and his personal interest, and that they should therefore not be subject to fees, or that the fees should be reduced.

While the fee structures between requests for general records and requests for one's own personal information are different, I do not accept the appellant's position that this is a request for the appellant's own personal information in the circumstances of this appeal. The appellant is a construction company, represented in this and other proceedings by its president. The appellant accepts that, given the unique name that he shares with his company, any search of that name would likely refer to either him or his company. The appellant's request and appeal is on company letterhead, and all correspondence throughout this appeal is between the municipality and the company. Neither party distinguished in any way between the interests of the company and of its president throughout the request and appeal, and I find that in the circumstances the request for records is not made "for access to personal information about the individual making the request."

The appellant also disputes the fee estimate amounts calculated by the municipality.

The appellant takes issue with the municipality's ability to charge for the estimated amount of time to upgrade a standard PC with a server size hard drive (0.5 hours) and to install the server operating system and exchange server (4.5 hours). The appellant takes the position that these costs are a result of the municipality's decision to back-up its information in an inefficient way, and that the appellant should not have to pay for those costs. The appellant also takes the position that back-up tapes must have been accessed before, and that the hardware and software upgrade costs should not be borne by the appellant.

I do not agree with the appellant's position. As has been stated elsewhere, the *Act* does not require that records be maintained by an institution in a particular manner or in a manner most advantageous to a requester (Orders MO-1336, MO-1367). I accept that in order to locate the records which are responsive to the appellant's request, the municipality must make the identified modifications to its system.

Concerning the estimated time to restore tapes from the 2001 and 2002 year ends, the appellant states:

> I presume that the tape is inserted into a slot and some keystrokes are entered. The computer restores the tapes and the operator can return 3 hours later. I should not have to pay for 3 hours of standing by while the computer does the work.

I asked the municipality to respond, by way of reply representations, to this concern raised by the appellant. The municipality's response states:

> The appellant's presumption that "…the tape is inserted into a slot and some key strokes are entered. The computer restores the tapes and the operator can return 3 hours later" is false. The computer operator must monitor the tape progress for errors and corruption, risk of which is significantly increased when dealing with

> aging media. Also, there is not one single tape for each year backed up: the operator must change tapes frequently.

With respect to the estimated time to export 18 mailboxes to .PST format and reload, the appellant states:

> Again … the operator would return after the 3 hours, enter a few more strokes on the terminal and go back to other business while the next three hours go by.

I also asked the municipality to respond to this concern raised by the appellant. The municipality's reply representations state:

> … the appellant argues that the operator could enter some keystrokes and return after 3 hours with the 18 mailboxes formatted to .PST format and reloaded to client. Unfortunately, as this is a data recovery operation, the process is not that simple. The operator must perform tasks for each of the mailboxes, monitor for errors and corruption and reload each one to the client.

Findings

The appellant is correct that the time it takes for the computer to "compile the data" is not chargeable time.

Furthermore, section 45(1)(a) clearly sets out that an institution shall charge fees for the "costs of every hour of manual search required to locate a record". In my view, the tasks listed by the municipality in justifying its fees cannot be considered a "manual search" to locate a record. Adjudicator Big Canoe reviewed the term "manual search" in Order M-1083. She stated:

> The search charges described in the *Act* are available with respect to **manual** search activities required to locate a record. The appellant submits, and the responses he has received from other institutions imply, that the amount of time required to locate the record responsive to his request is minimal, as the information is readily available in electronic format within the Board's computer systems. The use of the phrase "run reports from Personnel system" and the suggestion that Information Technology staff may assist in processing the request lead me to conclude that the Board does maintain the responsive information in some kind of electronic format. Additionally, the referenced capability of the Board's Personnel system to "run reports" is commonly understood as an ability to select fields of data, such as date of birth and date of hire, from a larger database of information to generate a record. This type of electronic search is not manual and does not, in my view, fall within section 6.3 of the Regulation. Accordingly, I find that the Board is not entitled to charge the appellant a search fee for the time spent on this activity under section 45(1)(a).

I agree with the approach taken by adjudicator Big Canoe, and adopt it for the purpose of this appeal. Accordingly, the time to perform the tasks set out by the municipality does not qualify as "manual search" time for the purpose of section 45(1)(a).

However, the municipality is entitled, and indeed required, to charge for the costs of "preparing a record for disclosure". In Order M-1083, Adjudicator Holly Big Canoe made the following findings regarding preparation time:

> In the circumstances of this appeal, time spent by a person running reports from the personnel system would fall within the meaning of "preparing the record for disclosure" under section 45(1)(b) and, therefore, the rate of $7.50 per 15 minutes established under section 6.4 of the Regulation may be charged. It should be noted, however, that the Board can only charge for the amount of time spent by any person on activities required to generate the reports. The Board cannot charge for the time spent by the computer to compile the data, print the information or for the use of material and/or equipment involved in the process of generating the record.

I adopt the approach taken by adjudicator Big Canoe in M-1083. Based on the representations received from the parties, I am satisfied that the municipality properly estimated the time required to upgrade a standard PC with a server size hard drive and to install the server operating system and exchange server, restore the tapes, export mailboxes and reload to client, and run the text searches. I am also satisfied that the municipality can charge for the amount of time these tasks take as the amount of time spent by any person on activities required to generate the responsive information. These tasks fall within the meaning of "the costs of preparing the record for disclosure" under section 45(1)(b), and the rate of $7.50 per 15 minutes established under section 6.4 of the Regulation may be charged. Accordingly, I uphold the municipality's fee estimate for the 26 hours estimated to conduct these identified tasks.

Other Costs

Offsite Storage Retrieval and Return

The municipality indicates that, as part of its fee estimate, IT staff had to spend a total of one hour to retrieve the tape media from storage (0.5 hours) and to store the tape media at the offsite location (0.5 hours).

In Order M-171, Adjudicator Anita Fineberg commented on the ability of an institution to collect for the cost of retrieving records from an off-site location:

> In my view, the time to drive to an off-site storage to retrieve records cannot properly be described as time to conduct a manual search, nor can it be characterized as time to prepare a record. Such costs, if they may be charged at all, could only fall under section 6(6) of the Regulation 823. This section restricts the costs that can be charged to those which are specified in an invoice received by the institution (section 6(6)) of the Regulation. In my view, at the very least, at

> the time of a fee estimate, an institution is obliged to provide evidence as to how this "projected" cost was arrived at. I have not been provided with any such evidence. The Board appears to have estimated the fee related to this item as $15.00 based on 30 minutes of time. In my view, this part of the fee estimate is inappropriate and I disallow any charges for this time.

I agree with this approach to the costs associated with off-site retrieval of records. The municipality has estimated the time for retrieving the records from an offsite location, and returning them to storage, is 60 minutes. I have not been provided with any evidence to suggest that this amount was "invoiced" to the municipality, and I disallow any charges for this time.

ORDER:

1. I do not uphold the municipality's fee estimate of $810.00.

2. I have revised the fee that the municipality may charge to the appellant for processing his access request to $780.00.

Original signed by: October 14, 2004
Frank DeVries
Adjudicator