

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3277

Appeal MA14-573

Town of the Blue Mountains

January 8, 2016

Summary: The Town of Blue Mountains (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for records regarding a golf club and residential development. The town issued a fee estimate in which it included a charge for legal costs it incurred for the review of the records for privilege. This order disallows the town's charge for its legal costs and reduces its fee estimate accordingly.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 12, 45(1)(b) and 45(1)(e).

Orders and Investigation Reports Considered: Order MO-1380.

OVERVIEW:

[1] The Town of Blue Mountains (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for the following:

...all e-mails, received and sent, from January 1, 2014 thru current for all town staff members in the CAO [Chief Administrative Officer]; Planning, Engineering Offices and [named lawyer] regarding [named golf club and residential development].

[2] The town issued a \$5,000.00 fee estimate and an interim decision on access and

requested a deposit of \$2,500.00. The town indicated that some information in the records was severed, as it was not responsive to the request.

[3] The requester (now the appellant) appealed the town's fee estimate and specifically that legal fees should not be part of the estimate.

[4] During the course of mediation, the mediator asked the town to provide a breakdown of the total estimate of \$5,000.00, along with an interim access decision.

[5] The town issued two revised decisions, both with a final fee estimate of \$4,366.24. This revised fee estimate was based on the following:

1. Computer and other costs incurred in locating, retrieving, processing and copying a record. Staff time with IT [Information Technology] to prepare secure computer folders for emails. IT also conducted the search of emails for staff no longer with the Town or currently off on leave (3 staff members). 180 minutes at \$7.50/15 minutes **\$90.00.**
2. Manual search required to locate a record. Combined staff time (17 staff members) to complete the search/request for emails/and copy and move emails to secure folder. 610 minutes at \$7.50/15 minutes **\$304.95.**
3. Preparing records for disclosure. Staff time to review emails for disclosure, remove duplicates. 14 hours at \$30/hour **\$420.00.**
4. Legal advice. This FOI request is associated with ongoing and other litigation. The issue of direct questions of privilege involved in the documents is at issue. **\$3,503.09 (includes non-refundable HST amount).**
5. Photocopies 241 copies at .20/copy **\$48.20.**

Total \$4,366.24

[6] The town notified the appellant by email that it intended to "grant full access to the third party records in this matter". The town confirmed that the third party had been notified and that the records would be disclosed, following the expiration of the 30-day appeal period.

[7] Following the expiration of the 30-day appeal period, the town confirmed that no third party appeal was filed and that the third party records would be disclosed upon payment of the fee.

[8] The town maintained its position on including legal fees. The appellant believes that legal costs are not applicable to the fee estimate.

[9] No further mediation was possible. Accordingly, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC *Code of Procedure and Practice Direction 7*.

[10] In this order, I disallow the town's charge for its legal costs and reduce its fee estimate by \$3,503.09 to \$836.24.

DISCUSSION:

Should the fee estimate of \$4,366.24 be upheld?

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

[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.²

[13] 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.³ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴ In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁵ This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

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

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;

¹ Section 45(3).

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

⁵ Orders P-81 and MO-1614.

- (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.

[15] More relevant 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.

[16] The town states that the subject matter of the request relates directly to current and ongoing land use planning issues, a development application, and an Ontario Municipal Board (OMB) proceeding involving the appellant and the town. It states that it has the right and responsibility, as a municipal corporation, to ensure that its interests are not compromised in the situation where ongoing litigation is present between the appellant and the municipality. In particular, it states that the identification of privilege and more importantly, the review of documents prepared for release to ensure that privilege is not waived unintentionally or inadvertently is of critical importance. In order to do that, it states that it is not unreasonable and not outside the scope of *MFIPPA* to include legal costs incurred in the preparation of records for disclosure as part of its fee estimate, in accordance with section 45(1)(e) of *MFIPPA*.

[17] The town acknowledges that Order MO-1380 determined that legal costs were outside the scope of costs enumerated in and contemplated by section 45(1)(e) of *MFIPPA*, as that section was intended to cover general administrative costs resulting from the request that are similar in nature to those listed in sections 45(1)(a) through (d). It states in that order the adjudicator did not expand on what the scope and extent of "general administrative costs" means and that there is no indication therein that there were other proceedings or any ongoing and active litigation involving the subject of the request.

[18] The appellant states that despite the town's belief that Order MO-1380 is no longer instructive, it has not produced an IPC order, policy, or any other reason to rebut the findings of this order or to demonstrate how it could ever be considered in the public interest to allow the municipality to hire a lawyer to review its records and give it advice.

[19] The appellant submits that section 6.1 of Regulation 823 reference to costs is not related to the determining of the existence of an exemption, but rather for the physical processing of a file by the town. It states that the town's submission ignores the purpose of this section, which is limited to the physical costs of locating the records and not to the cost of educating the Town Clerk as to what is or is not producible.

[20] The appellant refers to subsections 3 and 4 of section 6 of Regulation 823 and states that searching and preparing records for disclosure, including severing a part of the record, have an established cost of \$7.50 for each 15 minutes spent by any person. It states that this makes it clear that this is only a processing cost and not the cost incurred to get legal advice. It submits that it is incongruous with the intention of this provision to suggest that the town can claim professional fees that are hundreds of dollars per hour (which is advice on how to sever a record) where the *Act* contemplates costs which can only be sufficient for the manual labour required to sever the record.

[21] The appellant further states that allowing the head of an institution to claim the

legal fees for a request would have a chilling effect on the ability of the public to access information and would run directly contrary to the *Act*. It states:

Prior IPC orders support the fact that the intention is to recover the physical costs of finding and producing records. The IPC orders have found that any time spent determining whether or not to claim an exemption to disclosure under the *Act* is not an admissible fee.⁶ The town admits that review by lawyers was necessary to determine whether any documents requested by the appellant are subject to an exemption under the *Act*, and that the town is claiming fees for "legal advice" in the amount of \$3,503.09. The town's lawyers have made it clear through invoices and submissions that it was not involved in any of the technical processing of the documents. Rather, the lawyers were involved in advising on whether or not a claim of privilege exists. Recovery of fees for this service is directly contrary to [the] *Act*, the regulations, and the IPC decisions on the subject matter.

[22] In reply, the town states that it is important to consider that the application of *MFIPPA* evolves to meet new circumstances, particularly in this case in the context of active, pending and possible litigation between the appellant and the municipality. It is concerned that the records may be used against it in litigation before the OMB and in pending or planned litigation against the town by the appellant. It submits that the intention of the *Act* is not for it to be used as a vehicle for alternate, early and low-cost discovery on the part of litigants, at the expense of municipal taxpayers.

Analysis/Findings

[23] In this appeal, the appellant only disputes the charge of \$3,503.09⁷ for legal advice concerning any privileged information in the records. The town has claimed that this charge should fall within section 45(1)(e) as a cost incurred in responding to a request for access. It submits that this fee is chargeable as there is ongoing and pending litigation concerning the information in the records.

[24] Section 45(1)(e) has been found not to include the following costs:

- time for responding to the requester⁸
- time for responding to this office during the course of an appeal⁹

⁶ Orders P-4, M-376 and P-1536.

⁷ This amount includes HST.

⁸ Order MO-1380.

⁹ Order MO-1380.

- legal costs associated with the request¹⁰
- comparing records in a request with those in another request for consistency¹¹
- GST¹²
- costs, even if invoiced, that would not have been incurred had the request been processed by the institution's staff¹³
- coordinating a search for records¹⁴

[25] The town is charging the appellant for the legal costs of an outside law firm reviewing the records for privilege associated with litigation or pending litigation. It is seeking advice on whether to claim the section 12 solicitor-client privilege exemption for specific portions of the records. This exemption reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[26] I do not agree that section 45(1)(e) allows the town to claim fees for legal advice concerning the presence of privileged information in the records. Section 45(1)(e) is intended to cover general administrative costs resulting from a request which are similar in nature to those listed in sections 45(1)(a) through (d), but not specifically mentioned.¹⁵ As stated above, section 45(1)(e) does not include time for legal costs associated with a request,¹⁶ nor can it charge costs, even if invoiced, that would not have been incurred had the request been processed by the institution's staff.¹⁷

[27] I find that the town is unable to pass on the cost of the review of the records by an outside law firm as I find that it is charging for time for deciding whether or not to claim an exemption. Section 45(1)(b) of the *Act*, along with section 6.4 of Regulation 823, allow an institution to charge for preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person. Section 45(1)(b) does not include time for deciding whether or not to claim an exemption.¹⁸ I

¹⁰ Order MO-1380.

¹¹ Order MO-1532.

¹² Order MO-2274.

¹³ Order P-1536.

¹⁴ Order PO-1943.

¹⁵ Order MO-1380.

¹⁶ Order MO-1380.

¹⁷ Order P-1536.

¹⁸ Orders P-4, M-376 and P-1536.

find that legal costs incurred by an institution in the review of records in preparation for disclosure are not an allowable preparation charge under section 45(1)(b) nor is it an allowable other cost under section 45(1)(e).

[28] In making this finding, I acknowledge the town's submission that there is ongoing land use planning issues, a development application, pending or current litigation and an OMB proceeding involving the appellant.

[29] In any request, an institution is required to review records to determine if any exemptions are to be claimed. If so, records may be required to be severed in part or in whole.

[30] I have considered the application of Order MO-1380, referred to by the parties in their representations. In Order MO-1380, the records at issue were tender documents. In that order, former Senior Adjudicator David Goodis considered the application of sections 45(1)(b) and (e) as to whether an institution can charge a requester the legal costs it incurred as a result of a request and/or an appeal. In Order MO-1380, Senior Adjudicator Goodis stated:

Preparation

"Preparing the record for disclosure" under subsection 45(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the Act (Orders 4, M-376 and P-1536). In my view, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are also not allowable under the Act. These activities are part of an institution's general responsibilities under the Act, and are not specifically contemplated by the words "preparing a record for disclosure" under section 45(1)(b) (see Order P-1536)...

Other

It appears that under this portion of the fee, the Township has charged the appellant for responding to his request, as well as for responding to this office during the course of the appeal. Both of these functions are a necessary part of an institution's obligations in administering the Act, and associated costs are not recoverable (P-1536). Therefore, I find that this portion of the fee is not allowable under the Act.

It also appears that the Township has charged the appellant for the legal costs which it incurred as a result of the appellant's request and/or appeal. The Township has cited section 45(1)(e) of the Act for this part of the fee. In my view, legal costs associated with an access request are not contemplated by section 45(1)(e). This section, in my view, 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. Legal costs clearly are outside the scope of these types of costs. [Emphasis added by me]

[31] I adopt these findings of former Senior Adjudicator Goodis and find that the town's charges for legal costs for identifying records requiring severing under section 12 are not allowable under the *Act*. These legal costs associated with this request are not contemplated by section 45(1). These activities are part of an institution's general responsibilities under the *Act*.

[32] Accordingly, I am not allowing the town to charge the appellant for legal costs in the amount of \$3,503.09 and I am reducing its fee estimate of \$4,366.24 by this amount to \$862.34.

ORDER:

I do not allow the town to charge the appellant for its legal costs and reduce the town's fee estimate to the amount of \$862.34.

Original Signed by: _____
Diane Smith
Adjudicator

January 8, 2016