

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2697

Appeal MA09-25-2

Municipality of Port Hope

February 22, 2012

Summary: The municipality received a request for certain information relating to the Port Hope Harbour Commission. The municipality issued a decision letter, including fees for search time and photocopying. The requester sought a fee waiver with respect to the search time, which the municipality denied. The requester appealed both the amount of the fee for search time and the denial of the fee waiver. The municipality's fee was upheld, in part. Photocopying charges were upheld. However, the fee charged for search time was not upheld. As a result of the findings respecting search time fees, it was not necessary to decide fee waiver issue.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 45(1); R.R.O. 1990 Regulation 823, section 6.

Orders Considered: P-741 and P-1536.

OVERVIEW:

[1] This order disposes of the issues raised as a result of a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) made to the Municipality of Port Hope (the municipality) for access to information related to the Port Hope Harbour Commission (the Harbour Commission).

[2] By way of background, the municipality granted access to responsive records it had in its possession in response to the request. However, the municipality also responded that it could not provide an access decision with respect to records that were

[3] in the "custody, care and control" of the Harbour Commission. The municipality took the position that the Harbour Commission was neither part of the municipality, nor was it deemed to be part of the municipality under section 2(3) of the *Act*. The appellant appealed the municipality's decision to this office.

[4] After conducting an inquiry, I issued Order MO-2570, which required the municipality to secure the original copies of the records responsive to the appellant's request from the Harbour Commission, and to make an access decision.

[5] In response, the municipality issued an access decision and provided the appellant with a fee estimate. The municipality outlined the fee as follows:

Search time @ \$30.00/hr X 38 hrs	= \$1,140.00
Photocopying @ \$0.20 /pg X 229 pages	= \$ 45.80
Invoice for Large format Maps photocopying	= \$ <u>105.18</u>
TOTAL	\$1,290.98

[6] Upon receiving the decision letter, the appellant wrote the municipality and advised that they were willing to pay the photocopying fee, including the large map photocopying, but were requesting that the municipality waive the search time portion of the fee. In a subsequent decision to the appellant, the municipality denied the appellant's request to waive any portion of the fee.

[7] Consequently, the appellant appealed the municipality's decision not to waive the fee. In addition, the appellant is of the view that the search time was excessive and that the fee should be reduced.

[8] I sought and received representations from the municipality, which were shared with the appellant. The appellant advised this office that the appeal letter, a copy of which the municipality previously received, comprised its representations in this appeal.

[9] For the reasons that follow, I am upholding the municipality's fee, in part. In particular, I am upholding the photocopying fees for records and large maps, but I am disallowing the search fee. Having found that the search fee is not upheld, it is not necessary for me to make a finding regarding fee waiver of the search time.

ISSUE:

The sole issue for determination in this appeal is whether the fee or fee estimate ought to be upheld?

DISCUSSION:

[10] Where a fee exceeds \$25, an institution must provide the requester with a fee estimate.¹ 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.²

[11] 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.³

[12] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁴

[13] 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.

[14] 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

¹ Section 45(3) of the *Act*.

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Orders P-81 and MO-1614.

- (e) any other costs incurred in responding to a request for access to a record.

[15] More specific provisions regarding fees are found in section 6, of Regulation 823. The sections relevant to this appeal state:

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.

...

- 3. For manually searching a record, \$7.50 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.

Photocopying fee

[16] I note that the appellant indicates both in the fee waiver request and in the appeal letter to this office that the appellant is willing to pay for photocopying charges, including for the copying of large format maps. The municipality provided a fee estimate for photocopying @ \$0.20 /pg X 229 pages for a total of \$45.80 and an invoice for large format maps photocopying of \$105.18.

[17] Section 45(1)(c) includes the cost of photocopies. The municipality located 229 pages of records. Section 6.1 of Regulation 823 permits an institution to charge 20 cents per page for photocopying. Applying the photocopying fee to 229 pages of records, the appropriate photocopying fee is \$45.80, which is the fee that was charged by the municipality.

[18] In addition, section 6.6 allows for additional invoiced photocopying costs, which would include the large format map photocopying charge of \$105.18.

[19] Therefore, I find that the municipality's estimate with respect to photocopying to be reasonable and in accordance with the fee provisions in the *Act* and Regulation 823. Accordingly, I will uphold this portion of the fee.

Search fee

[20] The municipality submits that the search fee was for actual work already conducted rather than a fee estimate. Specifically, upon receipt of Order MO-2570, the municipality forwarded it to the Harbour Commission, who, in turn, provided all of its original records to the Municipal Clerk "without the benefit of any previous screening or relevancy test, or having the benefit of a [Harbour Commission] records inventory." The Municipal Clerk and three staff members⁵ reviewed six bankers' boxes of Harbour Commission records to determine if there were any records responsive to the request in Order MO-2570. The municipality then prepared a draft index of records to identify potentially responsive records. This draft index of records was then forwarded to [a third party] to determine the scope and verify the nature of some of the records as the "records were not relevant to the Municipality of Port Hope and not understood prior to the IPC Order to be under our purview, care and control."

[21] In its representations, the municipality included a Harbour Commission resolution acknowledging Order MO-2570, but re-confirming its position that it is separate and distinct from the municipality. However, in the spirit of transparency, the Harbour Commission was willing to participate with the municipality as the lead and provide the records.

[22] Further, the municipality submits that because it did not have any frame of reference or appreciation of the Harbour Commission's records relevant to the third party, the municipality was referred to the third party's head office.

[23] The municipality then prepared a box of records listed on the draft index of records and forwarded this box to the third party's head office. After a series of teleconferences between the municipality and the third party, a final index of records was prepared that was deemed responsive to the request. This index was then sent to the appellant with a decision letter.

[24] The municipality submits that the appellant then requested a fee waiver, which was denied, and that a revised decision letter was sent to the appellant, fully explaining and breaking down the associated time spent on the request, the number of staff involved, and the associated chargeable and unchargeable activities undertaken to respond to the request. The municipality also identified that these activities did not include time spent by the third party.

[25] The municipality states:

Upon receiving the Order, the [municipality] had a lengthy learning curve to identify, inventory and then subsequently review the inventory of

⁵ The municipality also notes that the three staff members have additional functions at the municipality, including answering the main switchboard and providing customer service at the front counter.

records relevant to the request for access to [Harbour Commission] records.

. . .

[T]he . . . Municipal Council believes the manner, form, approach, staff and time resources expended were significant and much of the resources expended were outside the scope of permissible fees under the *Act*.

[26] In the revised decision letter sent to the appellant,⁶ the municipality reiterated the fee as set out previously in this order and also included a table, which repeated the manual search time, photocopying of regular pages and then added a shipping cost for shipping the records to the third party. The table did not include the large format map photocopying. The letter then went on to:

- describe all of the unchargeable activities under the *Act*,
- state that the municipality is committed to the compliance with the principles of the *Act*;
- state that the municipality has been fair and equitable and expended a great deal of staff time and resources to satisfy the request and have appropriately charged fees;
- state that the chargeable fees are not the full cost to the municipality; and
- deny the request for a fee waiver.

[27] As part of its representations, the municipality provided a table, detailing activities and staff time expended. The municipality notes that the table did not include the time investment of the Director of Corporate Services and that the time expended by the three staff members includes dedicated regular hours and overtime hours.

[28] The table details a number of activities including:

- research;
- identifying potential exemptions;
- time spent photocopying;
- reviewing by the Deputy Clerk;
- reviewing potential exemptions with the third party; and
- finalizing the index of records.

⁶ The municipality included a copy of this letter in the representations.

[29] The appellant submits that the municipality did not incur any actual costs other than those associated with photocopying and the use of couriers. Any work done in connection with processing the request, the appellant submits, was conducted entirely by salaried municipal employees.

[30] In determining whether to uphold a fee estimate, my responsibility under section 45(5) is to ensure that the estimated amount is reasonable. The burden of establishing the reasonableness of the fee estimate rests with the municipality. To discharge this burden, the municipality must provide me with detailed information as to how the fee estimate has been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

[31] The municipality provided extensive representations about the non-chargeable activities involved in this request. With respect to the search itself, the municipality has indicated that three staff members searched through six bankers' boxes of records that had been forwarded to the municipality by the Harbour Commission, as a result of Order MO-2570. The municipality states that the breakdown of the search also involved the "accumulation of information, dissemination of material and qualification as appropriate under the guidelines, input and sorting of documents, review of documents and the creation of a draft Index of Records."

[32] I find that the municipality has not provided sufficient evidence for me to conclude that the search component of the fee was reasonable or that it was calculated in accordance with the *Act* and the Regulations.

[33] First, in my view, not all of the tasks listed by the municipality in support of its search fee can be considered to be a "manual search" to locate a record. Although the municipality has stated that six bankers' boxes were searched, the other activities described, such as dissemination of material, and input of documents, do not constitute a "manual search to locate a record." The search time also included the preparation of a draft index of records. Previous orders of this office have found that time spent preparing an index of records cannot be charged to a requester.⁷

[34] Second, and most crucially, the municipality indicated in the representations its unfamiliarity with the types of records that were the subject matter of Order MO-2570. An important aspect of a reasonable search is that it is conducted by staff who are familiar with, and knowledgeable about, the records. In this case, the search of the records provided to the municipality by the Harbour Commission was conducted by staff who were unfamiliar with the records.

[35] Based on the representations received from the municipality, it is reasonable to conclude that the effort required to identify responsive records is due to the position

⁷ Orders P-741 and P-1536.

taken by the Harbour Commission that, despite my conclusion in Order MO-2570, it remained separate and distinct from the municipality. According to the representations provided by the municipality, this resulted in the following:

The Harbour Commission provided original records to the municipality without the benefit of any previous screening or relevancy test;

Four municipal staff, including the Clerk, were required to review six boxes of Harbour Commission files to determine if the boxes contained responsive records;

Without the benefit of a meaningful index created by knowledgeable staff at the Harbour Commission, municipal staff prepared an initial draft Index of Records to assist in the effort to inventory potentially relevant/responsive records; and

The Index of Records was forwarded to a third party to verify relevancy due to the lack of input from the Harbour Commission and the unfamiliarity of municipal staff.

[36] While I sympathize with the dilemma faced by municipal staff in reviewing unfamiliar documents in order to identify responsive records, I cannot ignore my findings in Order MO-2570 that the Harbour Commission is deemed to be part of the municipality for the purposes of the *Act*. Given this finding, it follows that Harbour Commission staff, familiar with the record holdings, should have played a central role in the search for responsive records. However, Harbour Commission staff did not do so and placed the burden of the search on municipal staff who were admittedly unfamiliar with the records. As the municipality notes in its representations:

...the [municipality] had a lengthy learning curve to identify, inventory and then subsequently review the inventory of records relevant to the request for access to [Harbour Commission] records.

[37] The burden of the decision by Harbour Commission staff to remain uninvolved in the process of identifying responsive records, and the municipality's acquiescence with this decision, should not be placed on the appellants. Clearly, had Harbour Commission staff undertaken the search and identification of relevant records, the time, energy and resources required to respond to the appellant's request would have been greatly reduced. Given these circumstances, it would be inequitable for the municipality to now require the appellant to pay for the efforts required as a result of decisions taken by the municipal and Harbour Commission staff.

[38] For all of these reasons, I do not uphold the municipality's fee for search and will not allow the municipality to charge the appellant any fee for search time.

[39] In conclusion, I am upholding the municipality's fee, in part, as set out in the order provisions, below.

[40] As the appellant sought a fee waiver with respect to search time only and having disallowed the fee for search time, it is not necessary for me to consider whether the municipality should have granted a fee waiver.

ORDER:

1. I uphold the photocopying fee of \$45.80 for the records and the photocopying fee of \$105.18 for the large maps.
2. I do not uphold the municipality's decision regarding the fee for search time and I disallow it.

Original signed by: _____
Brian Beamish
Assistant Commissioner

February 22, 2012 _____