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

ORDER MO-1866

Appeal MA-030187-1

Regional Municipality of Durham

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Regional Municipality of Durham (the Region) made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

On December 10, 2002, the requester (now the appellant) submitted a request to the Region for the following:

> Copy of all correspondence exchanged with anyone and dealing with or referring to [the appellant] in any way which [the appellant] has not already received. In addition we request the following specific records as follows:
>
> 1) All correspondence between the [Region] and [an affected party] concerning the [named project] not copied to the [appellant].
>
> 2) Copies of all invoices rendered and correspondence exchanged with [an affected party] for extra fees following the start of construction.
>
> 3) All evaluations and communications related to the outstanding extras for Winter Conditions, Acceleration costs and any other extras outstanding which [the appellant] has not received.
>
> 4) Copies of the daily activity reports maintained by [an affected party] and the Region's representatives during construction of [the named project].

On December 16, 2002, the Region issued a 90-day time extension for the delivery of a decision, pursuant to section 20 of the *Act*. On December 23, 2002, the appellant narrowed the scope of his request to documents created on or after October 21, 1999 and up to December 23, 2002. The appellant also indicated that he did not require copies of drawings, specifications or other general or technical literature. The appellant asked that the records responsive to part four of his request, the daily activity reports, be provided immediately.

On February 5, 2003, the Region informed the appellant that the daily activity reports would be sent to him upon payment of the fee of $75.40. By letter dated February 24, 2003, the appellant provided the Region with the payment of $75.40 and asked that the Region include as part of his request a text search for all email containing a specific text reference in respect of email accounts for ten named Region employees. Shortly thereafter, the Region forwarded 350 pages of daily activity reports responsive to part four of the appellant's request.

On March 14, 2003, the appellant wrote to the Region to clarify that his request included the following documents: "The Provincial Funding Agreement, [t]he Grant application forms, with attachments [and t]he final audit of the funding which is performed by the Ministry on completion of the contract and the funding."

On March 25, 2003, the Region issued a decision letter in which it provided the appellant with access to a number of records and withheld access to others pursuant to sections 10(1)(a), 11(a) and 12 of the *Act*. The decision also set out a fee in the amount of $1,890.18, comprised of

photocopying ($272.80), search time ($1,605.00) and shipping costs ($12.38) before releasing records. The Region asked for payment of 50% of the fee in the amount of $945.09 before releasing the records. The Region also provided a detailed index of the responsive records.

On March 28, 2003, the appellant wrote to the Region to narrow his request to specific records noted in the index as well as emails between named individuals and the documents noted in his letter of March 14, 2003.

In response to the appellant's March 28th letter, the Region issued a revised decision letter in which it specified which records from the appellant's revised request it would release to him. The Region issued a revised fee in the amount of $1,648.33, comprised of photocopying ($38.80), search time ($1,605.00) and shipping costs ($4.53). The Region asked for payment of 50% of this fee in the amount of $824.17 before releasing these records. The Region also stated that the documents requested in the appellant's March 14th letter do not exist.

The appellant appealed the Region's decision challenging the exemptions claimed, the revised fee and the search for the emails he had requested in his letter of February 24, 2003. The appellant also asked this office to issue "an interim order" requiring the Region "to provide access to the records requested and [that] the [Region] agreed to release upon payment of the $0.20 per page fee…"with the balance of the fee to be resolved at appeal.

During mediation, the appellant confirmed that he accepted the Region's position that the documents requested in his March 14th letter (the Provincial Funding Agreement, the Grant application forms with attachments and the final Ministry audit) do not exist. The mediator also clarified with the appellant that his request for an interim order, as set out in his letter of appeal, would not be an issue. The appellant agreed to raise this issue at adjudication.

The appellant maintains the position that the Region should perform a software search for all emails containing a specific text reference including archived and deleted email storage areas, and that it should produce a list of emails generated by each search, in addition to the emails themselves. Therefore, reasonable search remains an issue in this appeal.

Further mediation was not possible and the file was forwarded to adjudication for inquiry.

This office first sought representations from the Region on the application of sections 10(1)(a), 11(a) and 12 and from three affected parties on section 10(1)(a) only. The Region submitted representations. In its representations, the Region indicated that it would be releasing Records 41, 86, 90, 102, 107, 166, 187, 189, 206, 225, 229, 230, 233, 254 and 293. The Region has issued a new decision letter to the appellant agreeing to release those records. Accordingly, these records and the application of sections 10(1)(a) and 11(a) are no longer at issue.

None of the affected parties provided representations.

This office then sought representations from the appellant. The appellant provided representations that were then shared with the Region only. The Region made representations in reply.

RECORDS:

The following three records remain at issue:

Record 162: Internal Region email communication regarding a claim by the appellant and draft letter from an affected party to the appellant, dated March 13, 2002 (6 pages)

Record 188: Internal Region email communication and two versions of a Claim Summary Form regarding the appellant's claim (7 pages)

Record 190: Internal email communication – legal opinion (2 pages)

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Region submits that section 12 applies to exempt Records 162, 188 and 190 from disclosure.

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches: common law and statutory privileges. The Region claims that the records qualify for exemption under Branch 2 of section 12.

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Analysis

The Region submits that all of the records remaining at issue are subject to the statutory solicitor-client communication privilege. It states:

> Record 162
>
> [Named individual] is an in-house lawyer with the Region. He was requested in the e-mail from [another named individual] dated March 12, 2002 to "review the letter to be sent back to [the appellant] and advise us how to proceed." In the e-mail dated the same day, [named individual], the Region's Manager of Construction & Asset Management at the time, provided her comments to [the in-house lawyer] respecting the contents of the draft letter to be sent to [the appellant] in response to the company's claim. The draft letter was prepared by [an affected party] who was the Region's engineering consultant during construction. The letter contains his advice and recommendations regarding a potential response to the claim.
>
> This record was prepared for [the in-house lawyer's] use in giving professional legal advice. The communications were intended to be confidential.
>
> Record 188
>
> Record 188 sets out settlement options for the claims of [the appellant]. It was sent to [the in-house lawyer]. It was prepared "prior to a meeting with [the appellant]" to discuss possible settlement of outstanding claims.
>
> This record was prepared for [the in-house lawyer's] use in giving professional legal advice and for the purpose of aiding [the in-house lawyer] in contemplation of litigation in relation to [the appellant's] claims for extra.
>
> It was prepared with the very clear expectation that it would be kept confidential.
>
> Record 190
>
> Record 190 is a direct communication from [the in-house lawyer] setting out his legal opinions with respect to the claims of [the appellant].
>
> It was prepared with the very clear expectation that it would be kept confidential.

In response, the appellant submits the following.

> There is no litigation or contemplation of litigation, however the Institution is using this as a pretence to avoid responding to issues of consequence to us and as a means of preventing access to its records of its operations.
>
> The institution believes it can use an allegation of litigation or can use the involvement of a legal department staff member in its normal review, to then cause the records that are created from the normal review process, to be tainted by a false sense of litigation, thus concealing normal operational records from access under the *Act*.

From my review of the records and the representations of the Region, I accept that Records 162, 188 and 190 are all subject to the statutory solicitor-client communication privilege in section 12. Records 162, 188 and 190 are all direct communications between Region employees and its counsel relating to the claim submitted by the appellant. The purpose of the exchange of emails was to seek and provide legal advice on the Region's response to the appellant's claim. I find the Region intended to keep these records confidential as the communications were in the form of internal emails with limited users.

The fact that there is no litigation or contemplation of litigation as suggested by the appellant is not a consideration here as I have found that the records qualify for exemption under the statutory solicitor-client communication privilege in section 12.

SHOULD THE REGION'S FEE ESTIMATE BE UPHELD?

General principles

Section 45(3) requires institutions to provide requesters with a "reasonable estimate" of any fee exceeding $25, prior to giving access.

Where the fee is $100 or more, the fee estimate may be based on either the actual work done by the institution to respond to the request, or a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records. [MO-1699]

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699].

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Section 45(1) reads:

> 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.

Section 6 of Regulation 823 sets out the fees that an institution must charge for access to a record that does not contain the requester's personal information. These include:

> 1. For photocopies and computer printouts, 20 cents per page.
>
> 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.

Representations of the Parties

The Region makes the following submissions in support of its fee estimate.

> It is the position of the Region that the fee should be reduced by $460.80 to reflect (a) a reduction in the amount of hours billed for search time ($495.00 – see page 5 of this letter); and (b) and increase of $34.20 to cover additional photocopy charges (171 pages at .20 per page) for records 41, 86, 90, 102, 107, 166, 187, 189, 206, 225, 229, 230, 233, 254 and 293. The total fee should therefore be $1, 429.38. It is the position of the Region that this entire amount must be paid prior to any records being released.
>
> The fee was based solely on the actual time it took staff to find and gather the records pertaining to the request. The search time was based on [the appellant's] original request. Not all search time was billed (see below).

The actual search time involved was set out in an e-mail to [named individual], a Records and Information Management Analyst in the Clerks Department of the Region, dated January 27, 2003 and attached to the affidavit of [named individual] as Exhibit "E". In this e-mail, time (the hours of [three named individuals]) was included for assembling information, proofing data and photocopying. These hours were deducted by [named individual] and not included in the fees billed to [the named individual]. The actual time spent by...Senior Project Coordinator, and..Project Manager, both in the Works Department [was] 53.5 hours…

No time was included in the fees billed to [the appellant] for any searches undertaken by the Finance Department.

No time was included in the fees billed to [the appellant] for any searches undertaken by Works Department staff other than [two named individuals].

A representative sample of the records was not used as the basis for determining the fee.

…

With the exception of billing summaries, invoices and backup documentation located in Region's Finance Department, all requested records were kept in the main project file in the Construction Division of the Region's Works Department. Some records are temporarily kept in the offices of project team members until such time as they can be filed. [Named individual] saved all of his e-mails on his computer. Other project team members printed their e-mails and filed them, along with hard copies of [named individual's] e-mails, chronologically in the main project file.

All current Regional employees known to be associated with the project were contacted and requested to go through all of their records. Attached to the Affidavit of [named individual] as Exhibits "B" and "C" are copies of e-mails dated December 19, 2002 and January 6, 2003 from [named individual] to Works staff requesting the records and identifying the types of records that needed to be searched. If any employee responded by saying that he or she had no records, it was so noted in the master file. It took a great deal of time to manually go through very large construction files and Finance Department records to pull out the requested documents and search all computer records.

In response, the appellant submits the following.

> On December 10, 2002, I made a request for specific records relating to my own construction project then recently completed, the [named project]. My request was for:
>
> 1. Correspondence between the Institution and its Independent Project Engineer, [named company], regarding the [named project] not copied to [the appellant].
>
>   This would be for correspondence created during our involvement with this project. This was a finite period of time of about two years. It should have required a nominal period of time to review the correspondence files for documents not already copied to [the appellant].
>
> 2. Copies of all invoices rendered and correspondence exchanged with [named company] for extra fees. This should not involve much searching since such correspondence should be maintained in some reasonable consolidated filing of similar documents.
>
> 3. Evaluations, related reviews and communications concerning outstanding extras from the contract.
>
> 4. The daily activity reports, which the institution delivered soon after the request was delivered and we paid the fees asked for. This should no longer be an issue.
>
> 5. A request was also made for a software search for emails containing specified text, which the institution did not address and did not perform.
>
> Rather than attempt to promote disclosure of records by assisting in narrowing and facilitating my request, the Institution made a mountain out of a molehill, which caused considerable unnecessary time expended and delay to this process of accessing these records. Namely, the institution prepared, on its very own and without my authorization, the many pages of charts identifying all of its various records, most of which were not of interest. This was done through a request for an extension for 90 days initially, which the institution used to create the summary chart of records.
>
> It is submitted that the costs the Institution now claims as search and preparation time was in fact the time to prepare the summary chart of records used to reply with its first decision letter. The Institution is now attempting to recover those costs by adding them to the access fee estimate.

> Soon after the institution provided me with their chart of documents, I identified the very few specific records of interest. The institution is now attempting to pass on to me its costs of producing the chart of all of its records, most of which are not being accessed.
>
> Had the institution opened dialogue with me, I would have been able to identify more precisely the types of documents I was seeking, thus rendering any search time nominal. I would have narrowed the request to the specific records currently agreed to be released and the few on which the Institution claims exception.
>
> I believe that the institution embarked on the unreasonable assembly of all records without any direction from me to do so…
>
> I should not have to pay for any time spent on organizing or listing records before the request was finalized on March 28, 2003. The assemblage and search was done by the Institution for its own interests and was not necessary to reply to my specific request.

The appellant also requests that this office issue an interim order requiring the Region to provide the records to him at a fee of $0.20 per page.

Analysis and Finding

As stated above, if the fee is $25 or more, the institution must issue a fee estimate. And as the fee was over $100 the Region had two choices. The Region could have proceeded either by way of an interim access decision, or a final access decision and fee estimate.

If the Region had chosen to issue an interim access decision, the interim decision would have included a fee estimate, based on a review of a representative sample of the records and/or the advice of knowledgeable staff that are familiar with the type and content of the records.

In this case, the Region chose to do all the work necessary to respond to the request at the outset, and to provide a final access decision and a fee estimate to the appellant. The Region also requested that the appellant pay a deposit before it would release the records for which access was granted.

On March 25, 2003, the Region provided its first fee estimate to the appellant in the amount of $1,890.18. On April 1, 2003, the Region provided a further fee estimate of $1,648.33 to take into account the specific records requested by the appellant, varying only the shipping and photocopying charges. And finally in its representations, the Region again reduced its fee to $1,429.38 to correct for having charged for photocopying time and to increase the photocopying charges for additional records disclosed.

In this case, the appellant, upon receiving the Region's first fee estimate, determined that he did not want the majority of the records and revised his request. However, the Region, having

completed all the work to respond to the appellant's request, sought to recoup the costs for work it had done. Instead of revising its search cost, the Region attempted to claim those costs for the appellant's revised request. This would leave the appellant in a position of having to pay for the search time for the original request, in order to get the records he now wants.

As stated above, the purpose of the fee estimate and interim access decision is to provide a requester with sufficient information to make an informed decision as to whether to pay the fee and pursue access, while protecting an institution from expending undue time and resources on processing a request that may be ultimately abandoned (Order MO-1699). If the Region had provided the appellant with an interim decision and fee estimate it would not be in its current position, and it would have put the onus on the appellant to decide whether to proceed with the full search. Instead, the Region acted to its disadvantage by completing the whole search without getting direction from the appellant on whether he wished to pay the estimated fee and proceed with the search.

While the *Act* does not require that the Region provide an interim access decision and fee estimate, in this case, I find that the appellant has been prejudiced by the Region's failure to provide one. The Region's decision to issue a final decision has put the appellant in the position of having to pay the full search charges for his narrowed request and has placed the Region in a position of being unable to recover their costs for having done the full search. In the circumstances of this appeal, I am not satisfied that the appellant should pay the Region's search charges for records he does not want. Moreover, the Region's representations do not satisfy me that 37 hours of manual search time would be needed to locate the records in the appellant's narrowed request. As a result, I am unable to uphold the Region's search charges as they pertain to the appellant's narrowed request.

On the other hand, I find that the Region's photocopying charges and shipping charges in its revised estimate are appropriate in the circumstances and as such should be upheld.

In light of my findings regarding the fees, it is unnecessary for me to deal with the issue raised by the appellant regarding the interim order.

REASONABLE SEARCH

General principles

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Analysis and Finding

The appellant alleges that the Region did not conduct the search he requested for emails that contain his name including archived and deleted emails, and did not produce a list of the emails generated or the emails themselves.

The Region submits the following in support of its position that it conducted a reasonable search.

> The only issue of concern regarding the search appears to be the reasonableness of the Region's search for certain Works Department staff e-mails. [The appellant] asserts that the Region should search for deleted e-mails. This request is unnecessary. In a letter to [the appellant]dated May 13, 2003, [the appellant] was advised that all e-mails between the named Works Department staff would have been included in the Index of Records sent to him. This did not satisfy [the appellant]. The issue was again brought up again in a letter dated May 20, 2003. The Regional Clerk responded in a letter dated May 26, 2003.
>
> No records of any kind that in any way relate to this construction project have been destroyed. All e-mails were printed and filed in the master file in Construction prior to their deletion from the computers of project team members. [Named individual] still has all of his e-mails saved. All e-mails were included in the Indexes of Records sent to [the appellant].

The appellant submits that, "The Institution has not addressed this part of the request and has not performed the search requested."

In response to the appellant's representations, the Region further submits the following:

> Individual employees can conduct such a search on their individual desktops, but such search will be limited to their own database of e-mails.
>
> All e-mails that are deleted (put into GroupWise's "Trash") are automatically purged from the electronic database after 60 days and irretrievable.
>
> …
>
> Because each employee involved in the project was asked to search their individual records, we believe that all that could reasonably be done to search for e-mail records was in fact done.

As stated above, the Region is not required to show that further records do not exist; the only issue is whether the search it conducted was reasonable. Furthermore, the Region is not required to do the search in the manner suggested by the appellant, in this case, a text search. The Region states that all of its emails are printed and filed in the master file prior to deletion. This would mean that any emails containing the appellant's name, including deleted or archived emails

would be in the Region's master file, which the Region did search. Moreover, each employee involved in the project was asked to search his or her own individual records. As a result, I find that the Region's search for the emails requested by the appellant was reasonable.

ORDER:

1. I uphold the Region's decision to deny access to Records 162, 188 and 190.

2. I do not uphold the Region's manual search charges of $1,110.00.

3. The Region is entitled to charge the appellant $0.20 per page for photocopying the responsive records for an estimated cost of $73.00 for 365 pages and $12.38 for shipping costs.

4. I find that the Region's search for the responsive emails is reasonable.

November 17, 2004

Stephanie Haly
Adjudicator