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

ORDER MO-2218

Appeal MA07-71

Regional Municipality of Durham

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NATURE OF THE APPEAL:

The requester submitted two requests to the Regional Municipality of Durham (the Municipality) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In his first request, the requester asked for **all** records relating to the Durham Region Non-Profit Housing project ultimately named Garrard Heights, from the time of its formulation and conception to the present time. In his second request, the requester sought **all** records relating to Awaiting Developments Inc. and the Municipality. [my emphasis]

The Municipality combined the two requests and provided the requester with a fee estimate in the amount of $ 4,819.80 representing photocopy costs of $469.80 and search time of $4,350, calculated as 145 hours at $7.50 per 15 minutes. The Municipality indicated that costs for preparing the records for disclosure had not yet been calculated, but anticipated that they could be significant. The Municipality also provided the requester with an index of records, which noted that the exemptions in sections 12 (solicitor-client privilege) and 15(a) (information soon to be published) may apply to some of the records.

The requester responded by narrowing the scope of his request to certain records listed in the index, and provided the Municipality with a 50% deposit as required. In doing so, the requester conveyed his expectation that the fees would be lower as a result of his amended request.

The Municipality processed the narrowed request, and provided a final access and fee decision noting that in addition to the exemptions quoted in its fee estimate letter, the mandatory third party exemption in section 10(1) would apply to information relating to other projects referred to in the records. The Municipality's final fee decision took into account the cost of preparing the records for disclosure and revised the photocopying charge, which resulted in a final fee of $4,724.40. The Municipality claimed the same costs for conducting its search as originally stated in its fee estimate. Noting that the requester had already paid the interim amount, the Municipality required the revised balance owing of $2,314.50. The requester paid this amount and received access to a number of records.

The requester (now appellant) appealed the Municipality's decision to deny access to one file under section 12, to deny some of the information under section 10(1) and the amount of the revised fee of $4,724.40.

During mediation, the Municipality reconsidered its decision relating to the Record 02 (from the Social Services – Housing Services Division) which had been withheld under section 12, and disclosed this record to the appellant in full. There is no indication that the Municipality required the appellant to pay the photocopy charges for this 103 page document. Also during mediation, the appellant indicated that he was not interested in the severances made under section 10(1) of the *Act*, and these records were removed from the scope of the appeal. As a result of either the Municipality disclosing additional records, or the appellant agreeing not to pursue other records, there are no records remaining at issue in this appeal.

However, the appellant continues to appeal the final fee charged by the Municipality.

The appellant also believes that the Municipality inappropriately labeled File 02 from the Social Services, Housing Services Division as a "legal file" and withheld it from him under section 12

of the *Act*. Although this file was disclosed to him during mediation, the appellant continues to request that I review the Municipality's initial decision to withhold the record from disclosure.

As all issues could not be resolved in mediation, this appeal was forwarded to the adjudication stage of the appeals process. I decided to seek submissions from the Municipality, initially, but only with respect to the issue of fees (at that time). The Municipality submitted representations in response and consented to sharing them, in their entirety, with the appellant.

I attached a copy of the Municipality's submissions to the copy of the Notice that I sent to the appellant. In addition to the fee issue, the appellant was given an opportunity to address his other concerns regarding the Municipality's initial decision to withhold File 02 pursuant to section 12 of the *Act*.

The appellant submitted representations that addressed both issues.

PRELIMINARY ISSUE:

RECORD DISCLOSED DURING MEDIATION

As I indicated above, the appellant was invited to provide submissions regarding his belief that the Municipality inappropriately labeled File 02 from the Social Services, Housing Services Division as a "legal file". Since this record has been disclosed to the appellant, the question before me is whether this aspect of the appeal is moot. In a recent decision (Order MO-2049-F), Senior Adjudicator John Higgins had occasion to consider a similar situation. I attached a copy of Order MO-2049-F in which the Senior Adjudicator discusses the issues that arose in that appeal. The appellant was asked to review this order, and in particular, the discussions under the headings "Analysis and Findings" at pages 3 – 4 and "Exercise of Discretion" at pages 10 – 13 and to explain why I should consider this issue. He was also asked to explain what consequences he believes should result.

The appellant provided submissions on this issue but asked that I not share them with the Municipality for "procedural and substantive" reasons, although he did not elaborate on what those reasons were. I find nothing in the appellant's representations on this issue that raises any confidentiality concerns or that would fall within the confidentiality criteria in accordance with the procedure for preparing and submitting representations as set out in Practice Direction 7. Accordingly, I will refer to the appellant's submissions in this decision.

The appellant submitted the following:

> It is the Municipality's burden to show that it had some reason to believe that the material, (file 02), initially withheld under section 12, was culpable of being considered in the realm of materials that have section 12 type qualities. The foregoing test predisposes the application of discretion by the Municipality. In

> other words, if the material in file 02 is not worthy of the air of discretion, the Municipality cannot be determined to have acted in good faith.

The appellant does not believe that the material in file 02 meets the test that he has devised, that is, whether it is "of a substance worthy of the air of a reasonable circumstance for a section 12 discretionary inquiry…" He believes that the Municipality intentionally segregated and mischaracterized this record as a "legal file" in order to obstruct its disclosure. Taking this argument further, the appellant submits that the Municipality's strategy was to see if he would appeal the decision and since there was no reason to withhold it, the Municipality would then disclose it. The appellant contends that this is an abuse of process; that the act of denying access was one that was vexatious and made in bad faith as a tactic to thwart his request.

The appellant asks me to obtain and review the material in file 02 and "determine if there is any reasonability to consider anything but what I am alleging" before presenting his arguments to the Municipality. He asserts that if I find that he fails this test then he will abandon this part of the appeal. The appellant stresses that the records of file 02 are "compellingly innocuous to the consideration of the applicability of solicitor client privilege". He queries how an experienced "Head" could exclude such material and suggests that the head was acting on the advice of others. Further, he charges that the ulterior purposes of these "advisors" are not defensible under the *Act*.

In Order MO-2049-F, Senior Adjudicator Higgins addressed whether the appeal of a record that had been made part of the public record in a judicial review was moot as regards that record. He stated:

> In Order P-1295, former Assistant Commissioner Irwin Glasberg outlined what has been accepted as the appropriate approach to the determination of mootness in appeals adjudicated by the Commissioner's office (see also Order PO-2046):
>
> > The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision [in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342]. There, the court commented on the topic of mootness as follows:
> >
> > > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when

> the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...
>
> In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

The live controversy which might have been said to exist between the parties relating to page 1 is now at an end because it is available to the appellant, meeting the first part of Sopinka's mootness test.

Under the second part of the test, I have considered whether the question of access to page 1 of the records is of sufficient public interest or importance to merit reviewing it regardless of its mootness. I have concluded that it does not and that no useful purpose would be served by proceeding with my inquiry in relation to it. I will not, therefore proceed with a determination of the solicitor-client exemption claimed for page 1 of the records.

The appellant does not dispute that disclosure is not required in these circumstances although he suggests that the non-disclosure of page 1 is indicative of a pattern of behaviour on the part of the City. I will address that concern later in this order.

Based on the mootness test referred to above, I find that the first part of the test has been met as the live controversy between the parties is at an end because the record has been disclosed to the appellant.

I find further that the appellant has provided no evidence that the information contained in the file is of sufficient public interest or importance to merit reviewing it regardless of its mootness. Accordingly, I find that no useful purpose would be served by proceeding with my inquiry regarding the application of section 12 to this record.

Apart from the question whether the discretionary exemption at section 12 should or should not have been claimed for file 02, the appellant's representations also raise questions about the motives and behaviour of the Municipality in claiming the exemption.

Under the heading "Exercise of Discretion" in Order MO-2049-F, Senior Adjudicator Higgins addressed the appellant's arguments in that case, that the institution had acted in bad faith and for an improper purpose in initially withholding the record in that case from disclosure. He summarized the appellant's submissions on this issue as follows:

> The appellant provided extensive representations on the City's decision to apply the section 12 exemption to the responsive records and, generally, in responding to this access request.
>
> The appellant places particular emphasis on the City's decision to withhold page 1 of the records, which is no longer at issue in this appeal because it was disclosed as part of the record of proceedings in the judicial review litigation, as discussed earlier in this order. He says that this decision is indicative of bad faith on the part of the City and, specifically, "most revealing of the manner in which the City handles access requests" since "[t]here is nothing in that document that could be described as Legal advice".
>
> The appellant refers to Order MO-1947, a July 2005 order of Commissioner Ann Cavoukian, and submits that this order addresses this use of exemptions that do not apply. The appellant quotes from Commissioner Cavoukian's comments about moving towards a "culture of openness" and away from a "protective mindset" in responding to access requests. The appellant's excerpt from Order MO-1947 includes the following:
>
> > …Exemptions should not simply be claimed because they are technically available in the *Act*; they should only be claimed if they genuinely apply to the information at issue.
>
> The appellant's submissions on the exercise of discretion appear to stem from a belief that the exemption claimed by the City cannot apply in the circumstances. He bases this on a belief that no solicitor-client relationship existed between the City's legal counsel and the staff members involved in the communications reflected in the records. As noted earlier, he also suggests that it is problematic for such a relationship to exist between the CAP office and the City's legal counsel, which he refers to as a "secret solicitor-client relationship".
>
> The appellant also states that, in Order MO-1923-R, the Commissioner "… has determined that both the third party and the City acted improperly".
>
> Finally, the appellant suggests that the City has invoked section 12 in an attempt to avoid litigation. He states that the purpose of his access request is:
>
> > To determine how an earlier request for a specific document, that is a legal report made as a submission, and given in secret from an

> applicant for a zoning variation to the Planning Department became an internal memo from a City Planner to the City Solicitor asking for legal advice with attachments.

In the appellant's opinion, the City's reliance on the ongoing judicial review proceedings as justifying the exercise of discretion in this instance demonstrates an attempt to:

> [protect] the City and or individuals who exercise authority and act for the city … from litigation that they may be exposed to at this time [for having assisted] one party to the detriment of another party in a process… that was ostensibly an open process where the City sat as an arbiter…

After considering all of the submissions on this issue, Senior Adjudicator Higgins found:

> Page 1 of the records, on which the appellant bases much of his discretion argument, is not before me in this appeal. Even if the appellant is correct that it is not properly exempt under section 12, I am not satisfied on this basis that the City acted in bad faith. **The whole point of the appeal process conducted by the Commissioner and her staff is to provide an independent review of institutions' decision-making under the *Act*, as reflected in section 1(a)(iii). It is self-evident that one of the basic legislative reasons for setting out the appeal process (at sections 39 through 44 of the *Act*) is that institutions may at times claim exemptions that are not available. Errors in decision-making are not, in and of themselves, indicative of bad faith or abuse of discretion.** [emphasis added]

Additional comments made by the Senior Adjudicator are also relevant in addressing the appellant's submission in the current appeal. He stated:

> The appellant also attempts to cast doubt on the City's good faith in claiming section 12 by arguing that the Adjudicator "… in Order MO-1923-R has determined that both the third party and the City acted improperly". Order MO-1923-R contains no such finding. It simply finds, after analysis of the relevant facts and law, that section 12 does not apply. The appellant's argument here is also undermined by the fact that the Commissioner's original order, reversed by Orders MO-1900-R and MO-1923-R, had *upheld* the City's section 12 claim. **This argument misconstrues not only Order MO-1923-R, but also the nature of the access and appeal process set out in the *Act*, as discussed in the preceding paragraph. A finding by the Commissioner or one of her delegated adjudicators that a claimed exemption does not apply is *not*, in and of itself, a finding that anything improper has taken place.**[emphasis added]

The Senior Adjudicator concluded:

> In addition, I can find no reasonable basis upon which I could find that the City evinced bad faith. There is simply no evidence of carelessness, recklessness or intentional fault on the part of the City in its exercise of discretion applying section 12 of the *Act* to exempt the responsive records.
>
> In summary and in view of the circumstances of this appeal, past decisions of this office, and the applicable law, I find that the City's exercise of discretion was not in bad faith and that the City did take into account relevant considerations. Accordingly, I find that the City properly exercised its discretion under section 12 of the *Act*.

I agree with the comments made by Senior Adjudicator Higgins, and find that they are similarly applicable in the current situation. Even if the appellant is correct that the file was not properly exempt under section 12, I am not satisfied on this basis that the Municipality acted in bad faith or for an improper purpose.

In this case, the search for records produced over 2000 pages of records. The evidence indicates that the Municipality expended considerable effort in locating and reviewing the records for disclosure. According to its final decision on access, following the appellant's narrowing of the records that he was seeking, the Municipality indicated that it was prepared to provide over 1000 pages of records to the appellant, of which only 173 were to be severed. I am not persuaded that placing a file in one location as opposed to another (according to the appellant's perception of where the file should be located) within an institution's records holdings, or claiming an exemption that cannot be defended or is not ultimately upheld, is indicative of bad faith. Nor does this, in itself, demonstrate that the Municipality has somehow acted for an improper purpose.

Rather, the evidence establishes that although the Municipality initially withheld file 02 from disclosure, it actively participated in mediation once an appeal was filed and ultimately decided to disclose the material to the appellant. Moreover, the withholding of this file must be viewed in the context of the Municipality's overall response to the appellant's request. I find that the Municipality has acted in accordance with the *Act*. Similar to Senior Adjudicator Higgins comments above, I find that there is no evidence of carelessness, recklessness or intentional fault on the part of the Municipality in initially withholding file 02 from disclosure under section 12.

DISCUSSION:

FEES

General principles

An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate. Where the fee is over $25 and under $100, the fee estimate must be based on the actual work done by the institution to respond to the request. 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).

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).

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 823, as set out below.

Section 45(1) requires an institution to charge fees for requests under the *Act*. That section 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.

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 records provided on CD-ROMs, $10 for each CD-ROM.
>
> 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.
>
> 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.

Calculation of fee

Basis of fee

In preparing a fee estimate, there are three optional approaches an institution can take. It may either base its fee on the actual work done to respond to the request; or it may seek the advice of an individual who is familiar with the type and contents of the requested records; or it may base its decision on a representative sample of the records (Order MO-1699).

As noted above, the bulk of the estimated and final fee in the present case is based on the time it actually took the Municipality to search for responsive records. That is, the Municipality based its fee on the actual work done. Given the large number of records involved and the amount of time required to search for responsive records, the Municipality was asked to explain why it undertook to complete the actual work rather than using another less costly method at the outset and/or communicating with the appellant to apprise him that the cost would likely be high and/or to clarify or amend his request.

The Municipality provided the following submissions on the steps it took in responding to the appellant's request by way of explanation for the approach it took in this case:

> Upon receipt of the Appellant's initial request for records pertaining to 'Garrard Heights' and 'Awaiting Developments' the Records and Information Management (RIM) Analyst responsible for coordinating all Regional responses to MFIPPA requests telephoned the Appellant and indicated the amount of work required for such a request and asked if the scope could be narrowed. At that time, the Appellant indicated that the scope could not be narrowed and as such the [Municipality] was obligated to undergo all applicable searches to discover any applicable records…the [Municipality] chose to base its estimate on the actual work done by the institution to respond to the request. The purpose of the estimate in this case, was to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access…The Appellant chose to pay the fee and pursue access to the records. The Appellant was well informed by the [Municipality] as to the enormity of the scope of the request and the potential for high costs.

The Municipality provided an affidavit sworn by the RIM Analyst which confirms that she spoke to the appellant to advise him of the time and costs associated with his request and to determine whether the scope of his request could be narrowed. In her affidavit, the RIM Analyst affirmed that the appellant "indicated to me that he wished to leave his request as is, and that he was aware of the cost…and that he accepted this." The RIM Analyst attached a copy of the note to file that she made of this conversation. The RIM Analyst indicated further that subsequent to this telephone conversation, she sent a letter to the appellant extending the time to fulfill his request as the request was for a large number of records and necessitated a great deal of search and review time to see what records were responsive.

The appellant responded to the Municipality's representations as follows:

> The fee estimate provided by the Municipality was not based on advice of those familiar with similar records or by way of sample. It appears the *Act* advised these methods in order to minimize time spent by institutions in gathering information for purposes of a fee quote or list of pertaining records. The *Act* intended that the institution use a sample representation and extrapolate.

In considering this issue, I am cognizant of the provisions of section 17 of the *Act*, which imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Keeping in mind one of the purposes of the *Act* as set out in section 1, which is to provide a right of access to information under the control of institution, there is an underlying expectation that institutions will make an effort to assist requesters in formulating their requests in such a way as to minimize the effort required by an institution to respond to a request, to ensure that the requester is able to obtain the information he or she is actually seeking and to minimize the potential fees that an overly broad request might produce.

In most cases, it would be prudent for an institution to use one of the alternative methods to search for responsive records in cases where there are a large number of records *in lieu* of conducting an actual search. This not only serves the interest of the institution, in that it does not need to expend a great deal of time preparing an initial response to a requester in the event that the costs will be too great for the requester to pay, but it also assists a requester who may be uncertain of what records he or she is actually seeking. This may also serve to help focus the

scope of the request so that the fees are within the requester's ability to pay, thereby serving the purpose of the *Act* in facilitating access.

In this case, the Municipality was clearly aware of the potential time and costs involved in responding to the appellant's request. In accordance with the spirit of the *Act*, the Municipality contacted the appellant prior to undertaking any work on the request in the hopes that he would narrow his request or otherwise make an effort to reduce the amount of work and/or time that would be involved in responding to it. I find that the appellant was very aware of the implications of his request and that he accepted the costs associated with it. The Municipality took a risk conducting an actual search for responsive records, since at the end of the day the appellant could have decided not to pursue access and the Municipality at that point, would not have been able to collect any money from him for that time spent searching. Fortunately for the Municipality, the appellant chose to pay the fee.

Despite any subsequent decisions that were made regarding the records he ultimately decided that he wanted, I find that the search conducted by the Municipality was done at the appellant's insistence, with clear knowledge of the associated costs. The appellant made an informed decision to pursue a broad request for **all** records relating to the Durham Region Non-Profit Housing project ultimately named Garrard Heights from the time of its formulation and conception to the present time, and for **all** records relating to Awaiting Developments Inc. and the Region, and cannot, thereafter, claim that the search should have been done differently, or not done at all. [my emphasis]

I find the approach taken by the Municipality as the basis for the fee to be reasonable in the circumstances.

Search

The Municipality states that in order to locate responsive records containing the terms "Garrard Heights" and "Awaiting Developments", its staff were required to go through every document relating to Durham Non-Profit Housing Corporation in the Social Services Department, Housing Services and the Finance Department, Housing Services. The Municipality indicates that one staff person in the Social Services Department was pulled from her full time position to work exclusively on this request over a three-month period. Another staff person assisted for a short period of time. The Municipality attached a chart to its submissions (Exhibit B), which records the time spent searching for responsive records by the two staff members assigned to the task.

The Municipality takes the position that although the appellant subsequently indicated that he did not require all of the records that had been located, this was not a narrowing of the scope of the search. The Municipality submits that by the time the index of records was provided to the appellant, the search for responsive records had already been completed with the appellant's full knowledge. The Municipality submits further that the appellant's search terms were so general that he should not be able to argue that he did not expect a large volume of records. Rather, the Municipality argues that the appellant simply chose to limit the number of pages requiring

photocopying. The Municipality referred to a letter written by the appellant, dated February 23, 2007 as evidence of his intention to avail himself of all of the records located as a result of the search. In this letter, the appellant wrote:

> I will detail the records I require at this time but reserve my right to request any additional records in the future.

The Municipality submits that the time taken to search for responsive records (135 hours by one person and 10 hours by another) was reasonable in the circumstances and that the costs associated with this search were calculated in accordance with the *Act*, that is $7.50 for every 15 minutes of manual searching for records. The Municipality indicates that it calculated this as $30/hour x 145 hours for a total cost of $4,350.

The appellant argues that he should not be charged for the costs of searching for records responsive to his requests. I have set out below the substance of his submissions on this issue.

> …The Municipality's fee estimate, as the Respondent's evidence states, was derived from time spent in assembling an index of records, determining which records were to be included and those to be excluded or severed.
>
> The Affidavit…indicates that the Respondent required an extended period of time to determine which records were responsive…
>
> The affiant, in paragraphs 2, 4 and 5, confirms the misconception that search time spent gathering information for purposes of a fee estimate or index of records is chargeable. This foregoing is further confirmed in the Respondent's solicitor's letter of July 17, 2007, paragraphs 1 through 5[the Municipality's submissions].
>
> In Exhibit "B" the respondent shows the misapplication of time spent from November 29, 2006 to February 20, 2007 in determining the ultimate cost…
>
> The Respondent's solicitor has, by letter dated July 17, 2007, confirmed…that on February 23, 2007, a date subsequent to the time spent identifying records for the purposes of preparing an index of records, I made my request for records. This request was made from the index of records sent to me by the Municipality. The index of records that I received at that time contained a list of records and notes relating to the class of each record in respect to its deliver, or whether, as in the case of file 02, its refusal to disclose.
>
> At that point in time, it was my exclusive choice to request production of any number or none of the records indexed. Such a determination, by me, would have been, pursuant to the *Act*, without any previously accrued cost, burden or liability. To allow institutions to charge for this phase of the process could open the potential of institutions accruing extreme cost and cause the requestor to back

> away from formalizing a request. At the time I chose to request certain records from the more encompassing list of indexed records I should not have faced an accrued cost. The error of incurring this cost was that of the Municipality.
>
> The Respondent has charged $4,350.00 for preparing an index of records.
>
> …
>
> The basis for the fee charged under the Respondent's scenario for the index of records is inconsistent with the *Act*. The *Act* and its underlying Regulations form a complete regulatory scheme. There is no room for a question of *quantum meritus* determination.
>
> I submit that the only *Act* compliant fees can be chargeable or payable.
>
> The only *Act* compliant fees levied are for photocopying that occurred for purposes of my request and my responsibility is only to those costs which occurred subsequent to the delivery of the index of records.

The appellant's arguments reflect an acute misunderstanding of the fee provisions of the *Act*. My findings of fact in this situation are as follows. It is very clear that the appellant submitted his request for records on November 17, 2006. The Municipality thereafter advised him that there would be significant costs associated with his requests, which he acknowledged. The appellant chose to continue to pursue access to a broad category of records. The Municipality responded to his request, conducted a search and prepared an index of responsive records, which was then provided to him along with an interim decision on access. The appellant was given an opportunity to review this index. At his option, he could select all of the available records to be provided to him, some of them or he could have abandoned his request. The appellant chose at that time to select copies of certain records to be provided, reserving his right to select others at a later date.

There is no evidence before me that the Municipality used the time spent searching for responsive records to prepare the index of records and the appellant's mere assertion that it did does not persuade me otherwise.

Contrary to the appellant's belief, his obligations to pay fees for the work involved in responding to his request began at the time he made his request, not when he decided to select certain records for photocopying, from the index of records that was created following a search. The *Act* clearly intends that requesters pay for the time taken to search for responsive records (section 45(1)(a) and item 3 of section 6 in Regulation 823). I accept the Municipality's submission that the request was extremely broad, requiring the review of a large number of records. The Municipality has demonstrated the actual time spent for two staff members to conduct the required search. I find that the Municipality's calculation of the costs associated with search were in accordance with the *Act*. The Municipality is, therefore, entitled to charge the appellant

$4,350 as the cost of searching for records responsive to his requests. The appellant has paid this fee and I find that he is not entitled to recoup any amount already paid.

Preparation for disclosure

Section 45(1)(b) includes time for

- severing a record (Order P-4)
- a person running reports from a computer system (Order M-1083)

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).

Section 45(1)(b) 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)
- identifying and preparing records requiring third party notice (MO-1380)
- packaging records for shipment (Order P-4)
- transporting records to the mailroom or arranging for courier service (Order P-4)
- time spent by a computer compiling and printing information (Order M-1083)
- assembling information and proofing data (Order M-1083)
- photocopying (Order P-184)
- preparing an index of records (P-741, P-1536)

The Municipality indicates that once the appellant selected the records that he wished to access, the RIM Analyst obtained those pages and determined that severances were required to 173 pages. According to the Municipality, the RIM analyst spent 2 minutes per page severing the exempt information. The Municipality notes that it made a small error in its original calculation of the cost for this activity. Originally, the Municipality used an incorrect formula and calculated the cost as $173. However, using the formula set out in section 6 item 4 of Regulation 823, that cost should have been $172.50. The Municipality indicates that it will refund the amount charged in excess of this latter calculated cost.

The appellant does not address the costs associated with preparing the record for disclosure, other than to reiterate his previous argument that the Municipality essentially charged him to prepare the index. I have already dealt with that argument.

I find that the Municipality's calculation of the costs associated with preparation of the records for disclosure, which consist solely of the time spent severing the records, to be in accordance with the fee provisions of the *Act*. The Municipality is, therefore, entitled to charge the appellant $172.50 as the cost of preparing the records for disclosure. The appellant has paid this fee and is not entitled to recoup any amount already paid, except for the $0.50 that he was incorrectly overcharged.

Photocopies

The Municipality indicates that it photocopied the 1007 pages of records that were requested by the appellant at a cost of $0.20 per page as set out in the Regulation for a total cost of $201.40. The appellant acknowledges in his representations that he is obligated to pay this amount.

I find that the Municipality's calculation of the costs associated with photocopying the records to be in accordance with the fee provisions of the *Act*. The Municipality is, therefore, entitled to charge the appellant $201.40 for photocopies. The appellant has paid this fee.

ORDER:

1. With one exception, I uphold the fees charged by the Municipality for the processing of these access requests.
2. I do not uphold the Municipality's original fee of $173 for preparing the records for disclosure, but do uphold the Municipality's amended fee of $172.50.
3. I order the Municipality to refund the outstanding amount to the appellant within 10 days of the receipt of this order.
4. In order to verify compliance with the terms of Order Provision 3, I reserve the right to require the Municipality to provide me with a copy of the letter to the appellant enclosing the refund.

Original signed by: August 23, 2007
Laurel Cropley
Adjudicator