

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER MO-3252**

Appeal MA14-454

Township of Southwold

October 16, 2015

**Summary:** The Township of Southwold (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to its caregiver policy and related to the installation of certain water line valves. The township responded to the appellant's request and provided him with 120 pages of records upon payment of a fee. The appellant appealed the fee decision and argued that additional records ought to exist. This order finds that the township's search for responsive records was reasonable and partially upholds the township's search fee. This order does not uphold the township's fee for "Services outside the institution".

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

### **OVERVIEW:**

[1] The Township of Southwold (Southwold or the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for:

... Southwold township "caregiver policy",

For second line water project number of curb stops<sup>1</sup> installed by error, number of curb stops installed by error forced to be paid for at time installation (numbers for connected and unconnected separate), the letter requesting payment for [#] second line when curb stop installed, the special deal made for [#] second line curb stop payment when installed, staff responsible for curb stop installation water line error, what the error was and documents to support.

Any documents for the water line curb stop/water service for [#] second line and communications to Stewart Title<sup>2</sup> the handouts, rules and/or policy for curb stops payment for the second line waterline prior to installing for [#] third line and [#] second line any communication between staff and council or council members, council packages/notes/minutes/recordings, phone records, building official reports, [name] documentation confirming second dwelling communication between township of Dutton/Dunwich staff and Southwold staff regarding [requester] and/or [name] issues.

Any evidence there was an actual complaint or parties/witness of complaint and to show no lies during a law enforcement investigation (confirming no breach of trust by [name]).

[2] The township issued a fee estimate of \$180 for processing the request and requested a 50% deposit. The appellant paid the deposit of \$90. The township then issued its access decision, together with its final fee. It granted full access to 106 pages and indicated that records do not exist for some of the requested items.

[3] As part of its access decision, the township provided a chart listing the appellant's request items and the township's corresponding response.

[4] The township's final fee was \$199.55, which it itemized as follows:

Search time, disclosing/locating & retrieving request	\$90.00
3 hours @\$ 30 per hour	
Photocopies	\$21.20
106 pages @\$.20 per page	

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<sup>1</sup> According to the township's website, a curb stop means the valve used by the township to shut off or turn on the water supply from the township's waterworks to any premises.

<sup>2</sup> Stewart Title is a title insurance provider. See <http://www.stewart.ca/AboutStewart.html>

Services outside the institution	\$84.00
Cost to reproduce Second Line water project	
Courier	<u>\$ 4.35</u>
Total	\$199.55

[5] Following the decision, the requester emailed the township asserting that additional records ought to exist. The township disclosed three additional documents and reiterated that additional records do not exist. It also provided a further explanation regarding certain requested items.

[6] The requester, now the appellant, appealed the township's decision, arguing that there ought to be additional responsive records and that the fee charged was unreasonable.

[7] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought and received representations from the township and the appellant. These representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I uphold the town's search for records and I partially uphold its fee.

## **ISSUES:**

- A. Did the institution conduct a reasonable search for records?
- B. Should the \$199.55 fee be upheld?

## **DISCUSSION:**

### **A. Did the institution conduct a reasonable search for records?**

[9] 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.<sup>3</sup> If I am satisfied that the

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<sup>3</sup> Orders P-85, P-221 and PO-1954-I.

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.

[10] 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.<sup>4</sup> To be responsive, a record must be "reasonably related" to the request.<sup>5</sup>

[11] 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.<sup>6</sup>

[12] 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.<sup>7</sup>

[13] 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.<sup>8</sup>

[14] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.<sup>9</sup>

[15] 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:
  - 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?

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<sup>4</sup> Orders P-624 and PO-2559.

<sup>5</sup> Order PO-2554.

<sup>6</sup> Orders M-909, PO-2469 and PO-2592.

<sup>7</sup> Order MO-2185.

<sup>8</sup> Order MO-2246.

<sup>9</sup> Order MO-2213.

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.

[16] The township states that its staff searched the individual property records, the files for the construction of the waterline in question, information on the computerized water and general billing system, emails and Building Department records. It also requested information from the engineering firm that designed and supervised the construction of the waterline.

[17] The appellant states that it appears that searches were not done for minutes of council meetings, packages sent to councillors for meetings, "water files", phone recordings, water department records, personal devices used for communication (blackberries etc. used by staff and building officials). He states:

Also the township of Dutton/Dunwich has not been mention which has identified records but refused to provide records as they are claiming no possession of records. The township of Dutton/Dunwich refused to accept their request for 30 minutes until [name] stated no problem as he has the records in his log book and only acts on work orders from Southwold. Where is the work orders on Southwold's side? 4 actions occurred to the curb stop some of which are documented by law...

[18] The appellant provided a list of specific information he is still seeking. In its representations, the township responded to each item in the list as follows:

- *a phone conversation about Southwold's caregiver policy.*

The township responded by stating that it does not record any of the telephone conversations of its employees or ratepayers.

- *who installed curb stops by error*

The township says that there were some curb stops installed in error by the contractor. However, there is no record that would indicate whose error it was. It could have been the contractor, the engineer or the municipality.

- *the completed notice of assessment letter for the appellant's property sent 10 years ago at installation.*

The township states that this was a blank form notice without an address on it. The address would have only been on the envelope and therefore there is no record of a completed form.

- *information in closed meeting packages about the appellant's issues from September 2013 to January 2014.*<sup>10</sup>

The township's Freedom of Information Coordinator (FOIC) states that it is his understanding that information regarding legal matters that are held in closed sessions and anyone attending these meetings should not be releasing the same to anyone.

[19] In reply, the FOIC also states that he interviewed all of the office staff who were employed by the municipality at the time, as well as the building official who undertook the inspection. The FOIC also states that he had a discussion with the head of the Water Department for Dutton/Dunwich who operated the water system for Southwold.

[20] The FOIC states that the minutes were reviewed and copies of the appropriate sections were supplied. He further states that in the appellant's case there was a disagreement over the payment or non-payment of a water connection fee and, for that reason, there was no overdue water account that was used to document the process. He states that it was most likely a verbal request to staff of its water department.

[21] The FOIC states that some of the information, such as the residents who wanted to connect to the system, would have been collected locally and forwarded to the engineering firm that was responsible for the design and the supervision of the construction of the waterline. He states that if the previous owner of the property in question did not request a curb stop, there would be no documentation in this regard.

[22] In surreply, the appellant says that the FOIC's representations focus on non-confidential records and that he should have addressed confidential records that may be exempt under *MFIPPA*, such as minutes of closed meetings. He also submits that there must be detailed records that supported the billing charges between the two

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<sup>10</sup> The appellant states that he was told by the social worker that a certain letter was to be addressed in closed meeting session.

townships as there are hourly charges for staff/equipment etc. working in Southwold and he finds the township's submission about verbal requests hard to believe.

***Analysis/Findings***

[23] From the appellant's representations, I can ascertain that there are two types of records that have not been located or accounted for directly by the township.

[24] The appellant submits that the minutes of closed meeting packages about his issues from September 2013 to January 2014 have not been located. The appellant did not directly seek this information in his representations. The only mention of minutes of meetings is where he asks for:

...any communication between staff and council or council members, council packages/notes/minutes/recordings, phone records, building official reports, [name] documentation confirming second dwelling communication between township of Dutton/Dunwich staff and Southwold staff regarding [appellant] and/or [name] issues.

[25] The township did provide the appellant with five sets of minutes of meetings in records it disclosed to him. None of these five sets of meeting minutes are for the time period of September 2013 to January 2014. Nevertheless, I find that if the appellant wanted access to minutes of township meetings for this time period concerning issues he was involved in, he should have specifically sought this information, specifying the issues these minutes would have related to.

[26] The appellant also submits that the township has not located detailed records that supported the billing charges between the two townships. The only mention of the other township in his request was as follows:

...documentation confirming second dwelling communication between township of Dutton/Dunwich staff and Southwold staff regarding [requester] and/or [name] issues.

[27] I find that that the appellant's request did not include a request for detailed billing charges between the two townships and that he is raising this for the first time at adjudication. Again, if the appellant wishes to receive access to specific billing charges between the two townships he should include this in a separate request to either of the townships.

[28] The township provided the appellant with 120 pages of records. In its initial decision letter and in a subsequent email to him, the township specifically responded to the appellant's request, as follows:

1) *Southwold Township Caregiver Policy*

The township stated that there is no Caregiver Policy.

2 + 3) *Number of curb stops installed by error on Second Line*

The township provided a copy of the "Commitment to Connect to Waterworks" letter and indicated that it has provided all documents relating to the Second Line project.

4) *Letter requesting payment for [#] Second Line when curb stop installed*

The township provided a letter, three invoices, an email and a Notice of Assessment.

5) *Special deal for [#] Second Line curb stop payment when installed*

The township provided three sets of minutes of council and three sets of by-laws. The township indicated that connection was not mandatory when the first waterlines were installed. It indicated that for those that did not connect at the time their waterline was installed, they could connect at a later date by paying the connection fee. The township further indicated it has no information or knowledge of a special deal.

6) *Staff responsible for curb stop installation waterline error*

The township provided a tender letter for the installation of the water line and the awarding of the contract.

7) *What is the error and documents to support*

The township provided maps.

8 + 9) *Documents for waterline curb stop/water service for [#] Second Line, communications to Stewart Title, handouts, rules, policy for curb stop payment for Second line waterline prior to installing [#] Third Line and [#] Second line*

The township provided a Notice of Public Information Meeting, the Minutes of the Public Meeting and a letter for the Second Line Waterworks Project, a commitment to connect to Waterworks map, a letter from the petitioners of the Second line Waterline, a letter regarding the Second Line Watermain Extension, and a copy of a letter signed for water meter referred to in the request.



10) *Communications between staff, council or council members, council packages, notes, minutes, recordings, phone recordings, building official reports, [name] documentation confirming Second dwelling*

The township provided three emails and confirmed there were no records from closed council meetings packages, minutes, recordings dealing with the [appellant] and/or [name] last fall.

11) *Communications between Dutton staff and Southwold staff regarding [appellant] or [name] issue*

The township provided five emails regarding a non-existing complaint, three emails regarding violations of a zoning bylaw, a letter regarding a failure to comply with a zoning bylaw and a further email. It also confirmed that Dutton/Dunwich acted on the township's instructions.

12) *Evidence that there was an actual complaint or parties/witness of complaint and to show no lies during law enforcement investigation (confirming no breach of trust by [name])*

The township stated that no responsive records exist.

[29] Based on my review of the appellant's request, the parties' representations, the records disclosed to the appellant, and the township's decision letter and subsequent email, I find that the township has conducted a reasonable search for responsive records. I find that the appellant has not provided a reasonable basis for concluding that additional responsive records exist. Therefore, I uphold the township's search for responsive records.

**B. Should the \$199.55 fee be upheld?**

[30] The institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.<sup>11</sup>

[31] 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.

[32] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

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<sup>11</sup> Orders P-81 and MO-1614.

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.

[33] 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. 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.

[34] The township states that the fees were based on the actual time spent, cost per copy provided in the *Act* and the actual cost incurred by it for outside review from the engineer and the courier firm.

[35] The township states that the records are maintained in a combination of systems. It states:

Paper copies of records regarding the property are stored in an individual "property file". This file contains hard copies of letters that would affect this property. Copies of emails received and sent are stored on a computer hard drive. Copies of water line invoices, water used, etc. are stored on a computerized water billing system. Copies of documents regarding the design and construction of the waterline are stored in a construction file. Each of these sources of information were reviewed and the applicable records were copied and forwarded to the [appellant].

[36] The appellant states that the fee paid by him should be refunded as the township did not give him a copy of the invoice for the \$84 for outside services and provided him with unreadable records.

### ***Analysis/Findings***

[37] In its decision letter, the township's breaks down the final fee as follows:

<b>Item</b>	<b>Cost</b>	<b>Breakdown</b>
Search time, disclosing/locating & retrieving request  3 hours @\$ 30 per hour	\$90.00	July 31 (1 hour), August 14 (2 hours)
Photocopies  106 pages @\$.20 per page	\$21.20	106 sheets
Services outside the institution	\$84.00	Cost to have Second Line water project reproduced
Courier	\$4.35	

<b>Total</b>	<b>\$199.55</b>	<b>\$199.55 - \$180 (deposit) 19.55 owing</b>
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[38] Concerning the township's search fee, I find that the search fee of 3 hours is not reasonable. The township has not only charged for searching for the records, but has also charged for "disclosing/locating and retrieving request". It did not provide an explanation of what this entails. In the Notice of Inquiry, the township was asked: "what actions are necessary to locate the requested records?"

[39] The township did not provide details of what searches were undertaken and how long the actual search took. As well, it did not provide a time breakdown for what is has classified as "disclosing/locating and retrieving request". The township did locate 106 pages initially, and then located another 14 pages when it disclosed an additional three records to the appellant. I find that a total time of 1.5 hours is reasonable for this search.

[40] In the Notice of Inquiry, the township was asked: "what actions are required to prepare the records for disclosure? What amount of time is involved in each action?"

[41] The township did not respond to this question.

[42] Although section 45(1)(b) of the *Act* allows an institution to charge the costs of preparing the record for disclosure, the township did not indicate specifically that it was relying on this section when charging for "disclosing/locating and retrieving request". If it had done so, I would have found that this fee does not come within section 45(1)(b). Section 45(1)(b) does not include time for:

- deciding whether or not to claim an exemption<sup>12</sup>
- identifying records requiring severing<sup>13</sup>
- identifying and preparing records requiring third party notice<sup>14</sup>
- removing paper clips, tape and staples and packaging records for shipment<sup>15</sup>
- transporting records to the mailroom or arranging for courier service<sup>16</sup>

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<sup>12</sup> Orders P-4, M-376 and P-1536.

<sup>13</sup> Order MO-1380.

<sup>14</sup> Order MO-1380.

<sup>15</sup> Order PO-2574.

<sup>16</sup> Order P-4.

- assembling information and proofing data<sup>17</sup>
- photocopying<sup>18</sup>
- preparing an index of records or a decision letter<sup>19</sup>
- re-filing and re-storing records to their original state after they have been reviewed and copied<sup>20</sup>
- preparing a record for disclosure that contains the requester's personal information [Regulation 823, section 6.1].

[43] Section 45(1)(c) allows an institution to charge a fee for computer and other costs incurred in locating, retrieving, processing and copying a record. This would include the cost of

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

[44] Although asked in the Notice of Inquiry, the township provided no evidence that it was necessary to develop a computer program or other method of producing the records from a machine readable record.

[45] The township was asked in the Notice of Inquiry whether it had received an invoice for any other costs, including computer costs, for locating, retrieving, processing and copying the records. If so, it was asked to provide a copy of any such invoice. The township did not provide a copy of the invoice for which it is claiming an \$84 fee for "Services outside the institution... Cost to have Second Line water project reproduced." I find without a copy of this invoice and without a detailed explanation of what the \$84 was being charged for, that I do not have sufficient evidence to allow this \$84 charge under the *Act*. Therefore, I am disallowing this \$84 charge.

[46] Section 45(1)(e) allows an institution to charge for 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

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<sup>17</sup> Order M-1083.

<sup>18</sup> Orders P-184 and P-890.

<sup>19</sup> Orders P-741 and P-1536.

<sup>20</sup> Order PO-2574.

in paragraphs (a) through (d), but not specifically mentioned.<sup>21</sup> Section 45(1)(e) does not include:

- time for responding to the requester<sup>22</sup>
- time for responding to this office during the course of an appeal<sup>23</sup>
- legal costs associated with the request<sup>24</sup>
- comparing records in a request with those in another request for consistency<sup>25</sup>
- GST<sup>26</sup>
- costs, even if invoiced, that would not have been incurred had the request been processed by the institution's staff<sup>27</sup>
- coordinating a search for records<sup>28</sup>

[47] The institution was asked whether there are other costs involved in responding to the request. The township did not respond and, therefore, I cannot determine whether any of the fees charged by it for the search or the invoiced costs include these non-allowable charges under section 45(1)(e).

[48] The township charged the appellant \$21.20 for photocopies, being \$0.20 per page for 106 pages. Section 6 of Regulation 823 allows the township to charge \$0.20 per photocopy. The township actually provided the appellant with 120 pages of records, taking into consideration the three additional records provided after the initial disclosure. I will, therefore, allow the township the amount of \$24 for photocopies.<sup>29</sup>

[49] Section 45(1)(d) allows an institution to charge shipping costs involved in responding to the request. In this case, the township charged the appellant \$4.35 for courier charges. The appellant did not specifically object to this shipping fee and I find this fee reasonable and will allow it.

[50] In conclusion, I have allowed the township to charge the appellant 1.5 hours for

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<sup>21</sup> Order MO-1380.

<sup>22</sup> Order MO-1380.

<sup>23</sup> Order MO-1380.

<sup>24</sup> Order MO-1380.

<sup>25</sup> Order MO-1532.

<sup>26</sup> Order MO-2274.

<sup>27</sup> Order P-1536.

<sup>28</sup> Order PO-1943.

<sup>29</sup> 120 pages of records at \$0.20 per page equal the amount of \$24.

search time at \$30 per hour. This amount totals a search fee of \$45. I have also allowed the township to charge \$24 for 120 photocopies and \$4.35 for courier fees for shipping the records to the appellant. I have not allowed the township's fee of \$84 for "Services outside the institution". Therefore, the total fee I have allowed is \$73.35. I will order the township to refund to the appellant the amount in excess of this total fee paid by him.

**ORDER:**

1. I uphold the township's search for records.
2. I uphold the township's search fee in the reduced amount of \$45.00, its photocopy fee of \$24.00 and a shipping fee of \$4.35, for a total of \$73.35. I order the township to refund to the appellant within 21 days of the date of this order any amount already paid by him that is not in accordance with this order provision.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ October 16, 2015