

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3123

Appeal MA13-279

Town of Oakville

November 18, 2014

Summary: The sole issue in this appeal is whether the fee estimate charged by the town for all records in any format relating to any aspect of the proposed Oakville gas plant is in accordance with the fee provisions of the *Act*. In this order, the town's fee estimate is upheld.

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

Cases Considered: Orders PO-3035, PO-3177.

BACKGROUND:

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

[A]ll records, or information on records in any format, relating in any manner, to:

- (a) The proposed Oakville Gas Plant.
- (b) [Named town mayor] concerning any aspect of the proposed Oakville Gas Plant.

- (c) The Town of Oakville concerning any aspect of the proposed Oakville Gas Plant, not otherwise included in the scope of paragraph (b) above.

For greater certainty, but so as not to restrict the generality of the foregoing, the scope of the request in paragraphs (a) to (c) above applies to any aspect of the proposed Oakville Gas Plant, including planning or location site deliberations, considerations, communications or decisions, relocation or proposed relocation site deliberations, considerations, communications or decisions, proposed impact or environmental studies deliberations, considerations, communications or decisions, complaints or opposition deliberations, considerations, communications or decisions, contractual provisions, cancellation deliberations, considerations, communications or decisions, 3rd party consultations, deliberations, considerations, communications or decisions, cancellation costs or projected costs deliberations, considerations, communications or decisions, government deliberations, considerations, communications or decisions, feasibility studies, legal deliberations, considerations, communications or decisions including settlement deliberations, considerations, communications or decisions, proposed testimony before legislative committees studying the gas plant issues.

[2] The appellant also requested continuing access for two years.

[3] The town responded to the request by issuing a clarification request/fee estimate letter in which it provided a fee estimate of \$2,061.94 to process the appellant's request. The town explained how it had arrived at this number:

A freedom of information request submitted in 2009, similar in both subject and scope, resulted in 5,120 pages of records being identified for full or partial release. The search time required to locate those records totaled 29 hours. The town estimates another 29 hours will be required to search across several departments to locate additional records created between 2009 and 2013. It is also necessary to retrieve 28 boxes of inactive records from its inactive records storage service provider to process the request.

[4] The town explained that its fee estimate comprised a search fee of \$870 (for 29 hours of estimated search time at \$30.00 per hour), reproduction costs of \$1,024 (for 5,120 pages reproduced at \$0.20 per page), and a fee of \$167.94 to retrieve and refile 28 inactive records storage boxes. This amounted to a total estimated fee of \$2,061.94, not including any additional reproduction fees for 2009-2013 records.

[5] The town also indicated that although no final access decision had been made, it was likely that third party notifications would be required in accordance with the *Act*, and that some records may be exempt from disclosure, under sections 11(d), 12, 14 and 52 of the *Act*.

[6] The town provided the appellant with copies of the relevant sections of the *Act*, and requested a fee deposit of 50% of the estimated total fee (\$1,030.97) before taking any further steps to process his request.

[7] The appellant wrote to this office to appeal the town's decision. During mediation, there was considerable discussion about the scope of the request and how the fee was calculated, or would be calculated with a revised scope. The town also sent the appellant various correspondence setting out the revised fees should he choose to limit the scope of his request.

[8] Mediation did not resolve the appeal, and it proceeded to the adjudication stage of the appeals process. As part of my inquiry, I received representations from the town and the appellant, which were shared in full. I also received reply representations from the town.

[9] For the reasons below, I uphold the town's fee estimate.

DISCUSSION:

[10] The sole issue in this appeal is whether I should uphold the town's fee estimate.

Should the fee estimate be upheld?

[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 to the responsive records.¹ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.²

[12] 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

¹ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

² Order MO-1520-I.

³ Order MO-1699.

[13] 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

[14] 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.

[15] 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.

[16] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 823. Those sections read:

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.
- 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 Orders P-81 and MO-1614.

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.
7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
- (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

Representations

[17] The town explained the basis of its fee estimate as follows:

- In 2009, the town received and processed a request under the *Act* which was similar in subject and scope to the current request. The records covered by that previous request spanned a date range of 2008-2009.
- 5120 pages of records were located as a result of the previous search, which required 29 hours of search time.
- The town estimates that a further 29 hours will be required to search across several departments to locate additional records created between 2009 and 2013.
- The fee to photocopy 5,120 pages at \$.20 per page totals \$1,024. There will also be additional photocopying fees for the records for 2009-2013.

- There are 28 boxes of paper records that require searching in order to identify responsive records. The fee to retrieve and refile 28 inactive records storage boxes totals \$167.94, based on a flat fee from the service provider.
- Of the 5,120 pages identified in the 2009 request, approximately 180 pages will require partial redaction, resulting in total preparation time of approximately 360 minutes (6 hours). The \$2,061.94 estimated fee does not cover this preparation time.

[18] The town states that the requested records are maintained in both paper and electronic formats. Paper records reside in the file holdings of different departments as well as the town's commercial records storage service provider. Electronic records reside in the departments' shared drives and employees' email accounts. The town will be required to search across the paper holdings and electronic shared drives in several departments to locate all responsive records created between 2009 and 2013. It will also be required to retrieve 28 boxes of inactive records from its commercial records storage service provider.

[19] The appellant submits that the fee estimate is not reasonable in that, among other things, the town should have retained a copy of the previous 2009 records disclosure so that a subsequent records request could be provided for a reduced cost. He also states that the town's estimate of search time appears to have been based on manual search hours, and the town should have been able to locate the majority of the records requested by way of an electronic search effort, which would be faster, more efficient and less costly.

[20] The appellant submits that the "deficient" records retention and retrieval system or processes used by the town are largely responsible for the excessive fee estimate and should not form an additional barrier to records disclosure, nor should he bear the burden of the town's deficient records management system. The appellant suggests that the records could easily be reproduced on a CD, which is a procedure adopted by other federal and provincial FOI offices, at little or no cost to the requester. He submits that the town is conducting itself in a manner either designed to deny access, or that results in such a denial.

[21] The town submits in reply that it did retain a copy of the previous 2009 records disclosure. In fact, it provided the appellant with a copy of the index of records from that disclosure, identifying each record reviewed, the access decision for each record and the exemption applied, to enable him to narrow his request. However, the appellant did not respond after receiving the index.

[22] The town also confirms that most of the search will be performed manually, as the request covers all records regardless of format. It submits that the fee estimate is

not a result of a deficient records management system but is directly related to the broad scope of the request, the multiple classes of records involved and the number of responsive records estimated to be located as a result of the search. The town submits that the types of records to be searched include but are not limited to: correspondence from constituents, records of public meetings, maps and drawings, records relating to land-use planning, energy generation, environmental impacts, human health studies/concerns and legal preparation across several town departments.

[23] With respect to the appellant's assertions about the release of records on a CD, the town states that its experience is that most requesters prefer receiving records in paper format; however, it also provides access to records on CD format on request.

Analysis

[24] I find that the town's estimate of 29 additional hours of search time to locate records from 2009-2013 is reasonable. The town bases this estimate on its knowledge that it required 29 hours of search time to locate records from 2008-2009, on substantially the same subject. The town had a solid foundation for this estimate, having previously performed a very similar search. It is not seeking to charge the appellant for locating the records from 2008-2009, which it has already gathered. Rather, it has provided an estimate, based on its previous experience, of the time that will be required to conduct a search in response to the appellant's request, which covers an additional three years.

[25] I also accept the town's submission that the majority of its search will be performed manually. Given the breadth of the appellant's request, it is reasonable to expect that a manual review of many paper records will be required, in addition to electronic searches (which will still require staff time to formulate and implement).

[26] The town's fee for retrieval and refiling of inactive files is based on an invoice it will receive from its third party commercial records storage service and I see no reason to doubt the amount of this fee. I therefore uphold \$167.94 as an invoiced cost that the town can charge the appellant.

[27] On the issue of whether the town may charge for photocopying given the appellant's desire to receive the records on a CD, I am guided by the approach taken in a similar situation, discussed in Order MO-2878:

In the circumstances, and because this appeal addresses the fee estimate, and not a final access decision, I will not determine the issue of whether providing the records on a CD will affect the fee estimate. I note, however, that simply stating that the records can be provided on a CD does not necessarily mean that fees for photocopying are not chargeable. Order MO-2528 addressed a similar argument by an appellant as follows:

[The Board] has provided a photocopying fee estimate of \$270 ...

The appellant "strongly contests" the Board's \$270 fee estimate for photocopies. He submits that he is willing to provide the Board with CDs or DVDs onto which the records containing both his and his children's personal information can be copied, which would eliminate the need to charge a photocopying fee.

In response, the Board submits that copying the records onto a CD may not be less costly for the appellant:

... At the present time, the records have all been photocopied for collecting and sorting purposes, and many of them will have to be "modified" to delete information that cannot be disclosed. The task of copying the records onto a CD may be entrusted to an outside resource if it is more efficient to proceed in this way. The costs of such work are currently unknown.

In some circumstances, it may be reasonable for an institution to provide an appellant with records on a CD, DVD or other portable storage media. In my view, however, it is not reasonable in the circumstances of this particular appeal to require the Board to copy the records onto a CD or DVD instead of photocopying them.

I find that the Board's photocopying fee estimate is reasonable and is required by paragraph 1 of section 6.1 of Regulation 823. ...

I adopt the approach taken in Order MO-2528. In the current appeal, the city has conducted some manual searches for records and has also indicated that exemptions will apply to records or portions of records. In the circumstances, it is not reasonable at this time to require the city to copy these records onto a CD instead of photocopying them.

[28] As above, at this time, I will uphold the current estimate for the purpose of assessing the amount the town is entitled to request as a deposit. I note that the estimate currently covers only part of the potential photocopying costs, as the town has not quantified the sum for photocopying records from 2009-2013. At the time the

records are finally prepared for disclosure, the town will only be able to recover actual photocopying costs and must refund the difference if it can reasonably, without photocopying the records, provide them on a CD.

[29] I find no basis for the appellant's assertion that the town has a deficient records retention and retrieval system, and that he should not bear the burden of this. It is reasonable to expect that a request of this nature will require considerable time to locate all the responsive records. The evidence does not support his assertion of a "deficient" system. The IPC decisions referred to by the appellant, in which fee estimates have been considerably reduced based on flawed record keeping systems, concern facts and requests that are quite different from those before me. In Order PO-3035, for example, the request covered about 80 expense receipts. Order PO-3177 dealt with about 50 records about expenses in connection with a specific event. In both of those appeals, the requests were much more focused than the one at issue here.

[30] The evidence also does not support the appellant's contention that the town is conducting itself in a manner that is either designed to deny access or results in a denial. In fact, it is evident that the town made considerable efforts to try and provide him with information to enable him to focus his request and reduce the cost of access.

[31] Based on the above, I uphold the following as a reasonable estimate of the fees to respond to the request:

Search time (approx. 29 hours x \$7.50/person/15 mins)	\$870.00
Photocopying costs (5,120 pages at \$.20 per page)	1,024.00
Invoiced cost for retrieval of inactive files from storage	167.94
Total	\$2061.94

[32] The town may request a deposit of \$1030.97 before taking any further steps to respond to the request.

ORDER:

I uphold the town's fee estimate.

Original Signed by: _____
Sherry Liang
Senior Adjudicator

_____ November 18, 2014