Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3017

Appeal MA13-238

Town of Halton Hills

February 26, 2014

Summary: The town received a request for a list of sites that had been before its Site Alteration Committee, including the application or exemption, the outcomes and/or decisions, the conditions imposed, and any charges and convictions laid. The town issued a decision granting access to the responsive record upon payment of a fee, and the appellant appealed the fee. This order upholds the town's fee for searching for records, and also upholds the town's fee to prepare the responsive list.

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

Orders and Investigation Reports Considered: Orders 99, M-203, PO-1834 and PO-3190.

OVERVIEW:

[1] The Town of Halton Hills (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> … a list of all Halton Hills sites that have been before the Site Alteration Committee as a:
>
> 1. Site alteration application or exemption,

2. The outcomes/decisions of the applications and/or exemptions by the Site Alteration Committee,
3. The conditions imposed by the outcomes/decisions of the Site Alteration Committee,
4. Charges and convictions laid since site alteration control was enacted in 2001.

[2] The town issued a fee estimate to the requester advising that it had calculated the fee to be $270 plus photocopying. The town requested that a deposit of 50% ($135) be paid in order to continue processing the request. The town also extended the time to respond to the request by an additional 30 days.

[3] Following receipt of the deposit, the town issued a decision advising that the fee to process the request is as follows:

Manually searching a record (time: 8.5 hours)	$255.00
Preparing a record for disclosure (time: 1.5 hours)	45.00
Photocopying Charges (51 copies @ 20¢ each)	10.20
Total:	$310.20

[4] The town advised that it would provide access to the records after the balance of the fee was paid. The appellant paid the balance of the fee, and the town disclosed the records, in full, to him.

[5] The appellant then filed an appeal of the town's decision.

[6] During mediation, the appellant indicated his belief that the fee was excessive, and that further records responsive to his request should exist. Also during mediation, the town provided additional information on how it had calculated the fee, and confirmed its fee of $310.20. The town also provided information regarding the search it had conducted, and confirmed its position that no further responsive records exist.

[7] The appellant advised that he was no longer taking issue with the nature of the search conducted by the town. He maintained, however, that the fee is excessive. Accordingly, the sole issue remaining in this appeal is whether the fee charged by the town should be upheld.

[8] Mediation did not resolve this matter, and it was transferred to the inquiry stage of the appeal process. I sent a Notice of Inquiry to the town, initially. The town provided representations, along with three affidavits, in response.

[9] I then sent the Notice of Inquiry, along with a copy of the representations of the town and the non-confidential portions of the three affidavits, to the appellant, who also provided representations to me.

[10] In this order, I find that the fee was properly calculated and is in compliance with the requirements of section 45(1). As a result, I uphold the fee.

DISCUSSION:

Should the fee be upheld?

[11] As noted above, the town has indicated that the fee is $310.20. The appellant takes issue with the amount of the fee.

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

[13] 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]

[14] 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]

[15] 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, the sole issue in this appeal is whether the actual fee charged by the town was in accordance with the fee provisions in the *Act*.

[16] 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;

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[1] Section 45(3).
[2] Order MO-1699.
[3] Orders P-81 and MO-1614.
[4] Sections 7 and 9 of Regulation 823.

(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.

[17] 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. 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.

[18] The town has divided its fee calculation into the time to search for the record, the time to prepare the record for disclosure, and photocopy costs. There is no dispute regarding the photocopy costs. With respect to the search and preparation fees, I will review each of these components in turn.

Search time

The town's representations

[19] The town provides representations in support of its fee amount.

[20] With respect to the manual search time of 8.5 hours (at $30/hour), the town states that the searches were conducted by three separate town staff members. It provides affidavits sworn by each of these three staff members regarding the time taken to search for the records.

[21] One of the affidavits, sworn by the Development Engineering Coordinator for the Infrastructure Services Department of the town (the development coordinator), reviews the steps necessary to conduct a search for responsive records. In this affidavit, the development coordinator begins by reviewing his qualifications and experience in dealing with records of the type requested. He confirms that, as a result of his experience, he has become very familiar with the records maintained by the Site Alteration Committee (which is the subject of the request), as well as this committee's procedures.

[22] The development coordinator's sworn affidavit then states that, with respect to the request for a list of the information identified in the request:

> No such list exists. In order to supply the requester with the information requested, it would be necessary to:
>
> > a) Conduct an electronic search of municipal records to determine the identification numbers and locations of storage containers containing potentially relevant Committee materials;
> >
> > b) Retrieve the identified storage containers from their off-site storage location;
> >
> > c) Review each Committee file to locate all originals and copies of Committee Agendas, Minutes from the meetings, Applications and Permits ("Records");
> >
> > d) Review Committee Records for information responsive to [the request], including the following:
> >
> > > i. the nature of the Application/Exemption;
> > > ii. the outcomes of the Application [and/or] Exemption;

> iii. the conditions imposed by the outcomes/decisions of the Committee; and
>
> iv. charges and convictions laid since site alteration control was enacted in 2001.
>
> e) compile a record (i.e. "list") setting out the information extracted from the Records responding to the request submitted by [the appellant].

[23] The development coordinator then confirms that steps (a) and (b) (above) were undertaken by two other staff members, and that each of these individuals spent 15 minutes on these tasks. The development coordinator then states that he completed steps (c) and (d), and provides the following sworn evidence regarding the time it took to complete these steps:

> My total time spent in completing these steps was approximately twelve (12) hours, apportioned as follows:
>
> - 5 hours were spent searching for all originals and copies of records;
> - 4 hours were spent searching the Agendas and Minutes for information responsive to [the request]; and
> - 3 hours were spent searching the individual Permit files for information responsive to [the request].

[24] The development coordinator then explains that, although his total time spent in completing the steps described in paragraphs (c) and (d) was approximately 12 hours, he reduced the time to 8 hours because he felt that there were some inefficiencies in his search time, and because of the difference in the actual time it took him to conduct the search, as compared to the earlier estimated time.

[25] The affidavits of the other two staff persons confirm that it took them each 15 minutes to conduct their searches.

[26] As a result, the town maintains that the search time of 8.5 hours is justified.

The appellant's representations

[27] The appellant takes the position that the time taken to search for the records is not reasonable. It states that it would be necessary for the town to keep indexes and files for all applications, and to identify the status of approved and completed Site Alteration Variance applications.

[28] The appellant then reviews the affidavit provided by the development coordinator. He confirms that the development coordinator has been involved in a number of the applications, but also that there were five inspectors involved in the applications. The appellant then states:

> In the [information] eventually disclosed [as a result of the request], virtually all [Site Alteration] variance applications (14 approvals) were handled by [the development coordinator] between 2010 and 2013. He would have to track approvals […] where they were in the approval process and close files when completed. It is impossible for town staff, and specifically [the development coordinator], not to keep records of [Site Alteration] Variance approvals to […] track fees, approval and stage of completion of each of 14 approved applications/permits over more than 3 years based on all of the processing each application was subject [to].

[29] The appellant then reviews the various steps required by staff as follows:

1. Staff reviews, prepares reports [for] applications and appears before [the Site Alteration] Committee,
2. [The Site Alteration] Committee decides on approval, imposes conditions,
3. Staff returns [the Site Alteration] Committee decision to [town] Council for approval on each application,
4. Staff ensure satisfactory completion of conditions which includes review of plans, soil analysis, haul routes, permit fees and deposits,
5. Staff undertakes site visits and advises of deficiencies or successful completion,
6. Staff signs off on permits and provide[s] authorization to the [town] treasury department that deposits were refunded to applicants.

[30] The appellant also states that the town's digital computing system is "uniquely designed and utilized by Ontario municipalities to track applications, processes fees and deposits," and that this system provides reminders and status updates to staff "as a time saver and record keeper on a variety of municipal applications." He also states that municipal auditing practices would require the town to cross reference the application fees and the deposits they receive and/or release. In addition, the appellant states that, in his view, the information he requested should be "readily available."

Analysis and findings

[31] With respect to the actual search time spent by the three staff persons to conduct the searches for responsive records, the appellant does not address this issue. Based on the detailed information provided in the town's representations, and on the

three sworn affidavits by town staff, I accept that the town's search time for this aspect of the request was 8.5 hours.

[32] The appellant's representations focus on his concern that the information he is seeking ought not to have taken that amount of time to locate, because the information could be more easily accessed. In support, the appellant refers to the development coordinator's familiarity with recent Site Alteration Committee files, the need for staff to be able to process and update matters processed by the Site Alteration Committee, and the town's robust digital computing system.

[33] In the circumstances of this appeal, I do not accept the appellant's argument that the information he is seeking could be more easily accessed.

[34] First, I note that the information requested in this appeal is not simply for recent information, or information which the development coordinator has been involved in. Rather, it is for a list of all town sites that have been before the Site Alteration Committee as an application or exemption, all of the outcomes and/or decisions of the applications and/or exemptions, all of the conditions imposed by the outcomes and/or decisions, and all of the charges and convictions laid since 2001. I also note that the 3-page list provided to the appellant as a result of his request itemises the various applications back to 2002, and provides details about them, including detailed comments about the outcomes, decisions and conditions imposed. Based on the nature of the information requested and provided, including the time period covered by the request and the requested details about the various outcomes and conditions, I am not persuaded that this detailed information could have been more easily accessed, as argued by the appellant.

[35] Furthermore, in the affidavit provided by the development coordinator, this individual provides sworn evidence that the list requested by the appellant does not exist, and states "[i]n order to supply the requester with the information requested, it would be necessary to" conduct the specific searches that were conducted by town staff.

[36] As a result, based on the nature of the information requested, and based particularly on the sworn affidavit evidence provided by the town's development coordinator, I find that search time of 8.5 hours is reasonable, and I uphold the fee of $255 for search time.

Preparation time

The town's representations

[37] The town's representations in support of its fee of $45 for preparation time (representing 1.5 hours at $30/hour) are as follows:

> … the "Preparing a Record for Disclosure" entry relates to the preparation of the list which forms the entire subject matter of the Request…. In this regard, it is acknowledged that existing IPC decisions have determined that the Preparation of a Record under Section 45(1)(b) does not include time for the preparation of an index of records; however, in the current case the requester specifically requested the production of a list (or "index") setting out specific information that needed to be extracted from the municipality's files. That list did not exist when the Request was submitted, and needed to be compiled in order to respond to the Request. Had the requester asked for documents containing the information described in the Request for Disclosure, the municipality could have supplied copies of the source documents (and left it to the Requester to compile his own list); however, the Requester did not ask for the source documents. Instead, he specifically asked for a list setting out specific information. The list … was prepared exclusively to respond to the requester's specific Request for Disclosure.

[38] The list was prepared by the development coordinator, who states in his affidavit:

> … I spent 1.5 hours compiling the requested list using the information obtained from the records that I reviewed [in response to step (e) described above].

[39] The town submits that, in these circumstances, the $45 cost of preparing the list should be included under section 45(1)(b) as the cost of preparing the record for disclosure.

The appellant's representations

[40] The appellant's representations focus on the reasons why he wants the requested information. He also confirms that he was unable to obtain the information from the committee minutes or accessible files, and had to make this freedom of information request.

Analysis and findings

[41] In this appeal, the town has indicated that it took 1.5 hours to prepare the list which was provided to the appellant. Based on the representations of the town and the affidavit evidence of the individual who prepared the list from the responsive records, I accept that it took 1.5 hours to prepare the list.

[42] The issue before me is whether the time to prepare this list is properly considered "preparation time" under section 45(1)(b) of the *Act*. As acknowledged by

the town, previous orders have confirmed that the time required to prepare an index of records, for example, is not properly counted as "preparation time."[5] Furthermore, previous orders have confirmed that there is no obligation on an institution to create a record in response to a request. As a result, technically, the time to create a responsive record is not covered by the fee provisions in the *Act*.

[43] However, other orders of this office have also considered circumstances where a request was made for a list or other single document containing defined, specific information only available from various sources. A number of these orders have confirmed that fees for creating the responsive record may be chargeable. Order M-203 resulted from a request for a list of the taxi license plates owned by 44 named licensees on a particular date. In that order, Adjudicator Donald Hale had to determine whether the time for compiling such a list was chargeable. The relevant part of that order reads:

> [The institution] submits that, because of the nature of the records, it must create a new list containing the names of the 44 licensees and the cab plates that each licensee owned in 1975. …
>
> … This cost is not, technically, the cost of "preparing the record"; rather, it is the cost of compiling a new record containing the information which is responsive to the request. In my opinion such an activity is entirely in keeping with the intention of section 45 as it is, in these circumstances, the cost of putting the information requested into the form asked for by the requester. The time spent preparing a record for disclosure may also include the time needed to sever any information which may fall within [an exemption in the *Act*].

[44] Former Senior Adjudicator David Goodis also considered this issue in Order PO-1834, and upheld the Ministry of Health and Long Term Care's (the ministry's) preparation fees. The ministry had argued that, in electing to create a record, it was complying with the spirit of the legislation, because the appellant requested that the information be provided to him in a specific format. After reviewing its statutory obligations, the ministry concluded that it was "reasonably practicable" to provide access to the appellant in the form requested. It also argued that creating the record in the form requested was the most cost-effective approach for the requester, and if the ministry had not adopted this approach, the preparation costs (of severing the non-responsive information from the various records) would have resulted in much higher costs to the requester.

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[5] See Orders P-741 and P-1536.

[45] More recently, in Order PO-3190, Adjudicator Stella Ball reviewed eHealth's decision to create a record and charge a fee for doing so. She stated:

> … I find that eHealth's election to create a new record in response to this appeal in order to provide the requested information to the appellant in a single document, is a reasonable approach, particularly in light of the relatively few hours required.

[46] Lastly, in Order 99, former Commissioner Sidney B. Linden made the following statement on this issue of creating a record:

> While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the *Act* is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the *Act*, it also enhances one of the major purposes of the *Act* i.e., to provide a right of access to information under the control of institutions.

[47] I adopt the approach to this issue taken in these previous orders, and apply it in the present circumstances.

[48] In this appeal, the request was for a list of specific types of information about various applications, including outcomes, conditions, convictions and charges. This information is contained in the various files identified by the development coordinator. The town chose to respond to the request for a list by preparing the requested list of the specific responsive information. Although it could have conducted the search for the records, pulled the relevant documents containing the information, severed the non-responsive or exempt portions of these documents, and then provided the appellant with the severed documents, it elected to compile the information from the records and create the requested list for the appellant. I find that the town's decision to do so was reasonable, particularly in light of the relatively short time it took to create the list, and considering that severing the responsive records and providing severed copies to the appellant would likely have resulted in a greater fee.

[49] Accordingly, I uphold the fee of $45 for preparation time.

[50] In conclusion, I find that the fee was properly calculated and is in compliance with the requirements of section 45(1).

ORDER:

I uphold the town's fee decision, and dismiss this appeal.

Original signed by: February 26, 2014
Frank DeVries
Adjudicator