Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3469

Appeal MA15-236

Town of Blind River

July 12, 2017

Summary: The Town of Blind River received a multi-part request for access to information relating to a $49.5 million Municipal Infrastructure Lending Program loan granted to the town. The town issued a decision letter setting out its fee for processing the request and advising that, as it did not have custody and control of certain documentation, it was forwarding the request to a separate entity under section 18(2) of the *Act*. The appellant appealed the fee estimate and alleged that the town did not conduct a reasonable search for records within its custody or control. The appellant also applied for a fee waiver, which the town denied. This order partially upholds the town's fee estimate and upholds its decision to deny a fee waiver and its decision to transfer the request to another entity.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1)(c), 4(1), 17, 18(2), 18(3), 45(1)(b), 45(1)(c), 45(1)(e), 45(4)(b) and 45(4)(c); Ontario Regulation 372/91, section 4.1, Regulation 823, R.R.O. 1990, sections 6 and 8; *Electricity Act, 1998*, S.O 1998, c.15, Sched. A., section 142.

Orders Considered: MO-1380, MO-2492, P-1536 and PO-2904.

Cases Considered: *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

BACKGROUND:

[1] The Town of Blind River (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) from a newspaper requester for access to the following information for the period between November 1, 2014 and April 20, 2015:

- A complete audited breakdown detailing how the municipality (and subsequently North Shore Power Group Inc. (NSPG)) spent the $49.5 million Municipal Infrastructure Lending Program (MILP) loan which was granted to the town in 2010. This would include all projects, investments (such as Plasco) and other projects or spend to which the funds were allocated.

- For the time period specified above, all emails including [named individual] (both sent and received from town operated communication systems and personal accounts such as Gmail, Hotmail, etc.) regarding the MILP loan, negotiations with CMHC, feedback from the community, all communications on the subject of the loan or repayment, as well as any communications with [a named law firm (law firm A)] about NSPG, communications with [another named law firm (law firm B)], communications with [named Mayor and a named individual], and other town councillors, [including] personal email accounts.

- For the time period specified above, all communications from [named Mayor] about the loan, its repayment or any discussion regarding renegotiation or public concern regarding the loan.

- The legal opinion of [law firm B] on the town's finances and specifically its Annual Repayment Limit (ARL) when it was considering taking on the CMHC/MILP loan in 2010. This would have been provided to the town prior to its decision to take on the loan.

- Due diligence documents that were provided to the town prior to the investment in Plasco. Some [of which] have been labeled "confidential".

- For the time period specified above, communications from [named individual] to town officials (elected and appointed) regarding the CMHC MILP loan, NSPG or the re-negotiation of the loan.

[2] The town then issued its preliminary decision letter setting out its fee estimate for processing the request. The letter also advised the requester that:

> With respect to the complete audited breakdown of the MILP requested, please be advised that such documents do not exist. The town is, however, able to provide its most recent audited financial statements for your review. Nevertheless, please consider that these statements may not provide the level of detail you are seeking in respect of the MILP.

> The town has determined it does not have the requested due diligence documents in its custody or under its control. As a result, in accordance with subsection 18(2) of the *Act*, we will be forwarding your request for said documents to [NSPG] and will provide you written notice to confirm once we have done so.

[3] It then provided the appellant with a fee estimate broken down as follows:

Email Correspondence

- Preliminary search
- Third party IT provider: 5.5 hours @ $95/hour = $522.50
- [law firm B] (IT Director working with the Town and its Third Party IT provider): 5 hours @ $95/hour = $475.00
- Software costs: $414.00

Remaining Search

- Third party IT provider: 4 hours @ $95/hour = $380.00
- Manually searching records: 5 hours @ 30/hour = $150.00
- Preparing records for disclosure: 3 hours @ $30/hour = $90.00
- Photocopying: 2000 pages @ $0.20/page = $240.00
- Audited Financial Statements:
- Manually searching records: 15 minutes @ 30/hour = $7.50
- Photocopying: 36 pages @ $0.20/page = $7.20

[4] The town further advised that based on its review of a representative sample of records, it would likely be granting partial access to the responsive records stating in the letter that it would rely on the exemptions at sections 7(1) (advice or recommendations), 9(1) (relations with other governments), 10(1) (third party information), 11 (economic and other interests) and 12 (solicitor-client privilege) of the *Act* to deny access "to all or a portion of some of the responsive records." Finally, the town advised the requester that he may apply for a fee waiver under the *Act*.

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

[6] As a result of the transfer of the request discussed in the town's decision letter, NSPG also issued a decision letter[1]. Amongst other things, NSPG advised the appellant in its letter that:

> … Please be aware that NSPG has no city-operated, nor town-operated communication systems. Our email is located on a POP server not an IMAP server. The result being that once the account holder downloads their email it is deleted from the server.
>
> …
>
> With respect to your request for the legal opinion of [law firm B], NSPG simply does not possess this. If it exists, it would have been provided by [law firm B] directly to the town and is likely subject to privilege.
>
> Moreover, the due diligence binder requested is subject to an existing non-disclosure agreement with Plasco and thus cannot be produced.
>
> …

[7] During the course of mediation, the appellant advised the mediator that he was appealing the amount of the fee estimate, is of the view that additional records should exist with respect to the audited breakdown of the MILP loan and that the due diligence documents are within the town's custody or control. The parties also participated in a telephone conference call to discuss the appeal. At the conclusion of this conference call, the town agreed to review the fee estimate. In addition, the appellant submitted a request for a fee waiver.

[8] The town denied the fee waiver request but subsequently issued a revised decision with respect to its fee estimate for processing the request, indicating that it would waive $414.00 of the fee, representing the amount for the purchase of computer software.

[9] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[10] During the inquiry into the appeal, I sought, and received, representations from the town and from the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] On February 13, 2017, the Divisional Court of Ontario in *Mann v. Ontario (Ministry of the Environment)*[2] (*Mann*) considered the fee waiver provisions found in

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[1] A copy of which was included in the appellant's representations in the appeal. It does not appear that the appellant appealed that decision.
[2] 2017 ONSC 1056.

section 57(4) of the *Freedom of Information and Protection of Privacy Act*[3]. This provision is similar to section 45(4) of *MFIPPA* which is at issue in this appeal. In light of the manner in which the Divisional Court characterized the fee waiver test in *Mann*, I decided to send the parties a letter enclosing a copy of the decision in *Mann* and inviting them to provide me with any additional representations they may wish to make regarding the fee waiver issue, in light of this recent decision. Only the appellant provided representations in response to my letter.

[12] This order partially upholds the town's fee estimate and upholds its decision to deny a fee waiver as well as its decision to transfer the request to another entity.

ISSUES:

A. Should the town's decision to forward the request under section 18(2) of the *Act* be upheld?

B. Should the fee estimate be upheld?

C. Should the fee be waived?

DISCUSSION:

Issue A: Should the town's decision to forward the request under section 18(2) of the *Act* be upheld?

[13] Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[14] Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[4] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[5] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38). The courts and this office have applied a broad

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[3] R.S.O. 1990, c. F.31.
[4] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[5] Order PO-2836.

and liberal approach to the custody or control question.[6]

[15] Section 18 also applies to a request received by an institution. It reads:

> 18 (1) In this section,
>
> "institution" includes an institution as defined in section 2 of the Freedom of Information and Protection of Privacy Act.
>
> (2) The head of an institution that receives a request for access to a record that the institution does not have in its custody or under its control shall make reasonable inquiries to determine whether another institution has custody or control of the record, and, if the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
>
> > (a) forward the request to the other institution; and
> >
> > (b) give written notice to the person who made the request that it has been forwarded to the other institution.
>
> (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
>
> (4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,
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> > (a) the record was originally produced in or for the other institution; or
> >
> > (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.
>
> (5) Where a request is forwarded or transferred under subsection (2) or (3), the request shall be deemed to have been made to the institution to

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[6] *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) cited with approval in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 and Order MO-1251.

> which it is forwarded or transferred on the day the institution to which the request was originally made received it.

The town's representations

[16] The town states that it advised the appellant in its decision letter that it never had the requested due diligence documents in its custody or under its control. The town took the position that these documents were under the custody or control of a third party, NSPG, which it asserts is an institution under the *Act*, and that it forwarded the request to the head of that institution in accordance with section 18(2) of *MFIPPA*. The town submits that the head of NSPG is the appropriate decision maker in respect of access to any record or part of a record under the custody or control of that institution.

[17] The town further submits that it is its understanding that:

> … the requested due diligence documents are subject to a signed non-disclosure agreement. Although the town is not a party to this agreement the town is, nevertheless, bound by its terms given that the town is NSPG's sole shareholder and its councillors are NSPG's directors. This agreement imposes a duty to not disclose the due diligence documents to any third parties except the parties' outside advisors.
>
> Notwithstanding that the due diligence documents are not in the town's custody nor under its control, even if they were, the town is bound not to disclose them under the terms of the above-noted non-disclosure agreement.

[18] The town submits that based on the foregoing, the appellant should properly direct his request for the disclosure of these documents to NSPG's head.

The appellant's representations

[19] In its representations the appellant repeats its concerns about the loan transaction and why the requested records should be disclosed.

[20] With respect to the existence of a non-disclosure agreement, the appellant submits that:

> … on Sept. 28, 2015 it was announced that after a lengthy period of protection under the *Companies Creditors Arrangement Act* (*CCAA*) that Plasco Energy Group, had been broken into numerous pieces and a new company called "Plasco Newco Inc." has emerged … . Plasco Newco Inc. has been sold to RMB Advisory Services and assumed ownership of "intellectual property, financial and business information" … of the former Plasco Energy Group Inc. "All other third party liabilities of Plasco were transferred from Plasco and assumed by an unrelated entity, which

> continues to be subject to the CCAA protection by the Court" … . The former Plasco Energy Group Inc.'s Trail Road demonstration facility, which was used to secure the Town of Blind River's $25 million investment in the firm, has been sold to a liquidator for $487,000 U.S. … .

[21] The appellant submits that as a result of the *CCAA* process, the company known as "Plasco Energy Group Inc." with which the town claims to have had a "signed non-disclosure agreement" no longer exists and this is therefore no longer a "barrier to releasing the documents used to support its investment of the public's funds".

[22] The appellant sets out its view of the circumstances of the MILP loan mechanics, and submits that both the town and an identified individual have stated that they operate independently and that one does not overlap responsibilities with another, which "seems to suggest that the town and NSPG are being run as independent institutions", but the facts do not support this assertion:

> … an Access to Information Request filed with CMHC [identified request] raises a number of flags. The first is the loan agreement … between "the Corporation of the Town of Blind River and CMHC" which is signed by then Blind River Mayor [named individual] and [named individual]. [Named individual's] signature on a loan agreement binding the residents of Blind River to a multi-year loan of $49.5 million suggests that he is more than simply "an officer of NSPG". In this instance he is acting in the role of a Town official.
>
> Furthermore, in correspondence received through the CMHC access request … [named individual], manager of Loans Administration & Direct Lending for CMHC claims that [named individual] has been the point of contact at the Town of Blind River regarding the municipality's loan. He has also been re-negotiating the terms of the loan, on behalf of the town, despite his claims that he is neither an "official" nor an "employee" of the Town of Blind River.

[23] The appellant submits that the town and NSPG cannot claim to be operating as independent institutions when the "head" of one of those institutions is clearly acting in an official capacity for both.

[24] The appellant continues:

> [Named individual] has been acting in a role that is better suited to the town's Treasurer, Mayor or Solicitor. He is directly dealing in the business of "a public body" specifically in the town's finances. While it may appear on paper that the Town of Blind River and NSPG are separate institutions with independent "heads", it appears the reality is anything but that. As a result, the town should not be able to call upon the "Deemed Institutions"

> argument as a viable argument to claim that the documents are not in the "custody" or "under the control" of the Town of Blind River.

The town's reply representations

[25] With respect to the impact that the *CCAA* proceeding had on any non-disclosure agreement the town submits that this office has no authority to interpret the results of this reorganization or to interpret what effect, if any, the *CCAA* proceeding has on its obligations under the aforementioned non-disclosure agreement.

[26] With respect to the appellant's allegations regarding the roles of the named individual, the town submits that the town and NSPG are both deemed "institutions" and have designated their own respective "heads" for the purpose of complying with the *Act*. The town submits that the named individual acting as a "point of contact" with CMHC has no bearing on whether the town and NSPG are each distinct institutions. The town submits that to the extent that the named individual was so acting, he was doing so simply for convenience and to facilitate communication and documentary exchange with CMHC.

[27] With respect to its record retention policies, the town submits:

> Lastly, to reiterate what has already been stated above, the town submits that the IPC has no jurisdiction to adjudicate whether NSPG's retention and IT policies comply with the *Municipal Act, 2001* or the *Archives and Recordkeeping Act, 2006*. Moreover, even if the IPC did have such jurisdiction, which is expressly denied, the town can only respond to its own practices, not those of NSPG. In any event the town submits that these matters are wholly beyond the scope of the present proceeding and it was, therefore, inappropriate for them to have been raised by the appellant.

The appellant's sur-reply representations

[28] In sur-reply the appellant submits that the outcome of the *CCAA* process is vital to determining whether the documents specified are in the custody or under the control of the municipality:

> … With the outcome of the process now clear, we know that the NDA [non-disclosure agreement] raised by the Municipality of Blind River as a barrier to releasing those records has now been removed. The IPC has every right to consider the effect that other legislation, including the *CCAA* process, has on the outcome of these arguments.

[29] The appellant also submits that determining the named individual's role at the town is important in determining whether the records requested are in the custody and control of the municipality:

> I maintain that [named individual's] involvement with the municipality's $49.5 million CMHC loan (which includes his co-signing of the actual loan agreement and ongoing actions as the main point of contact with the lender throughout the years) is evidence that these two institutions are not separate at all, but are in fact acting as one. Any records in [named individual's] possession that comply with the … request should be surrendered as a result.

The appellant adds:

> Finally, I submit that the IPC does in fact have jurisdiction in determining whether NSPG's retention and IT policies comply with the *Archives and Recordkeeping Act, 2006*. In fact, the IPC has had to wade into these issues in the past. In a 2013 Special Investigation Report titled "Deleting Accountability: Records Management Practices of Political Staff … , the previous Information and Privacy Commissioner Ann Cavoukian writes, "Open and transparent government is at the heart of every strong democracy - it is essential to preserving freedom and liberty. Records management processes that require the retention of essentially all documentation are an essential part of the freedom of information process. To put it quite simply, if there is no requirement to retain documentation, then freedom of information legislation is rendered meaningless-full stop."

Analysis and Finding

[30] I begin by noting that the following provisions of *MFIPPA* and Regulation 372/91 enacted under *MFIPPA* deems NSPG to be an institution under *MFIPPA* and, therefore, subject to *MFIPPA*.

[31] Section 2(1) of *MFIPPA* provides that an "institution" means,

> (a) a municipality,
>
> (b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts,
>
> (c) any agency, board, commission, corporation **or other body designated as an institution in the regulations;**

Regulation 372/91 enacted under *MFIPPA* states:

1. (1) The following bodies are designated as institutions:

1. Belmont Improvement Area Board of Management.

2. Each board established for transitional purposes under section 7 of Ontario Regulation 204/03 (Powers of the Minister or a Commission in Implementing a Restructuring Proposal) made under the *Municipal Act, 2001*.

2.1 The Board of Governors of Exhibition Place.

2.2 The Board of Management of the Hummingbird Centre for the Performing Arts.

3. Centre in the Square Inc.

4. Revoked: O. Reg. 48/12, s. 1 (2).

4.1 Every corporation incorporated under section 142 of the Electricity Act, 1998, except,

i. each subsidiary of Hydro One Inc., as "subsidiary" is defined in subsection 2 (1) of that Act, and

ii. Hydro One Brampton Networks Inc.

4.2 The Downtown Improvement Area Board of Management.

4.3 The Hamilton Entertainment and Convention Facilities Inc.

5. Joint committees of management established under the *Community Recreation Centres Act*, all such committees.

6. Kitchener Housing Inc.

6.1 Every local housing corporation incorporated under Part III of the *Social Housing Reform Act, 2000*.

7. Municipal Property Assessment Corporation.

8. Every source protection authority as defined in subsection 2 (1) of the *Clean Water Act, 2006*.

9.-11. Revoked: O. Reg. 343/08, s. 1 (3).

12. Toronto Atmospheric Fund.

[emphasis added by me]

[32] Section 142 of the *Electricity Act, 1998*[7] reads:

> 142 (1) One or more municipal corporations may cause a corporation to be incorporated under the *Business Corporations Act* for the purpose of generating, transmitting, distributing or retailing electricity.
>
> (1.1) A corporation that one or more municipal corporations caused to be incorporated under the *Business Corporations Act* after November 6, 1998 and before May 2, 2003 to acquire, hold, dispose of and otherwise deal with shares of a corporation that was incorporated pursuant to this section shall be considered to be a corporation incorporated pursuant to this section.
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> (2) Not later than the second anniversary of the day this section comes into force, every municipal corporation that generates, transmits, distributes or retails electricity, directly or indirectly, shall cause a corporation to be incorporated under subsection (1) for the purpose of carrying on those activities.
>
> (3) Two or more municipal corporations may incorporate a single corporation for the purpose of complying with subsection (2).
>
> (4) The municipal corporation or corporations that incorporate a corporation pursuant to this section shall subscribe for all the initial shares issued by the corporation that are voting securities.
>
> (5) A municipal corporation may acquire, hold, dispose of and otherwise deal with shares of a corporation incorporated pursuant to this section that carries on business in the municipality.
>
> (6) A corporation incorporated pursuant to this section shall be deemed not to be a local board, public utilities commission or hydro-electric commission for the purposes of any Act.

[33] NSPG is a corporation enacted under section 142 of the *Electricity Act, 1998*[8]; therefore, it is designated as is an institution under Regulation 372/91 enacted under *MFIPPA*. As an institution under section 2(1)(c) of the definition of this term in *MFIPPA*, NSPG is subject to *MFIPPA's* provisions.

[34] The town states that it forwarded the request to NSPG pursuant to section 18(2)

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[7] S.O. 1998, c. 15, Sched. A.

[8] See in this regard Note 1 to the publicly available NSPG Financial Statements for the year ended December 31, 2015.

of the *Act* because it did not have custody or control of the due diligence documentation. In that regard it would appear that the agreement that the due diligence documentation pertains to is a transaction involving NSPG and Plasco Energy Group Inc., or related companies, to which the town was not a party[9]. Accordingly, it is clear that the due diligence documentation is in the custody and control of NSPG and not the town. This is confirmed in NSPG's decision letter to the appellant which effectively acknowledges that NSPG has custody and control of a due diligence binder but has decided not to disclose it. It does not appear that the appellant appealed NSPG's decision.

[35] Although it is not the basis of my decision with respect to this issue, I also pause to note that it would appear that by virtue of the transaction being involving NSPG and Plasco Energy Group Inc., or related companies, and not the town, there is also the foundation for an argument that NSPG would have been considered to have a greater interest in the record, giving rise to a possible transfer under section 18(3) of the *Act*.

[36] As a result, in all the circumstances, I uphold the town's decision to forward the request to NSPG under section 18(2) of the *Act*, and I will not review the position that the town may also arguably have custody or control of the records.

Issue B: Should the fee estimate be upheld?

[37] 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,
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> (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.

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

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[9] See in this regard Note 17 to the publicly available NSPG Financial Statements for the year ended December 31, 2015.

> 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:
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> 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.

[39] Where the fee exceeds $25, an institution must provide the requester with a fee estimate[10]. 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.[11]

[40] The purpose of a fee estimate is to give the requester sufficient information to

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[10] Section 45(3).
[11] Order MO-1699.

make an informed decision on whether or not to pay the fee and pursue access.[12] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[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.[14]

[41] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

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

[42] Section 45(1)(b) includes time for

- severing a record[15]
- a person running reports from a computer system[16]

[43] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[17]

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

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

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

Other costs –Section 45(1)(e)

[45] Section 45(1)(e) 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.[18]

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[12] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[13] Order MO-1520-I.
[14] Orders P-81 and MO-1614.
[15] Order P-4.
[16] Order M-1083.
[17] Orders MO-1169, PO-1721, PO-1834 and PO-1990.
[18] Order MO-1380.

Section 45(1)(e) does not include

- time for responding to the requester[19]
- time for responding to this office during the course of an appeal[20]
- legal costs associated with the request[21]
- comparing records in a request with those in another request for consistency[22]
- GST[23]
- costs, even if invoiced, that would not have been incurred had the request been processed by the institution's staff[24]
- coordinating a search for records[25]

The town's representations

[46] The town submits that its fee estimate was based on a representative sample of the records as well as the advice of its counsel, who is familiar with the type and content of the records.

[47] It submits that in its initial decision letter it advised the appellant that preliminary searches were conducted using a representative sample of keywords. It states that those preliminary searches were conducted by the town's third party IT services provider who houses the servers on which the town's email accounts are located. It submits that the preliminary search yielded an estimated 1000 pages of email records that were potentially responsive to the request. The town states that the appellant was advised that, based on these results, it estimated that a full search could yield as many as 2000 pages of potentially responsive email records. The town states that it provided the appellant with a fully detailed breakdown of the fee in its estimate.

[48] The town further states that although section 45(1)(c) of the *Act* allows for the cost of developing a computer program for the search, it ultimately waived the software costs. The town explained that:

> It should be noted that the software costs under the subheading "Preliminary Search"' were voluntarily waived by the town for the

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[19] Order MO-1380.
[20] Order MO-1380.
[21] Order MO-1380.
[22] Order MO-1532.
[23] Order MO-2274.
[24] Order P-1536.
[25] Order PO-1943.

> requester's benefit. Section 45(1)(c) includes the cost of, inter alia, developing a computer program. It was not actually necessary to develop a computer program as a specialized off-the-shelf solution was available for purchase. It is submitted that had the town refused to waive the cost of this off-the-shelf program it would have otherwise been eligible under section 45(1)(c) given that the town's IT services provider could have developed a custom program as an alternative, but at a much greater cost. In other words, it submitted that section 45(1)(c) was not designed to penalize those seeking to achieve cost efficiencies by using off-the-shelf software as opposed to custom programs.

[49] In addition, based on the town's review of the representative sample, it estimated that partial access to the records would be granted and that the exemptions at sections 7(1), 9(1), 10(1), 11, and 12 of the *Act* may apply to all or a portion of some of the responsive records.

[50] Finally, the town submits that, despite being invited to do so, the appellant did not revise or narrow the request in order to reduce the fee.

The appellant's representations

[51] With respect to the reasonableness of the search fee, the appellant submits that the email searches turned up a total of 363 emails fitting the criteria requested. The appellant submits however, that this does not represent an accurate figure as several of the searches used the same, or similar, search terms and many of those 363 results are duplicates. The appellant submits that, based on the applicable sections of the *Act*, the cost of photocopying those emails is approximately $72.60, or $10 for a CD/DVD, which is vastly different than the estimated fee set out in the town's letter. The appellant further submits that although the *Act* contemplates a user pay principal, "[t]he fees are not meant to be punitive in nature nor are they to act as a barrier to obstruct access to any 'public records'".

[52] The appellant submits that the emails it initially requested encompassed the time period between November 1, 2014 and April 1, 2015, which should negate the need for the purchase of any software. This is because the appellant asserts that the documents requested would be easily accessible using common email search tools which are available to anyone with access to the email accounts, which in the case of the town would be, in the appellant's view, the Town's Clerk/Administrator. The appellant states that it is not asking for documents from a decade ago when software compatibility and archived hardware may pose a barrier to accessing information.

[53] The appellant submits that support for the ease of accessing responsive records is found in the material the town provided with its representations which the appellant asserts indicates that the town's technical advisor took approximately 1.5 hours on May 15, 2015, between 1:16 p.m. and 2:49 p.m., to identify 363 documents that fit the

criteria of the access request. In addition, the appellant submits that "nowhere in that conversation is the purchase of additional software, hardware or fees discussed".

[54] Furthermore, relying on the retention and preservation requirements in section 254(1) of the *Municipal Act, 2001*[26] the appellant submits that:

> Email communications surrounding a response to questions about a municipal issue, such as questions surrounding a controversial $49.5 million CMHC loan, to publicly elected officials (including the Mayor) and municipal employees meet all of the criteria … under Ontario's *Archives and Recordkeeping Act, 2006*[27]. As a result, the municipality has clear legal responsibilities to ensure the accessibility of those records, under both the Ontario's *Archives and Recordkeeping Act*, *2006* and the *Municipal Act*, *2001*, despite its claims that the "Town is a small Northern Ontario community with very limited economic resources". While the spotlight seems to be on
>
> (CEO of North Shore Power Group) [named individual's] communications, the request is farther reaching to officials like [named Mayor], where there shouldn't be any issue in providing records or communications.

[55] The appellant submits that if the town needs to buy or develop software every time it needs to access email archives then it is not meeting its duties under the *Municipal Act, 2001* or the *Archives and Recordkeeping Act, 2006*. The appellant submits that at the very least, this all begs one to ask what the town's official policy is regarding "Record and Retention Schedules" which deal with the above issues and are mandated by law.

[56] The appellant submits that "while the search, which took 1 hour and 33 minutes to complete seems to be reasonable, the fee estimate is not and should be struck down".

The town's reply representations

[57] The town states that although the appellant correctly notes that the preliminary searches the town undertook yielded a total of 363 emails, it incorrectly assumes that each of these messages is equivalent to one page in length. The town states:

> … While the town has not undertaken a page-by-page analysis of these messages it made what it considered a reasonable estimate that these yielded approximately 1,000 pages. The town submits that: To that end,

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[26] *Municipal Act, 2001*, S.O. 2001, c. 25.
[27] *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A. The appellant refers to section 22(1) and the definition of "public record" in that statute.

> in the course of preparing this response, the town had occasion to engage in further discussions with [named individual], its technical advisor. [The town's technical advisor] explained that the results of the preliminary searches were close to 100% accurate based on the terms used. He reiterated, however, that the number of email messages retrieved would likely increase if additional terms were searched.

It is important to note that the town voluntarily waived the cost of the software purchased by [the town's technical advisor] to conduct the above-noted preliminary searches. This waiver was solely for the appellant's benefit. Nonetheless, the appellant contends that the time period at issue, November 1, 2014 to April 1, 2015 should have negated the need to purchase any software. The appellant states this is because "the documents requested would easily be accessible using common email search tools".

> In email correspondence dated December 22, 2015, [the town's technical advisor] stated that using the purchased software (MAPILab Search for Exchange) "provided much faster results than going through individual mailboxes and attempting to export individual items based on the requested criteria's [sic]. The purchase of this software tool probably saved well over 4-6 hours at $100 per hour". Thus, not only was the cost of software waived, the appellant was the direct beneficiary of the efficiencies created through its use. A copy of [the town's technical advisor's] December 22, 2015 email correspondence is attached as [a schedule to the town's reply representations].

[58] The town submits that it is not commenting on the appellant's representations regarding the *Municipal Act, 2001* and the *Archives and Recordkeeping Act, 2006* as the town's position is that the IPC has no authority under those statutes and because they "have no bearing whatsoever on the IPC's determination of the merits of the present appeal."

Appellant's sur-reply representations

[59] The appellant submits that the town seems to suggest that the purchase of "MAPILab Search for Exchange" software was done as some sort of good will gesture. The appellant argues that this is not the case as the purchase of the MAPlLab software allows the municipality to fulfil its responsibilities under document and retention laws, including the *Archives and Recordkeeping Act, 2006* the *Municipal Act, 2001* and *MFIPPA* and:

> … Despite the municipality's claims, this hasn't been done as a favour. Being able to produce records is a responsibility that lies solely on its shoulders. As you are aware, section 10.1 of the *Freedom of Information*

> *and Protection of Privacy Act* [*FIPPA*][28] clearly states: "10.1 Every head of an institution shall ensure reasonable that measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution."

[60] The appellant takes the position that the software was purchased to help the municipality fulfil its legal obligations under various statutes including *MFIPPA* and *FIPPA* and submits that "[t]he expected number of records included in its search has changed repeatedly during the course of these proceedings, leaving me with further doubts about its validity".

Analysis and finding

[61] As the town waived the cost of the purchased software, it is not necessary to address that element of the fee estimate any further. The fees apportioned to the third party IT provider will be addressed below.

[62] With respect to the appellant's position that the town could have used a simpler method to conduct the search, I accept the town's evidence that utilizing the software actually reduced the search time. I am not going to comment on the town's record keeping practices other than to refer to Order PO-2904, where I wrote:

> This office has previously stated that government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed [See the postscript to Order M-583]. However, this office has also stated that institutions have an obligation to maintain their electronic records in formats that ensure expeditious access and disclosure in a manner or form that is accessible by all members of the public. In the electronic age, this is essential for an open and transparent government institution. [See Order MO-2199]. Furthermore, in the postscript to Order P-1572, former Assistant Commissioner Mitchinson emphasized that as parts of government become increasingly reliant on electronic databases to deliver their programs, it is critically important that public accessibility considerations be part of the decision-making process on any new systems design.

[63] I also make no comment on the appellant's concerns about NSPG's record keeping practices as the NSPG's decision letter is not the subject of this appeal nor is NSPG a party to the appeal before me.

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[28] R.S.O. 1990, c. F.31.

[64] That said, I do have concerns about the town's fee estimate.

[65] It appears that the town seeks to charge the appellant for the legal costs relating to the search. While search time is allowed for someone who is familiar with the type and content of a record, that does not contemplate delegating the task to a law firm. In my view, the legal costs associated with the appellant's access request are not contemplated by section 45(1)(e) or any other provision of section 45(1)[29]. In that regard, I agree with the determination in Order MO-1380 and also find that section 45(1)(e) is intended to cover general *administrative* costs resulting from requests which are similar in nature to those listed in paragraphs (a) through (d), but not specifically mentioned.

[66] I am also troubled by the claim for the third party IT provider. In Order MO-2492, this office upheld the time required to extract emails from backup databases as search time for which an institution is entitled to charge a fee under section 45(1)(a) of the *Act*. This office has also stated that time spent by an individual in running reports from a computer system is covered by section 45(1)(b)[30]. Although the search was conducted by the third party IT provider the town has not explained why the cost being claimed was the sum of $95.00 for each hour, nor provided an invoice from the third party IT provider in support of this claim. I note that if the town's own staff conducted the search, which is what the *Act* contemplates[31], it would only have been entitled to charge $7.50 for each 15 minutes of time spent searching for responsive records for disclosure. The fee estimate indicates that the IT provider spent 5.5 hours on the preliminary search and 4 hours for the remaining search. In my view, in all the circumstances, the town should be allowed to claim for this time but this amount should be reduced to $30.00 an hour.

[67] In all other respects, I accept that the town has provided me with sufficient evidence to establish the estimated fees claimed, including the estimated photocopying costs, save for the correction of a multiplication error as 2000 pages @ $0.20/page = $400.00

[68] As a result of my findings above the fee estimate shall be revised as follows:

Email Correspondence

- Preliminary search
- Time to conduct search and run computer reports: 5.5 hours @ $30/hour = 165.00

[29] See Order MO-1380.
[30] See Order M-1083.
[31] See Order P-1536.

Remaining search

- Time to conduct search and run computer reports: 4 hours @ $30/hour = 120.00
- Preparing records for disclosure: 3 hours @ $30/hour = $90.00
- Photocopying: 2000 pages @ $0.20/page = $400.00

Audited Financial Statements:

- Manually searching records: 15 minutes @ $30/hour = $7.50
- Photocopying: 36 pages @ $0.20/page = $7.20

Issue C: Should the fee be waived?

General principles

[69] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> > (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
> >
> > (b) whether the payment will cause a financial hardship for the person requesting the record;
> >
> > (c) whether dissemination of the record will benefit public health or safety; and
> >
> > (d) any other matter prescribed by the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> > 1. Whether the person requesting access to the record is given access to it.

> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[70] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 6 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.[32]

[71] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.[33] Furthermore, the institution or this office may decide that only a portion of the fee should be waived.[34]

Section 45(4)(b): financial hardship

[72] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.[35] For section 45(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.[36]

Section 45(4)(c): public health or safety

[73] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
    a. disclosing a public health or safety concern, or

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[32] Order PO-2726.
[33] Orders M-914, P-474, P-1393 and PO-1953-F.
[34] Order MO-1243.
[35] Order P-1402.
[36] Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

b. contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record [37]

Part 2: fair and equitable

[74] For a fee waiver to be granted under section 45(4), it must be "fair and equitable" in the circumstances. In addition to the factors specifically identified in section 45(4), relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.[38]

[75] In *Mann*[39], the Divisional Court wrote the following with respect to the fee waiver provision in the Federal Act:

> [6] As is apparent from the plain wording of the subsection, waiver of "all or any part" of an amount required to be paid is mandatory, if the head determines, in his or her opinion, that it is fair and equitable to do so, after considering the factors outlined in the subsection.
>
> [7] … There is only one requirement in the subsection for waiver of all or any part of a fee and that is whether, in the opinion of the head, it is fair and equitable to do so. The head is guided in that determination by

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[37] Orders P-2, P-474, PO-1953-F and PO-1962.
[38] Orders M-166, M-408 and PO-1953-F.
[39] Referenced at paragraph 11 above.

the factors set out in the subsection, but it remains the fact that the sole test is whether any waiver would be fair and equitable.

[8] The Adjudicator considered the facts of this particular case. She found that the dissemination of the records would benefit public health or safety, but concluded, nonetheless, that it would not be fair and equitable to grant a waiver. In reaching that conclusion, the Adjudicator began by noting that the fee provisions in the Act established a user-pay principle, which is:

> … founded on the premise that requestors should be expected to carry at least a portion of the cost of processing a request.

[9] The Adjudicator then went on to set out a number of factors that might be considered in deciding whether it was fair and equitable to waive the fees. She noted that the applicant had not addressed this issue directly in his submissions. She also noted that the applicant had not attempted to work with the [Ministry of the Environment] to narrow the scope of his request. She further noted that she had already reduced the fee that the applicant would have to pay from $660 to $385. Contrary to the applicant's submission, it is clear that the Adjudicator considered the "overcharging" in reaching her conclusion regarding what was fair and equitable in this case.

[10] While the applicant has attempted to compartmentalize the Adjudicator's reasons in an effort to show error, the fact is that he has not been able to point to any error or omission in the Adjudicator's overall analysis. Rather, he asserts simply that the fee should be waived because the information sought would benefit public health and safety. The applicant's position would be correct if s. 57(4) required a waiver solely on that basis. However, it does not. It requires that the waiver be fair and equitable in the opinion of the head. A finding that the former exists does not dictate that the latter must follow.

[11] The requirement that a waiver must be fair and equitable gives the head a broad range of discretion in reaching his/her opinion. I am unable to find anything in the record, in this case, that could sustain a finding that the Adjudicator's decision did not fall within a range of possible, acceptable outcomes that are defensible.

The town's representations

[76] The town submits that the only criteria cited by the appellant in its fee waiver request is that dissemination of the record will benefit public health or safety.

[77] The town submits that the requested records all pertain to the MILP loan and

that the appellant has failed to provide sufficient evidence to establish that dissemination of any responsive records could relate to public health or safety. Furthermore, the town submits that the appellant did not initially allege that the fee estimate provided by the town represents a financial burden for the newspaper.

[78] The town further submits that granting a fee waiver would not be fair or equitable:

> … given that the town is a small Northern Ontario community with very limited economic resources. In contrast, the appellant represents a large national newspaper … which undoubtedly makes numerous information requests as part of its daily operations.

[79] Moreover, the town submits that granting the requester a fee waiver would unreasonably shift the burden of the cost of his request to the town, its staff, and ultimately its taxpayers.

The appellant's representations

[80] The appellant submits that examples of "public safety" are quite broad. The appellant then recounts the financial limits placed on all municipalities under the *Municipal Act, 2001*[40] and how the appellant believes the town negatively impacted its annual repayment limit. The appellant alleges that:

> … due to its decision to take on the CMHC loan the town will find it incredibly difficult to secure any monies for any capital projects over the next 22 years (the term of the new loan agreement with CMHC). Meaning, should the town need money … it may not be able to secure any. The decision to take on $49.5 million in debt for a solar project that never occurred has put the town's finances and future in peril. Without the ability to borrow funds to build infrastructure or respond to an emergency, the municipality is putting its citizens at risk.
>
> Shedding any light on the decision making process behind how this loan was approved, how these funds were appropriated and ultimately how they were spent is all in the best interests of the residents of the Town of Blind River and should be provided at no charge as current debt load carried by the municipality is the "connection" between the public interest issue and ensuring the health and safety of the residents in the future.

The town's reply representations

[81] The town submits that the appellant's "unfounded and unsubstantiated

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[40] The appellant refers to Ontario Regulation 403/02 to the *Municipal Act, 2001*.

allegations about how the town supposedly exceeded the financial limits placed on it", which the town denies, "are scandalous and added purely for colour" as this appeal solely concerns whether the town's fee estimate should be waived.

Appellant's sur-reply representations

[82] The appellant adds in sur-reply that the newspaper is a local daily newspaper, not a "national newspaper" as the town claims. The appellant submits:

> … We have limited resources and massive budget pressures that make any additional spend extremely unlikely. To paint the [newspaper] as some organization sitting on a massive pile of money is false and misleading.

The appellant's additional representations

[83] Although the appellant was invited only to comment on the recent Divisional Court decision in *Mann*, he provided no specific representations on the decision. Rather, he repeated his earlier submissions. He also raised an allegation of conflict of interest against an individual named in his request. I will not be addressing that allegation in this order.

Analysis and finding

[84] On review of the representations and material before me, I conclude that dissemination of the information contained in the responsive records would not benefit public health or safety for the purposes of section 45(4)(c). The evidence before me does not suggest that any of the responsive records relate to public health or safety in any way that supports a fee waiver. The connection made by the appellant between the current debt load carried by the town and public health or safety concerns is highly tenuous. Furthermore, even if it had been explicitly claimed, the appellant has failed to provide the requisite evidence to support a fee waiver based on financial hardship under section 45(4)(b).

[85] On my review of the circumstances surrounding the appellant's original request, I am satisfied that the town responded appropriately to the request. The town also waived the cost of the software purchase. I find that these factors weigh against granting a fee waiver. I also note that I have reduced the fee estimate in this decision.

[86] Furthermore, an important factor to consider is if a waiver of the fee would shift an unreasonable burden of the cost from the appellant to the town. After considering all of the circumstances, as well as the town's voluntary reduction of the fee estimate, I find that this factor weighs against granting a fee waiver.

[87] Considering the factors that are relevant in deciding whether granting a fee waiver would be "fair and equitable," I have concluded that the factors that weigh

against doing so outweigh those in favour. Accordingly, it is not fair and equitable in the circumstances for the town to waive the fee.

Final Matter

[88] As I have upheld a fee estimate that exceeds $100 and denied a fee waiver, if the head of the town requests a deposit equal to 50 per cent of the fee estimate in accordance with section 7(1) of regulation 823, and the appellant pays the requested amount, and the request is processed, should the appellant decide to do so it may then appeal the reasonableness of the town's search for records that are responsive to its request for:

> a complete audited breakdown detailing how the municipality (and subsequently North Shore Power Group Inc. (NSPG)) spent the $49.5 million Municipal Infrastructure Lending Program (MILP) loan which was granted to the town in 2010. This would include all projects, investments (such as Plasco) and other projects or spend to which the funds were allocated.

ORDER:

1. I order that the town's fee estimate shall be revised as set out in paragraph 68 of this Order.

2. I uphold the town's denial of a fee waiver.

3. if the head requests a deposit equal to 50 per cent of the fee estimate in accordance with section 7(1) of regulation 823, and the appellant pays the requested amount, and the request is processed, should the appellant decide to do so it may then appeal the reasonableness of the town's search for records that are responsive to its request for:

> complete audited breakdown detailing how the municipality (and subsequently North Shore Power Group Inc. (NSPG)) spent the $49.5 million Municipal Infrastructure Lending Program (MILP) loan which was granted to the town in 2010. This would include all projects, investments (such as Plasco) and other projects or spend to which the funds were allocated.

Original Signed by: July 12, 2017

Steven Faughnan
Adjudicator