



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

ORDER MO-2612

Appeal MA10-320

Town of Penetanguishene



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NATURE OF THE APPEAL:

The appellant submitted a request to the Town of Penetanguishene (the Town) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following records:

1. Retainer agreement between the municipality and (a named law firm)
2. Showing the payments made to your law firm/s in the year[s] 2008 and 2009
3. Showing the billings from your law firm in relation to the Human Rights cases (Tribunal) for the year[s] 2009 and 2010-12-03
4. Showing the charges by your law firm, and or consultant in relation to the municipal employees future union

The Town issued an access decision on August 9, 2010 with respect to Items 1 to 4, as follows:

1. *Retainer Agreement between the Municipality and (a named law firm):*
 - There is no responsive record.
2. *Payment charges made by your law firm/s in 2008 and in 2009*
 - The Town granted access to the following records pertaining to Item 2:
 - General Ledger Summary all legal fees (account 2210) rendered in 2008
 - General Ledger Summary all legal fees (account 2210) rendered in 2009
3. *Charges by your firm/s for services rendered in relation to Human Rights issues*
 - The Town granted access to the following records pertaining to Item 3:
 - General Ledger Detail of all legal fees pertaining to the Human Rights Tribunal
4. *Charges by your law firm/s for services rendered in relation to union related issues, 2009 and in 2010*
 - The Town granted access to the following records pertaining to Item 4:
 - Invoice Listing Report Summary of all legal fees in relation to Collective Bargaining

The Town also issued a \$30 fee with its August 9, 2010 decision. With respect to the fee, the Town referred to section 45 of the *Act* and indicated that its \$30 fee was for search time, calculated in accordance with each part of the request as follows:

2. *Payment charges made by your law firm/s in 2008 and in 2009*
 - Search time 15 minutes @ \$7.50 / 15 minutes - \$ 7.50
3. *Charges by your law firm/s for services rendered in relation to union related issues, 2009 and in 2010*
 - Search time 15 minutes @ \$7.50 / 15 minutes - \$ 7.50

4. *Charges by your firm/s for services rendered in relation to Human Rights issues*

- Search time 15 minutes @ \$7.50 / 30 minutes - \$ 15.00

The appellant appealed the Town's decision to this office.

As part of the mediation process, the law firm wrote to the appellant regarding the circumstances surrounding the provision of its services to the Town, stating:

The firm provides legal services to the Town of Penetanguishene. These services are not provided under an existing Retainer Agreement, nor have we ever provided services to the Town under such an Agreement. We are retained on a file by file basis.

Following his receipt of this letter from the law firm, the appellant indicated that he wished to have access to the by-law that authorized its hiring.

Also during mediation, the Town agreed to conduct another search for a by-law authorizing the hiring of the law firm. Following its search, the Town advised the mediator and the appellant that, based on a search of its records management system and by-law index, there are no files and/or by-laws authorizing the retention of the law firm by the Town. The Town also advised that it has enacted a procurement by-law which contains provisions regarding the hiring of professional and consulting services. The Town subsequently wrote to the appellant enclosing a copy of the procurement by-law and advising that sections 6(e) and (f) of it outline the requirements for engaging professional or consulting services. Finally, it indicated that the second search also did not reveal a retainer agreement for the law firm.

Following receipt of the Town's letter, the appellant advised the mediator that he still wished to obtain access to records relating to the hiring process of the law firm as part of this appeal, rather than submitting a new request for this same information. As a result, the scope of the request was identified by the mediator as an issue for adjudication.

The appellant also advised the mediator that he objects to the \$30 search fee, and refers to section 253 of the *Municipal Act*, section 1 of the *Canadian Charter of Rights and Freedoms* and article 19 of the *United Nations International Covenant on Civil and Political Rights* in support of his position.

I sought and received the representations of the Town, initially, and shared a complete copy of them with the appellant, who also made submissions in response to the Notice of Inquiry provided to him. In the Notice of Inquiry, I specifically asked the parties to the appeal to provide representations on whether records relating to the retention of the law firm are within the scope of the appellant's request, as originally framed and subsequently amended. I also asked for submissions on the adequacy of the fee estimate provided by the Town to the appellant.

DISCUSSION:

SCOPE OF THE REQUEST

Clearly, records that speak to the retention of the law firm by the Town are responsive to that part of the appellant's request that asks for "the retainer agreement between the municipality and [the law firm]." Both the Town and the law firm itself have advised the appellant on several occasions that the law firm and the Town do not have a retainer agreement for the provision of the firm's services. Rather, the firm is retained on a case-by-case basis by the Town. The Town also provided the appellant with a copy of the procurement by-law upon which it relies as its authority for the procurement of professional and consulting services, like those provided by the law firm. Specifically, the Town indicated to the appellant that it is relying on sections 6(e) and (f) of the by-law as the legal basis for its retention of the law firm, rather than a formal retainer agreement. The appellant attended at the Town's offices and examined the by-law at that time.

According to the information contained in the Mediator's Report relating to this appeal, the appellant is seeking access to "records relating to the hiring process of [the law firm]." In the Notice of Inquiry provided to the appellant, I specifically asked the appellant to address this issue. The appellant's representations are focussed entirely on other matters and do not in any way speak to the scope of his request, in its original or in some amended form. In addition, in his representations, the appellant failed to address whether the information provided by the Town regarding the basis upon which the Town retained the services of the law firm satisfied his request for records relating to the hiring of the law firm.

In my view, the appellant has an obligation in these circumstances to indicate clearly any deficiencies in the manner in which the institution has responded to a request if he or she is of the view that the response is inadequate or incomplete. In this case, the appellant has not done so, and I am unable to determine whether he continues to take the position that his request was not properly responded to by the Town. As a result, I am unable to provide a remedy for any alleged deficiency in the Town's response to the request as framed originally and as amended.

ADEQUACY OF THE FEE

The appellant disputes the \$30 fee charged by the Town for responding to his request. Where the fee exceeds \$25, an institution must provide the requester with a fee estimate. In this case, the Town provided this office and the appellant with a very detailed explanation of the manner in which the fee was calculated and details of the searches conducted for each part of the request. It must be noted that the fee estimate of \$30 included only charges for the searches, and did not claim fees for any of the other items relative to the Town's response to the request.

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 and 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 [Orders P-81 and 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. I have only set out section 45(1)(a) of the *Act* and paragraph 3 of section 6 of Regulation 823 below, as they form the basis for the amounts claimed by the Town.

Section 45(1)(a) requires an institution to charge fees for searches conducted in order to respond to requests under the *Act* and 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,

the costs of every hour of manual search required to locate a record;

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:

For manually searching a record, \$7.50 for each 15 minutes spent by any person.

The Town submits that it conducted searches of its electronic General Ledgers for information relating to items 2, 3 and 4 of the request and that it located responsive information. It indicated that it spent a total of one hour conducting these searches of its General Ledger database for the three items described in the request. Items 2 and 3 of the request required a total of 15 minutes of search time each, while item 4 required 30 minutes, for a total of 60 minutes. It was this search time of one hour which formed the basis for the Town's \$30 fee estimate.

The appellant did not address the fee aspect of the appeal in his representations, though he indicated that he was relying on section 253 of the *Municipal Act*, which provides that individuals have a right to inspect a municipality's record-holdings, including municipal by-laws, subject to *MFIPPA*. In addition, the appellant relies upon section 25 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and the *United Nations International Covenant on Civil and Political Rights* as the basis for obtaining the records being sought in this appeal. I note that the Town has agreed to provide the appellant with complete access to all of the records which he is seeking, upon payment of the mandatory fees under *MFIPPA*.

Based on the representations of the Town and my review of the information recovered as a result of its searches, I find the fees charged for the conduct of the three searches of the Town's General Ledgers to be reasonable in the circumstances. I further note that the fee represents only the recovery of the cost of conducting the searches, and not the photocopying or preparation fees that may have also been charged by the Town for responding to the request. In the absence of any submissions from the appellant regarding the adequacy of the evidence submitted by the Town in relation to the calculation of its fee, I am satisfied that the fee charged is in accordance with the mandatory requirements of section 45 and Regulation 823.

As noted above, the appellant has raised several other issues relating to the basis for his entitlement to the information that is responsive to the request. The Town is prepared to grant him complete access to all of the information sought, upon payment of the mandatory fee which is prescribed by the *Act*. The fee provisions of the *Act* are mandatory and can only be waived in situations where an appellant makes a fee waiver request under section 45(4), which is not the case in this appeal. Moreover, I am not persuaded that the appellant is entitled to obtain the records without the payment of a fee on the basis of a provision of the *Municipal Act* granting access rights to documents under the control of the Town's clerk, as a result of a *Charter* right or through the operation of *United Nations International Covenant on Civil and Political Rights*. Accordingly, I find that the Town is entitled to charge a fee of \$30 to obtain access to the requested information in accordance with section 45(1) and Regulation 823.

ORDER:

I uphold the Town's fee estimate of \$30 and dismiss the appeal.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 8, 2011