

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2913

Appeal MA12-228-2

The Corporation of the Town of Kingsville

July 12, 2013

Summary: The appellant sought records related to the town's sewer separation project. The town issued a decision granting access to responsive records upon payment of a fee. The appellant appealed the fee and also claimed that additional responsive records exist. This order partly upholds the town's fee and finds that the town's search for responsive records was reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17(1) and 45(1).

Orders and Investigation Reports Considered: Orders M-1083, MO-1854, MO-2471, MO-2474, P-1536 and PO-1943.

OVERVIEW:

[1] The Town of Kingsville (the town) received a seven-part request for records under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) relating to a sewer separation project undertaken by the town in 2010.

[2] The town issued an interim access and fee estimate decision in the amount of \$544.00, representing 14 hours of search time at \$30.00 per hour, \$37.20 for photocopying costs at \$0.20 per page, and \$195.26 for the project manager's charges.

The town also advised that there were no records responding to points 5 and 6 of the request.

[3] The requester, now the appellant, appealed the town's decision.

[4] During mediation, the town reduced the photocopying costs to reflect one copy rather than two, and also agreed that it would remove an additional \$150.00 from the fee amount, leaving \$370.00 payable after the payment by the appellant of \$150.00 as a deposit.

[5] As mediation did not resolve this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the town, seeking its representations. The town provided representations. I then sent a copy of these representations, along with a Notice of Inquiry, to the appellant. The appellant did not provide representations in response.

[6] In this order, I partly uphold the town's fee. I also find that the town's search for records was reasonable.

ISSUES:

- A. Should the fee be upheld?
- B. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Should the fee be upheld?

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

[8] 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

¹ Section 45(3).

² Order MO-1699.

[9] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.³

[10] In this appeal, the town provided the appellant with a fee estimate. The deposit was paid and the town performed the work to respond to the request.⁴ Therefore, at issue in this appeal is the actual fee charged by the town.

[11] 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.

[12] 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.

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

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 Orders P-81 and MO-1614.

⁴ Sections 7 and 9 of Regulation 823.

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.

[14] In its decision, the town provided a breakdown of its fee as follows:

15.4 hours of search and preparation time @ 30.00 per hour	\$462.00
186 pages photocopied @ \$0.20 per page	37.20
Invoice from project manager	<u>195.26</u>
Total	\$694.46

[15] During the mediation stage of the appeal, the town agreed to reduce the search and preparation time spent by \$150.00, being the equivalent of five hours. Therefore, the total time spent was reduced to \$312.00.

[16] Also during mediation, the town agreed to reduce the photocopy costs by half, for a total of \$18.60, as the town had initially charged the appellant for the copies of the records it made for itself.

[17] Therefore, at issue in this appeal is the following fee:

10.4 hours of search and preparation time @ 30.00 per hour	\$312.00
93 pages photocopied @ \$0.20 per page	18.60
Invoice from project manager	<u>95.26</u>
Total	\$525.86

reduced to \$520.00 by the town during mediation

[18] The town provided details as to how it reached its fee in the following table:

Date	Details of work performed	Time spent	Relevant section and reason for application
April 23/2012	Email by Freedom of Information Co-ordinator (FOIC) to a councillor and the Deputy Mayor; email by FOIC to Manager of Municipal Services re: request for documents	0.2	45(1)(a) - Councillor and Deputy Mayor were asked to provide any documents in connection with item #5 of the original request. Manager of Municipal Services was asked for the sewer separation project file.
May 1/2012	FOIC reviewed sewer separation document binders 1 and 2	3.0	45(1)(a) - Each page of 2 binders was reviewed in order to determine if the particular document was responsive to any one of the itemized requests.
May 1/2012	FOIC reviewed email and sewer separation file (hardcopy); FOIC had a discussion with Director of Municipal Services re: email documents	0.5	45(1)(a) - FOIC had a separate file related to the sewer separation project due to the preparation of the local improvement by-law and also received certain complaints related to the work and/or the charges which would be responsive to item #7 of the request. The discussion with Director of Municipal Services related to his search of his own email for any records relevant to the request.
May 1/2012	FOIC reviewed Cityworks for complaints related to sewer separation project by street name [4 street names]	2.7	45(1)(a) - Cityworks is customer care that generates work orders based on complaints or requests for service received. In connection with request item #7, Cityworks was searched using the names of each street that was subject to the sewer separation project during the relevant time period.

May 1/2012	Director of Municipal Services searched emails	0.5	45(1)(a) - In the event that Director of Municipal Services received a complaint directly by email or had other documents which may have been responsive to the request, Director of Municipal Services searched his email records.
May 9/2012	FOIC continued to review Cityworks for complaints [1 street name]; email to Director of Municipal Services re: follow up	1.5	45(1)(a) - Cityworks is customer care software that generates work orders based on complaints or requests for service received. In connection with request item #7, Cityworks was searched using the names of each street that was subject to the sewer separation project during the relevant time period.
May 10/2012	FOIC organized documents received to date, commence review for exemptions	2.5 (reduced in supplementary decision)	45(1)(b) - Although not particularly described the review would have included the severing of the information as well
May 17/2012	FOIC emailed project manager requesting relevant documents; letter to requester	0.3	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager. The project manager was asked to provide any responsive documents.
May 28/2012	FOIC reviewed email from requester	0.1	
June 5/2012	FOIC left message for project manager re project manager's position on release of documents	0.1	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager, the project manager was asked to provide any responsive documents.

June 6/2012	FOIC left message for project manager re project manager's position on release of documents	0.1	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager, the project manager was asked to provide any responsive documents.
June 12/2012	FOIC emailed project manager; FOIC commenced preparation of decision	0.9	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager. The project manager was asked to provide any responsive documents.
June 14/2012	FOIC continued decision and review of documents for exemptions: final review and copy documents	3.0 (reduced in supplementary decision)	45(1)(b) - Although not particularly described the review would include the severing of the information as well.
	TOTAL	15.4 hours Reduced to 10.4 hours in supplementary decision	

[19] The town states that this reduction of time from 15.4 hours to 10.4 hours takes into consideration that some time spent on May 10, 2012 and June 14, 2012 would have been for the purpose of identifying records to be severed, assembling information and photocopying.

[20] The town also received an invoice from the project manager representing one hour of time which he required to search for documents responsive to the request, for which he charged the town a fee of \$195.26 under section 45(1)(c).

[21] During the mediation process the town agreed to a total fee of \$520.00.

Analysis/Findings

[22] In reviewing the town's fee, my responsibility under 45(5) of the *Act* is to ensure that the amount of fee is reasonable in the circumstances. The burden of establishing the reasonableness of the fee lies with the town. In order to discharge this burden, the town must provide me with a detailed explanation of how the fee has been calculated,

and how each individual component of the overall fee fits within the scope of the *Act* and regulations.⁵

[23] I will now consider each subsection of section 45(1).

Search – Section 45(1)(a)

Other costs –Section 45(1)(e)

[24] Section 45(1)(a) allows the town to recover fees for the cost of every hour of manual search required to locate a record.

[25] Concerning section 45(1)(a), in the Notice of Inquiry, the town was asked to explain in its representations how the requested records were kept and maintained. It was also asked to explain what actions were necessary to locate the records and, in this case, the actual amount of time involved in each action.

[26] I have carefully reviewed the town’s representations. I note that certain items that were charged by the town as part of its fee do not constitute part of a manual search under section 45(1)(a). In particular, the town has charged the appellant 4.2 hours of search time at \$30.00 per hour for searching a computer software program, Cityworks, as set out below:

Date	Details of work performed	Time spent	Relevant section and reason for application
May 1/2012	FOIC reviewed Cityworks for complaints related to sewer separation project by street name [4 street names]	2.7	45(1)(a) - Cityworks is customer care software that generates work orders based on complaints or requests for service received. In connection with request item #7, Cityworks was searched using the names of each street that was subject to the sewer separation project during the relevant time period.

⁵ Order P-1536.

May 9/2012	FOIC continued to review Cityworks for complaints [1 street name already searched above]; email to Director of Municipal Services re: follow up	1.5	45(1)(a) - Cityworks is customer care software that generates work orders based on complaints or requests for service received. In connection with request item #7, Cityworks was searched using the names of each street that was subject to the sewer separation project during the relevant time period.
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[27] The town searched Cityworks for four street names in total. The town initially searched these four street names on May 1, 2012 and states that it took 2.7 hours to search the software for responsive records. It then spent another 1.5 hours on May 9, 2012 to search one of the street names again, for a total of 4.2 hours.

[28] The town has charged 4.2 hours for searching Cityworks,⁶ relying on section 45(1)(a). Section 45(1)(a) allows the town to charge for time spent for manually searching for records. Section 45(1)(b), not section 45(1)(a), includes time for a person running reports from a computer system.⁷ The town has not claimed that section 45(1)(b) applies to these 4.2 hours of search time.

[29] The town has not indicated in its representations how searching software comprises a manual search. In Order M-1083, Inquiry Officer Holly Big Canoe stated that:

The search charges described in the *Act* are available with respect to manual search activities required to locate a record. The appellant submits, and the responses he has received from other institutions imply, that the amount of time required to locate the record responsive to his request is minimal, as the information is readily available in electronic format within the Board's computer systems. The use of the phrase "run reports from Personnel system" and the suggestion that Information Technology staff may assist in processing the request lead me to conclude that the Board does maintain the responsive information in some kind of electronic format. Additionally, the referenced capability of the Board's Personnel system to "run reports" is commonly understood as an ability to select fields of data, such as date of birth and date of hire, from a larger database of information to generate a record. This type of electronic search is not manual and does not, in my view, fall within section 6 [item

⁶ Other than an unspecified amount of time to send one follow up email to the project manager.

⁷ Order M-1083.

3] of the Regulation.⁸ Accordingly, I find that the Board is not entitled to charge the appellant a search fee for the time spent on this activity under section 45(1)(a)...

In the circumstances of this appeal, time spent by a person running reports from the personnel system would fall within the meaning of "preparing the record for disclosure" under section 45(1)(b) and, therefore, the rate of \$7.50 per 15 minutes established under section 6 [item 4] of the Regulation⁹ may be charged. It should be noted, however, that the Board can only charge for the amount of time spent by any person on activities required to generate the reports. The Board cannot charge for the time spent by the computer to compile the data, print the information or for the use of material and/or equipment involved in the process of generating the record...

In my view, "preparing the record for disclosure" under subsection 45(1)(b) should be read narrowly (Order 4). It is not appropriate, in my view, to include time spent to "assemble information, proof data" within what is chargeable under section 45(1)(b)...

In summary, then, I find that the Board is entitled to charge for the costs of preparing the record for disclosure, at the rate of \$7.50 for each 15 minutes spent by any person on activities required to generate the reports. The Board is not entitled to include in this estimate the time spent by the computer to compile the data or print the information or for the use of material and/or equipment involved in this process. As the Board previously estimated that it would be able to "search and locate records, run reports and identify appropriate staff" in one hour, it follows that to run reports, the only activity for which a charge is allowable, an estimate of less than one hour would be reasonable.

[30] In Order MO-1854, Adjudicator Frank DeVries relied on Order M-1083 and determined that the time it takes for the computer to "compile the data" is not chargeable time.

[31] The town describes Cityworks as a computer software program. Although it has claimed section 45(1)(a), the town has not indicated in its representations how a manual search could be performed on the Cityworks software or what specific actions were performed that took 4.2 hours to do. As stated in Order M-1083, an electronic search is not a manual search.

⁸ Section 6, item 3, of Regulation 823.

⁹ Section 6, item 4, of Regulation 823.

[32] The town also has not provided any information as to how much of the 4.2 hours of time was allocated to running a computer report.

[33] Furthermore, the town has not provided information as to how much time from the total time claimed of 2.7 hours to search Cityworks was non-chargeable time¹⁰ spent by the computer to compile the data or print the information or for the use of material and/or equipment involved in this process. As Cityworks is a computer software program, I find that I do not have sufficient evidence to determine whether the time spent to search the Cityworks software was time spent conducting a manual search under section 45(1)(a). However, I will allow two hours of time to run the computer report on Cityworks as a reasonable amount of time recoverable under section 45(1)(b). Therefore, I will disallow the remaining 0.7 hours of the 2.7 hours of time.

[34] The town also has not provided information as to why it needed to search the software for 1.5 hours again on May 9, 2012 for one street name that it had already searched on May 1, 2012. I find that the additional 1.5 hours on May 9, 2012 to search one street name, that was already searched on May 1, 2012, is not reasonable and I will disallow the time of 1.5 hours, in its entirety.

[35] I find that the 1.5 hours charged by the FOIC for the time spent sending an email to follow up with an employee of the town, is not allowed under the *Act*. In the representations prepared by the FOIC, she states that on May 9, 2012 she asked the town's Director of Municipal Services to provide responsive photographic and soil sample records. This follow-up email from the FOIC to a staff member is not time spent manually searching for responsive records. Nor can this email be considered allowable time under any of the other charges in section 45(1).

[36] In particular, section 45(1)(a), which has been applied in this case, only permits an institution to charge for every hour of manual search required to locate a record. The FOIC in this appeal was the individual responsible for co-ordinating the search for records responsive to the appellant's request. In sending a follow-up email, she was not directly involved in conducting a manual search for responsive records. In Order PO-1943, Adjudicator Laurel Cropley determined that a FOIC in such a situation was performing an administrative function. As such, the work she undertook could not be reasonably characterized as encompassing part of the manual search required to locate responsive records.

¹⁰ Order M-1083.

[37] In Order PO-1943, Adjudicator Cropley stated that:

In reviewing section 57(1)¹¹ and Regulation 460¹² as a whole, I find that the administrative functions performed by the Policy Advisor [the individual responsible for co-ordinating the search] are not allowable costs under the legislative scheme as set out in the *Act* and Regulation as they currently stand.

[38] Section 45(1)(e) allows an institution to recover any other costs incurred in responding to a request for access to a record. This section is intended to cover general administrative costs resulting from a request which are similar in nature to those listed in paragraphs (a) through (d), but not specifically mentioned.¹³

[39] Section 45(1)(e) does not include

- time for responding to the requester¹⁴
- time for responding to this office during the course of an appeal¹⁵
- legal costs associated with the request¹⁶
- comparing records in a request with those in another request for consistency¹⁷
- GST¹⁸
- costs, even if invoiced, that would not have been incurred had the request been processed by the institution's staff¹⁹
- coordinating a search for records²⁰

[40] The town has not claimed section 45(1)(e) for this or any other email or item charged to the appellant. I find that I have not been provided with sufficient evidence

¹¹ Section 57(1) of the *Freedom of Information and Protection of Privacy Act*, (the provincial *Act*), the equivalent to section 45(1) of *MFIPPA*.

¹² The provincial equivalent to Regulation 823.

¹³ Order MO-1380.

¹⁴ Order MO-1380.

¹⁵ Order MO-1380.

¹⁶ Order MO-1380.

¹⁷ Order MO-1532.

¹⁸ Order MO-2274.

¹⁹ Order P-1536.

²⁰ Order PO-1943.

to find that the town incurred chargeable administrative costs when it sent a follow-up email to one of its staff members.²¹

[41] Similarly, I find that the following emails and phone calls which are listed in the table provided by the town, as well as the time spent to prepare the decision letter, are administrative functions, not time spent manually searching for records; nor do they qualify as general administrative costs under section 45(1)(e).

[42] In Order MO-2474, Adjudicator Jennifer James determined that costs charged by an institution to consult its internal staff and to coordinate staff to prepare the records did not qualify as costs under section 45(1)(e) of the *Act*.

[43] Relying on Orders PO-1943 and MO-2474, I find that the following amounts are not chargeable under sections 45(1)(a) or 45(1)(e) of the *Act* and I will disallow them:

Date	Details of work performed	Time spent	Relevant section and reason for application
April 23/2012	Email by FOIC to a councillor and the Deputy Mayor; email by FOIC to Manager of Municipal Services re: request for documents	0.2	45(1)(a) - Councillor and Deputy Mayor were asked to provide any documents in connection with item #5 of the original request. Manager of Municipal Services was asked for the sewer separation project file.
May 17/2012	FOIC emailed project manager requesting relevant documents; letter to requester	0.3	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager. The project manager was asked to provide any responsive documents.
May 28/2012	FOIC reviewed email from requester	0.1	
June 5/2012	FOIC left message for project manager re project manager's position on release of documents	0.1	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager, the project manager was asked to provide any responsive documents.

²¹ Order MO-2474.

June 6/2012	FOIC left message for project manager re project manager's position on release of documents	0.1	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager, the project manager was asked to provide any responsive documents.
June 12/2012	FOIC emailed project manager; FOIC commenced preparation of decision	0.9	45(1)(a) - Upon review of the town's records, it became apparent that some records that may be responsive to the request may be retained by the project manager. The project manager was asked to provide any responsive documents.

[44] I have found above that the town can charge the appellant two hours of preparation time at \$30.00 per hour for the items that it has claimed above, for a total of \$60.00. In addition, I find that the following items qualify as proper search time under section 45(1)(a):

Date	Details of work performed	Time spent	Relevant section and reason for application
May 1/2012	FOIC reviewed sewer separation document binders 1 and 2	3.0	45(1)(a) — Each page of 2 binders was reviewed in order to determine if the particular document was responsive to any one of the itemized requests.
May 1/2012	FOIC reviewed email and sewer separation file (hardcopy); FOIC had a discussion with Director of Municipal Services re: email documents	0.5	45(1)(a) - FOIC had a separate file related to the sewer separation project due to the preparation of the local improvement by-law and also received certain complaints related to the work and/or the charges which would be responsive to item #7 of the request. The discussion with Director of Municipal Services related to his search of his own email for any records relevant to the request.

May 1/2012	Director of Municipal Services searched emails	0.5	45(1)(a) - In the event that Director of Municipal Services received a complaint directly by email or had other documents which may have been responsive to the request, Director of Municipal Services searched his email records.
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[45] I will allow this claimed time of 4 hours of search time under section 45(1)(a) in addition to the two hours of preparation time under section 45(1)(b) allowed above, for a total of six hours of search and preparation time at \$30.00 per hour, or \$180.00.

Preparation for disclosure - Section 45(1)(b)

[46] The town has charged fees under section 45(1)(b) of the *Act*, as follows:

Date	Details of work performed	Time spent	Relevant section and reason for application
May 10/2012	FOIC organized documents received to date, commence review for exemptions	2.5 (reduced in supplementary decision)	45(1)(b) - Although not particularly described the review would have included the severing of the information as well
June 14/2012	FOIC continued decision and review of documents for exemptions: final review and copy documents	3.0 (reduced in supplementary decision)	45(1)(b) - Although not particularly described the review would include the severing of the information as well.

[47] Section 45(1)(b) allows fees to be charged for the costs of preparing records for disclosure and includes time for

- severing a record²²
- a person running reports from a computer system²³

[48] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.²⁴

²² Order P-4.

²³ Order M-1083.

²⁴ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[49] Section 45(1)(b) does not include time for

- deciding whether or not to claim an exemption²⁵
- identifying records requiring severing²⁶
- identifying and preparing records requiring third party notice²⁷
- removing paper clips, tape and staples and packaging records for shipment²⁸
- transporting records to the mailroom or arranging for courier service²⁹
- assembling information and proofing data³⁰
- photocopying³¹
- preparing an index of records or a decision letter³²
- re-filing and re-storing records to their original state after they have been reviewed and copied.³³

[50] The decision letter in this appeal indicates on payment of the fee, the entire 93 pages of records will be disclosed. There is no mention of any severances or exemptions claimed to apply to the records. Accordingly, I find that the town cannot charge preparation time for severing the records. I allowed the town two hours in my discussion above for the time spent running a computer report. I find that the May 10 and June 14, 2012 fees charged above by the town for organizing documents, reviewing documents for exemptions, preparing the decision letter and copying documents are not proper fees under section 45(1)(b) and I will disallow these fees.

²⁵ Orders P-4, M-376 and P-1536.

²⁶ Order MO-1380.

²⁷ Order MO-1380.

²⁸ Order PO-2574.

²⁹ Order P-4.

³⁰ Order M-1083.

³¹ Orders P-184 and P-890.

³² Orders P-741, P-1536.

³³ Order PO-2574.

Computer and other costs incurred in locating, retrieving, processing and copying a record – Section 45(1)(c)

[51] Section 45(1)(c) includes the cost of

- photocopies
- computer printouts and/or CD-ROMs
- developing a computer program

[52] Section 45(1)(c) does not include the cost of

- a computer to compile and print information³⁴

[53] The town has charged \$0.20 per photocopy, which is the proper amount to be charged under item 1 of section 6 of Regulation 823. There are no responsive computer printouts or CD-ROMs in this appeal. Nor was the town required to develop a computer program to locate the responsive records.

[54] The town received an invoice dated June 13, 2012 from the project manager, which according to the FOIC, represents one hour of time for the project manager to search for documents responsive to the request. The town was charged \$195.26 by the project manager and claimed that amount under section 45(1)(c). The town provided me with a copy of this invoice, which reads:

For: 2010 Sewer Separation – MFIPPA Request

Total Fee	172.80
Percent Complete	100.00
Total Fee Earned to Date	172.80
Previously Billed	<u>0.00</u>
Current Fee Billable	172.80
HST 13%	<u>22.46</u>
Amount Due this Invoice	<u>\$195.26</u>

[55] Item 6 of section 6 of Regulation 823 allows an institution to recover 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.

³⁴ Order M-1083.

[56] In Order MO-2471, it was determined that invoiced costs must describe in detail the work that was done before it can be recovered from a requester under the Act.³⁵ In this appeal, the invoice provides no details of the work performed by the project manager to locate responsive records. However, the town has indicated that this invoice represents one hour of search time by the project manager to locate responsive records. Order P-1536 determines that costs, even if invoiced, that would not have been incurred had the request been processed by the institution's staff, cannot be recovered.

[57] Accordingly, I find that only the amount of \$30.00 can be recovered by the town for one hour of search time. This is the amount that the town would have been able to charge under section 45(1)(a) that would have been incurred had the request been processed by the institution's staff. Accordingly, I will allow the town to recover the amount of \$30.00 for the invoiced cost of the project manager to search for responsive records.

[58] Furthermore, the town cannot recover HST on this search amount. 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. HST is not a fee authorized by the *Act* and Regulation 823.³⁶ I will disallow the HST charge to the appellant.

Shipping costs - Section 45(1)(d)

[59] Previous orders have determined that section 45(1)(d) does not include the cost of correspondence to notify affected parties or discharge other general responsibilities under the *Act*.³⁷ The town did not charge the appellant shipping costs. Nor can it be determined that any of the town's charges fall within section 45(1)(d).

Conclusion

[60] In conclusion, I find that the town can charge the appellant 6 hours of search and preparation time at \$30.00 per hour, invoiced cost of \$30.00, plus photocopy charges at \$0.20 per page for 93 pages, as follows:

6 hours at \$30.00 per hour	180.00
Invoiced cost	30.00
Photocopies of 93 pages	<u>18.60</u>
Total	\$228.60

³⁵ See also Orders MO-2776 and PO-3132.

³⁶ Orders M-706, M-679, M-236, MO-2274 and MO-2687.

³⁷ Order MO-2274.

[61] As the appellant has paid the town \$150.00 as a deposit towards the fees, the amount remaining to be paid by the appellant is \$78.60.

B. Did the institution conduct a reasonable search for records?

[62] 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 17.³⁸ 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.

[63] 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.³⁹ To be responsive, a record must be "reasonably related" to the request.⁴⁰

[64] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴¹

[65] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴²

[66] 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.⁴³

[67] The institution was asked to provide a written summary of all steps taken in response to the request. In particular, it was asked:

1. Did the institution 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 institution did not contact the requester to clarify the request, did it:

³⁸ Orders P-85, P-221 and PO-1954-I.

³⁹ Orders P-624 and PO-2559.

⁴⁰ Order PO-2554.

⁴¹ Orders M-909, PO-2469 and PO-2592.

⁴² Order MO-2185.

⁴³ Order MO-2246.

- (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution 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 institution inform the requester of this decision? Did the institution 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.

[68] With respect to the search it performed for responsive records, in addition to the information provided above, the town advised that:

- On May 1, 2012, the named Councillor advised via telephone that he had no notes.
- On May 3, 2012, the Deputy Mayor advised via email that she gave the notes she made the day in question to the Councillor who accompanied her, as he was noting the size of the trees. The Deputy Mayor advised that she retained no data, or paperwork.
- On May 1, 2012, an email was sent by the FOIC to the Director of Municipal Services who had the ultimate oversight of the 2010 sewer separation project. He was asked the following:
 - to review his email and provide any email that relates to original request item numbers 1, 4 and 7 and to provide any other document that he may have related to items 1, 4 and 7 that is not contained within the project binders
 - for the photos referred to in original item number 2.

- to request that the Manager of Municipal Services and the current Manager of Public Works, review their email and provide any email that relates to item numbers 1, 4 and 7.
 - to provide any other document that his department may have related to items 1, 4 and 7 that was not contained within the project binders
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- On May 9 2012, a further email was sent to the Director of Municipal Services requesting that he provide the photos of Grace Street as the appellant indicated that the Director of Municipal Services had the same. As the appellant had also indicated that soil samples were conducted, the Director of Municipal Services was asked to provide related documentation.
 - On May 9, 2012, the Director of Municipal Services responded that there were no photos on file. The Director of Municipal Services indicated that there were no results specific to 2010 sewer separation project on file locally.
 - On May 11 2012, the Director of Municipal Services advised that all records related to the 2010 sewer separation project were compiled within the construction binder and that he did not locate any additional information in any email search
 - On June 13, 2012, two photos and two documents which had not been revealed within the town's records were provided by the project manager. The documents included the field book notes of a town inspector regarding his conversation with a resident regarding topsoil settlements and the field book notes of the project manager regarding the review of restoration of a named street.
 - On September 11, 2012, a further email was sent to the project manager in follow up to the appellant's assertion that that soil samples were conducted of the dirt used prior to the grass seeding. As a result, further particulars were provided relating specifically to the appellant's letter of appeal.
 - On January 8, 2013, the Councillor was asked for the third time whether he had located the subject notes. He indicated that the notes were gone and had been left behind to be discarded when he moved many months ago. He did, however, invite the appellant to contact him directly to discuss the issue.

Analysis/Findings

[69] Based on my review of the town's very detailed representations and in the absence of representations from the appellant, I find that the town has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.

[70] The town's searches were conducted by experienced employees knowledgeable in the subject matter who expended a reasonable effort to locate responsive records.

[71] Accordingly, I find that the town has conducted a reasonable search for responsive records and dismiss this aspect of the appeal.

ORDER:

1. I uphold the town's fee in the reduced amount of \$228.60.
2. I uphold the town's search for records and dismiss this aspect of the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ July 12, 2013