



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2138**

**Appeal MA-060068-1**

**Township of Minden Hills**



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## **NATURE OF THE APPEAL:**

The Township of Minden Hills (the Township) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

... all building department records concerning [adjoining named neighbour's] property at [address]. This is to include transcripts of all inquiries and complaints concerning the new buildings and especially concerning the drainage, on that lot. The substance of the complaints as well as the building officials responses and those of the [named neighbour] need to be included, in full detail, with dates, whether or not the responses were oral or written. Details of all follow ups need to be included.

A chronological list of all visits made to the site, by the building officials, with dates, conclusions etc. is required.

If this issue of the [named neighbour] drainage has been discussed between any employees, councillors or administrators, [we] want all transcripts of these discussions.

A list of all contractors and subcontractors, who worked on the property is to be included, especially the contact information for these people.

The Township granted partial access to the records that it identified as responsive to the request, but did not set out the exemptions which it relied upon under the *Act* to deny access to portions of the records. The Township enclosed an invoice showing a fee totaling \$101.65. The fee consisted of \$60.00 for 120 minutes of search time, \$30.00 for 60 minutes of preparation time, \$5.00 for photocopying (25 pages at \$0.20 per page) and \$6.65 GST, which the Township claimed under the fee provisions in section 45 of the *Act*.

The requesters (now the appellants) appealed the Township's decision and fee.

During mediation, the appellants informed the mediator that they are not appealing the denial of access to the portions of the records which were not disclosed. Accordingly, denial of access to this information is not an issue in the appeal.

During mediation, the appellants also clarified their request, as follows:

Records that show why the Township concluded that [the named neighbour was] not required to change their grade on their property and how the Township came to that conclusion.

The appellants advised the mediator that records responsive to this reformulated request have not been provided. The Township informed the mediator that there are no additional records. Therefore, the reasonableness of the Township's search for responsive records is at issue in this appeal.

The appellants informed the mediator, that with respect to the fee, they are not appealing the \$5.00 photocopying charge. However, the appellants are appealing the balance of the fee in the amount of \$96.30 inclusive of GST. This issue was not resolved.

As further mediation was not possible, the file was moved to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Township setting out the facts and issues in this appeal and seeking its written representations. The Township did not provide me with written representations and instead advised this office by telephone that the appellants have all of the responsive records and the fee charged is the fee set out in the legislation. The appellants were sent a Notice of Inquiry containing the information received from the Township and seeking their representations in response. In response I received written representations from the appellants. The Township subsequently provided written representations that reflected the information it provided on the telephone, which I forwarded to the appellants. I forwarded the appellants' representations to the Township seeking its reply representations on certain statements made by the appellants. The Township did not provide me with reply representations.

## **DISCUSSION:**

### **FEES**

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]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

Section 45 requires an institution to charge fees for requests under the *Act*. That section reads:

- (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.

(3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this *Act* that is over \$25.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

6. 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.

6.1. The following are the fees that shall be charged for the purposes of subsection 45 (1) of the *Act* for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, \$10 for each disk.
3. For developing a computer program or other method of producing the personal information requested from

machine readable record, \$15 for each 15 minutes spent by any person.

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

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.

(2) A head shall refund any amount paid under Subsection (1) that is subsequently waived.

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.

As the fee exceeds \$25, the Township was required by the *Act* to provide the appellants with a fee estimate.

As the fee was over \$25 and under \$100, the fee estimate must be based on the actual work done by the Township to respond to the request.

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

The Township did not provide the appellants with a fee estimate as required by section 45(3). Instead the Township provided the appellants with 25 pages of records, along with a fee invoice totaling \$101.65. The invoice also provided that interest, at the rate of 1.25% per month, would be added to the amount outstanding past the due date. The invoice did not have a due date on it.

The appellants are appealing the amounts charged on this invoice save and except for the \$5.00 photocopying charge.

The Township states in its written representations that:

The fees charged ... are in accordance with the guidelines set out and reflect the amount of staff time spent fulfilling the request. No fees were charged for shipping.

The appellants state in their representations that the Township has never explained nor justified what they spent 120 minutes searching for nor what they spent 60 minutes preparing. The appellants state that it took them four minutes to photocopy the 25 pages of records.

### **Analysis/Findings**

In this appeal, I must determine whether the fee charged by the Township complies with the fee provisions of the *Act* and Regulation 823. In determining whether to uphold a fee under section 45(5), I must ensure that the fee is reasonable. The burden of establishing the reasonableness of the fee rests with the Township. To discharge this burden, the Township must provide me with detailed information as to how the fee has been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim [MO-2089].

As stated above, the Township did not provide the appellants with a fee estimate as required by the *Act*. 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]. The fee estimate can also assist a requester to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. A fee estimate also protects an institution from expending undue time and resources on processing a request that may ultimately be abandoned [Order 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].

Section 45(1) does not include time for:

- deciding whether or not to claim an exemption [Order P-4, M-376, P-1536]
- identifying records requiring severing [MO-1380]
- time spent by a computer compiling and printing information [Order M-1083]
- assembling information and proofing data [Order M-1083]

I find that the Township has not provided me with sufficiently detailed information to permit me to conclude that the fee charged has been calculated in accordance with the provisions of the *Act*. In particular, the Township has not provided me with information as to why it took 120 minutes to search for and locate the 25 pages of records, including where they searched and what steps were undertaken in order to respond to the appellants' request.

The Township has also not provided me with information as to why these 25 pages of records required 60 minutes of preparation time. With respect to preparation time, section 45(1)(b) does include time for severing a record [Order P-4]. Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990]. There are 25 pages of records and only 11 pages contain multiple severances. I

find, therefore, that the Township has not made out a prima facie case to justify the entire 60 minutes of preparation time.

In support of my conclusion concerning the lack of justification for the search and preparation fee charged in this appeal, I note as well that some of the records contain the personal information of the appellants as defined in section 2(1) of the *Act*. The appellants' personal information in the records includes their address and the views or opinions of another individual about the appellants. By section 6.1 of Regulation 823, the Township is not allowed to charge search and preparation fees for access to personal information about the individual making the request for access. As I have not received sufficiently detailed representations from the Township to determine how the Township arrived at their search and preparation fee, it is not clear whether the appellants have been charged fees to access their own personal information.

In addition, while the Township is entitled to charge 20 cents per page for photocopying, under the *Act's* fee provisions, it is not permitted to charge for the time actually spent photocopying the documents [MO-2089].

As stated above, I have not received representations from the Township as to how the 120 minutes of search time and the 60 minutes of preparation time were arrived at. Accordingly, it is not clear whether the Township has charged the appellant for items which are not authorized by section 45(1).

The Township has also charged the appellants interest and GST on the search and preparation time and the photocopies of the records, which are not charges authorized by the *Act*. Section 45(1) of the *Act* and Regulation 823 lists the items that can be charged by an institution to respond to a request for access. This list of items does not include interest or GST [Orders M-706, M-679, M-236].

There are 11 pages of records with multiple severances of personal information that is not that of the appellants. Given the lack of information provided by the Township concerning the search and preparation fee, including whether the fee charged included search and preparation time for access to records containing the personal information of the appellants, I have decided to allow fees only in respect of the 22 minutes of preparation time representing the time necessary to sever the 11 pages of records with multiple severances at two minutes per page. The fee charged for this preparation time, at the statutory set fee of \$7.50 per 15 minutes, equals \$11.00. As the appellants have not appealed the \$5.00 photocopy charge, the total allowable fee to the appellants is therefore \$16.00, representing \$11.00 preparation time and \$5.00 for photocopies.

## **SEARCH FOR RESPONSIVE RECORDS**

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].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Township was asked to provide a written summary of all steps taken in response to the request. In particular, the Township was asked to respond to the following, in affidavit form:

1. Did the Township contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the Township did not contact the requester to clarify the request, did it:
  - (a) choose to respond literally to the request?
  - (b) choose to define the scope of the request unilaterally? If so, did the Township outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the Township inform the requester of this decision? Did the Township explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The appellants were asked to provide representations concerning the basis of their conclusion that additional responsive records exist.



The Township stated in its written representations that:

A reasonable search of the Building/Planning Department files was conducted and the [appellants] received a copy of all information contained in the Township files concerning the drainage of the subject property.

The Township provided an affidavit from its Chief Building Official in which he declares only that “a reasonable search was conducted for all records pertaining to Appeal MA-060068-1”.

The appellants raised the following relevant questions, which were not responded to by the Township:

- Amongst the few documents that were sent to us is a very brief summary entitled “Water Run Off”. It is handwritten. It does not contain the transcripts of conversations, concerning the run off that we originally requested. However, this very brief summary indicates to us that someone was writing this from his notes. Why then did we not receive the original notes instead of a possibly, censored version?...
- [A named municipal councilor] has not responded to [our] emails and has not provided any of his transcripts or notes on this topic. As a long-standing professional councilor, surely he must keep notes!

### **Analysis/Findings**

I find that the Township has not provided me with sufficient evidence to allow me to conclude that it has conducted a reasonable search for responsive records. I base this finding not only on the lack of meaningful representations, including a detailed supporting affidavit, from the Township, but also on the following concerns over the records that have been produced:

- Although the Township states in its representations that the appellants received a copy of all information concerning the drainage of the “subject property”, the Township has failed to identify which property it is referring to. The records concern a drainage issue encompassing both the appellants’ own property and that of their neighbour.
- The document that the appellants refer to as “Water Run Off” contains brief initialed handwritten notes from more than one individual in chronological date order. It appears to be in summary form. The Township has not responded to the appellants’ representations as to whether there are background notes to accompany this document.
- The appellants also point out that the Township has not addressed why it provided records from one named municipal councilor, but has not produced records from the other named councilor.

On this basis, I find that a reasonable search has not been conducted for all records pertaining to this appeal and I will order the Township to do so.

**ORDER:**

1. I allow the Township to charge the appellants the sum of \$11.00 for the preparation time fee in this appeal plus the amount of \$5.00 for photocopies, for a total fee of \$16.00.
2. I do not uphold the remainder of the fee charged by the Township.
3. I order the Township to conduct a new search for records relating to:
  - a) the drainage of both the appellants' property and their neighbour's property;
  - b) any background notes to the document entitled "Water Run Off";
  - c) any records from the municipal councilor whose records have not been disclosed in the 25 pages of records already disclosed to the appellants;

and to provide the appellants with a decision in accordance with the provisions of section 19 of the *Act*, treating the date of this order as the date of the request, without charging a fee and without recourse to a time extension under section 20 of the *Act*. I further order the Township to provide me with a copy of its decision letter to the appellants.

Original signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

December 22, 2006 \_\_\_\_\_