

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2908

Appeal MA12-267

Enwin Utilities Limited

June 28, 2013

Summary: The appellant sought access to the board meeting minutes of three companies for 2010 and 2011. Enwin located responsive records and issued a fee estimate of \$1,007.40, which it then reduced to \$765 when the appellant agreed to remove "in camera" minutes from the scope of her request. This order upholds up to \$525 of Enwin's fee for preparation of the responsive records under section 45(1)(b) and \$10 for providing the records on a CD-ROM under section 45(1)(c).

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

OVERVIEW:

[1] The appellant submitted multiple requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to Enwin Utilities Ltd. (Enwin) for access to all minutes from all board meetings held by Enwin, Enwin Energy (EWE) and Windsor Canada Utilities (WCU) in 2010 and 2011.

[2] In response to the requests, Enwin provided a fee estimate of \$1,007.40, broken down as follows:

- 6 hours of search time @ \$30.00/hour = \$180.00

- 23 hours of preparation time @ \$ 30.00/hour = \$690.00
- 687 pages to be photocopied @ \$0.20 each = \$137.40

[3] After reviewing the records responsive to the requests, Enwin advised the appellant that the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information) and 11 (economic and other interests), and the mandatory exemption in section 14(1) (personal privacy), applied to portions of the responsive records.

[4] The appellant confirmed that she was not interested in pursuing access to the portions of the minutes relating to closed meeting deliberations, and she revised her requests to exclude these portions. In response, Enwin provided a revised fee estimate of \$765.00, which excluded "in camera" minutes. Enwin provided the following revised fee break down:

- 4.5 hours of search time @ \$30.00/hour = \$135.00
- 17.5 hours of preparation time @ \$ 30.00/hour = \$525.00
- 525 pages to be photocopied @ \$0.20 each = \$105.00¹

[5] The appellant considered Enwin's fee estimate excessive and appealed it to this office.

[6] During mediation, the appellant advised that she was willing to receive the responsive records in electronic rather than paper form if this would reduce the fees.

[7] Mediation did not resolve the appeal and it was moved to adjudication for an inquiry under the *Act*.

[8] I sought and received representations from Enwin and the appellant, which were shared in accordance with *Practice Direction 7* and section 7 of this office's *Code of Procedure*.

[9] For the reasons set out below, I uphold Enwin's fee estimate, in part.

DISCUSSION:

[10] The sole issue in this appeal is whether the fee estimate should be upheld.

¹ Enwin listed 687 pages in its revised fee estimate, but subsequently advised that the correct number was 525.

[11] Where the fee required to be paid under the *Act* exceeds \$25, an institution must provide the requester with a fee estimate.² 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.³

[12] 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.⁴ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁵ In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁶

[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, in part:

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;

...

[15] More specific provisions regarding fees are found in section 6 of Regulation 823, which reads, in part:

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:

² Section 45(3).

³ Order MO-1699.

⁴ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁵ Order MO-1520-I.

⁶ Orders P-81 and MO-1614.

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.
- ...

Enwin's Representations

[16] In its representations, Enwin asserts that it has complied with all of the legislated requirements of the *Act*, and therefore, its revised fee estimate should be upheld. Enwin states that in calculating the fee, it sought the advice of its Executive Assistant to the President & Chief Executive Officer, its external legal counsel in whose office the original minute books for all three companies are located, and the corporate secretaries for each of WCU, Enwin, and EWE. Enwin explains that the corporate secretaries are legally responsible for the maintenance of the respective corporate records and are, therefore, familiar with the requested records. Enwin also asserts that it based its revised fee estimate on the actual work done by it to respond to the requests.

[17] Enwin submits that it based its calculation of the search fee under section 45(1)(a) of the *Act* on the actual time spent to locate the responsive records. It states that the search consisted of its Executive Assistant taking the following steps:

1. Searching the electronic database for each company to retrieve electronic versions of applicable minutes for each company.
2. Reviewing and cross-referencing the physical minute books to the electronic minutes to ensure all applicable minutes were obtained. This was done due to the many changes in employees recording the minutes over the years.
3. Physically searching the minute books to obtain all of the applicable appendices cross-referenced to the applicable minutes. This was necessary because the appendices to the minutes are not stored in the electronic database.
4. Cross-checking the results with Enwin's payroll department, which has a record of the dates of the board minutes for each of the three companies.

[18] Enwin states that its search was quite intensive and four and a half hours of search time is a reasonable amount to charge. Enwin adds that it did not include other administrative time spent on searching for the minutes.

[19] Regarding its preparation costs calculated under section 45(1)(b), Enwin states that portions of each of the 525 pages of records may be exempt from disclosure pursuant to the various exemptions it identified in its interim decision letter, and therefore, thorough vetting and manual severing is required.

[20] Enwin also submits that because the records are stored electronically, they will need to be reproduced electronically, resulting in further time spent on preparing the records for disclosure; notwithstanding this, Enwin states that it has not included additional time for reproducing the records stored electronically since it did not want to duplicate the time estimated for searching for the records.

[21] Enwin states that it is entitled by virtue of section 45(1)(b) and pursuant to the determinations in Orders P-4 and M-1083 to charge fees for severing the records and for reproducing the electronic records. Enwin states that in accordance with previous orders of this office that have permitted two minutes to sever a page, it calculates 1050 minutes or 17.5 hours will be required to sever the 525 pages of responsive records.

[22] Regarding computer and other costs calculated under section 45(1)(c), Enwin states that it has charged a fee of \$105 to reproduce the responsive records based on 20 cents per page, as prescribed by section 6 of Regulation 823. Enwin argues that although the appellant has agreed to receive the records on a CD-ROM which would reduce the section 45(1)(c) costs by \$95, assuming the records already exist electronically, Order MO-2595 upheld a photocopy estimate, notwithstanding the requester's position that the records could be provided electronically.

The Appellant's Representations

[23] The appellant asserts that Enwin's fee is prohibitively expensive. She argues that taxpayers are entitled to know what business is conducted at Enwin board meetings because the City of Windsor is the sole shareholder of Enwin, meaning it is effectively owned by taxpayers, and as the local electrical utility, Enwin is a fundamental part of municipal operations.

[24] The appellant criticizes Enwin for keeping its board meetings closed to the public so that neither taxpayers nor members of the media, like her, can attend. She argues that there is no law preventing the meetings from being open, and she notes that the mayor and other councillors have stated publicly that board meetings should be open. The appellant also takes issue with the fact that the board meeting minutes are not publicly available, unlike the minutes of the board meetings for Windsor's water utility, the Windsor Utilities Commission, which publishes its minutes on its web site.

[25] The appellant states that in light of her revised request which excludes minutes from the "in camera" sessions, the responsive records that remain should not require severing. She notes that the largest part of the fee is the preparation fee for the severing of records at \$525. She notes that in April and May of 2009, Enwin released to her newspaper, hundreds of pages of minutes of meetings and documents relating to meetings held between 2002 and 2012, and after initially severing most of the material, Enwin disclosed most of it, thus proving that there was no need for most of the initial severing.

[26] The appellant argues that because Enwin's minutes are stored electronically, they should be available at the click of a mouse. She also points out that she has requested records from recent meetings and these should be readily available, obviating the need for a \$135 search charge. Finally, the appellant reiterates that she is willing to receive the records electronically.

Analysis and Findings

[27] Enwin confirms in its representations that the responsive records are maintained electronically in a searchable database from which its Executive Assistant retrieved the electronic minutes for each company for the two years in question. The additional actions Enwin states were taken to search for the records include cross-referencing the electronic minutes to the physical minute book kept by its external legal counsel to ensure that all minutes were obtained; physically locating any appendices which are not stored electronically; and cross-checking the results with its payroll department to confirm the dates of the board minutes. Enwin states that these steps took four and a half hours to complete.

[28] Enwin does not provide me with details on the actual amount of time involved in each step. Enwin only states that it spent half an hour each searching for EWE's 2010 and 2011 board meeting minutes and located 11 pages for each year for a total of 22 pages; it spent half an hour searching for its 25 pages of minutes from 2010, and one hour searching for its 137 pages of minutes from 2011; and it spent one hour searching for the 167 pages of minutes from WCU's 2010 meetings, and another hour searching for 174 pages of minutes from WCU's 2011 meetings.

[29] Although Enwin states that its search fee is based on actual time spent searching for the records, Enwin's representations do not adequately explain why four and a half hours were required to find two recent years' worth of board meeting minutes that are maintained electronically by the three companies' corporate secretaries. For example, Enwin has not identified the number of meetings held by each company each year, nor has it indicated how many meeting minutes contained appendices that had to be located physically from the original copies of the minutes kept with its external legal counsel. This latter information, about an activity that could be appropriately charged under section 45(1)(a), would have helped Enwin establish the extent and cost of its

manual search. Also, I am not convinced that the cross-referencing and cross-checking activities described by Enwin are appropriately charged under section 45(1)(a) or that the cost of these activities should be borne by the appellant.

[30] Furthermore, Enwin confirms in its representations that the companies' corporate secretaries are legally responsible for maintaining the responsive records, which I note are essential to the companies' operations. Recognizing that these important records are likely stored in an orderly and easily searchable manner in an electronic database, I do not accept that four and a half hours is a reasonable amount of search time. I agree with the appellant that the minutes are instantly available electronically. Based on the fact that the responsive records are electronically maintained and instantly retrievable, and considering Enwin's representations do not provide necessary details about how many appendices had to be located manually, I do not uphold any portion of the search fee in this appeal.

[31] As for preparation time calculated under section 45(1)(b), I accept Enwin's submission that two minutes may be charged for each page that requires multiple severances, which reflects the generally accepted approach established by previous orders of this office.⁷ I will therefore uphold two minutes of preparation time for each page that requires multiple severances to a maximum of \$525. I will also direct Enwin to reduce this portion of the fee to reflect the number of pages that require no severances, for which no preparation time may be charged, and the number of pages that require a single severance, for which I will only allow one minute of preparation time to be charged.

[32] With respect to the photocopying fee which Enwin calculates as being \$105, I find that it is unreasonable for the following reasons. The appellant has requested that the records be provided to her electronically. Rather than directly provide representations on its ability or inability to produce the responsive records electronically, Enwin relies on Order MO-2595 to assert that notwithstanding the appellant's request that the records be provided electronically at a significantly lower cost, the photocopying fee should be upheld. I do not accept Enwin's submission.

[33] Order MO-2595 involved a request for an individual's emails for a ten month period and can be distinguished on this basis. The reproduction of emails is very different from the reproduction of meeting minutes, which are recorded and maintained in word processing software and can be electronically reproduced with ease. The different considerations inherent in the electronic manipulation of emails make the finding in Order MO-2595 inapplicable in this appeal.

[34] In this appeal, I conclude that Enwin can easily provide the records in electronic format in one of two ways. Enwin can sever copies of the paper records, as it states it

⁷ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

will do, and then scan the severed paper records into its system and save them on a CD-ROM. Alternatively, Enwin can sever the electronic records electronically on its own system, and then save the severed electronic records on a CD-ROM. These methods assume that Enwin has a scanner in its office, and that its word processing software allows it to delete portions of existing documents; two safe assumptions to make. Regardless of the method, I find that it is not reasonable to require the appellant to pay \$105 for photocopies of the records when Enwin is capable of providing the records on a CD-ROM at a cost of \$10.

ORDER:

1. I do not uphold any search time under section 45(1)(a).
2. Under section 45(1)(b), I uphold two minutes of preparation time for each page that requires multiple severances, and one minute of preparation time for each page that requires only a single severance, up to a maximum of 17.5 hours or a total cost of not more than \$525. I order that Enwin reduce the maximum amount of \$525 to reflect the number of the 525 pages that require no severances.
3. I uphold only \$10 under section 45(1)(c) for Enwin to provide the responsive records on a CD-ROM.

Original signed by: _____
Stella Ball
Adjudicator

_____ June 28, 2013