

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3652

Appeal MA16-243

County of Norfolk

August 21, 2018

Summary: The County of Norfolk (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records that reference the appellant dated between 2007 and March 31, 2016. In this order, the adjudicator reduces the county's fee estimate from \$2,797.50 to \$790.00.

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

Orders Considered: Order PO-3818.

OVERVIEW:

[1] The County of Norfolk (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to the following information:

1. In accordance with Order MO-3281 - Oshawa Decision I am requesting copies (digital) of any and all materials, correspondence, emails, minutes of meetings of council and staff that directly or indirectly reference myself collected or generated by staff or members of council and outside agencies or persons between the years of 2007 and March 31, 2016.

2. There will be virtually no research time since the municipality has a computerized records management by-law /system whereby these types of records have specific file designations in accordance with The Ontario Municipal Records Management System (TOMRMS) for instant retrieval. All materials requested were to [be] filed in accordance with the TOMRMS system and the bylaws for the Municipal Act.

[2] In response, the county provided an interim access decision with a fee estimate. The county's decision stated as follows:

An initial review of the records indicates that it will cost an estimated \$2,797.50 to process your request. The fee estimate is based on the amount of time needed to search, retrieve and review records for disclosure. The total [number] of hours is based on the number of staff hours required.

The Municipal Freedom of Information and Protection of Privacy Act outlines the fees for searching, retrieving and reviewing documents for disclosure. The cost is \$7.50 per 15 minutes [and] it has been estimated that it will take approximately 93.25 hours to search, retrieve and review all the emails, electronic records and paper records for the number of years that you have indicated in your request. There would also be the cost of photocopying, \$.20 per sheet, which an estimate cannot be made at this time.

MFIPPA Regulations 460/823 - section 7 states where the fee estimate is over \$100.00, an institution may request a deposit equal to 50% of the estimated fee. We will wait until we receive the amount of \$1,398.75 from you before we resume processing this request.

[3] The requester, now the appellant, appealed this decision to this office.

[4] During the mediation process, the appellant advised that he was appealing the calculation of the fee estimate on the basis that the fee estimate was excessive.

[5] The county confirmed the fee estimate based on the details of the appellant's initial request. The county advised that it was willing to revisit the fee estimate if the appellant provided clarification of the request or narrowed the scope of the request.

[6] The appellant confirmed his initial request and asked that the file move to the next stage of the appeals process.

[7] Accordingly, this file proceeded to adjudication, where an adjudicator conducts an inquiry. Representations were sought and 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 order a reduction in the county's fee estimate from \$2,797.50 to \$790.00.

DISCUSSION:

Should the fee estimate of \$2,797.50 be upheld?

[9] An institution must advise the requester of the applicable fee where the fee is \$25 or less.

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

[11] 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

[12] 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

[13] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

[14] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁵

[15] 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.

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

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;

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.

[17] More specific provisions regarding fees are found in sections 6, 6.1, 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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

- 1. For photocopies and computer printouts, 20 cents per page.
- 2. For records provided on CD-ROMs, \$10 for each CD-ROM.
- 3. 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.

4. 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.

[18] The county states that because of the significant hours of staff time needed to conduct the search for records related to this request, no search has been undertaken at this time. It states that its staff has estimated the number of hours it would take to search through their respective department/division. The county provided an index of records detailing emails that were located in response to part 1 of the request.

[19] Concerning part 2 of the appellant's request, the county states that TOMRMS is used to index the paper records contained in files and boxes but that this system does not identify every document contained in the file or box, so there would still be the need to search each record to see if it contained responsive information. As well, it states that TOMRMS does not give records management staff the ability to do a word search instantaneously.

[20] The county further states that its information systems services would be able to do a word search in the electronic documents backup tapes, but at this time it does not have a program that would allow the staff to search all electronic documents on all network drives.

[21] The county states that the request for information was sent to all management positions in the county, as well as to the mayor and to council. It states:

Each department/division was asked to provide an estimate of time to search and retrieve any records related [to the request].

Many departments and divisions responded that they had no records in response to the request.

Where there was a response that records may be housed in a specific area, then an estimate was given on how much time it would take to

search and retrieve. No action was taken to produce the records until the Records Management/FOI⁶ Coordinator sent out the fee estimate and a commitment was made by the [appellant] to pay 50% of the estimated payment...

The largest searches would be in drainage, information services, and the clerk's office as the [appellant] is very involved in an on-going drainage issue...

The appellant did not respond to our request to clarify the request...

[22] The appellant states that he relies on Regulation 823 of *MFIPPA* whereby no time or search charges can be levied for access to his own personal information.

[23] In reply, the county states that there are a very large number of legal actions commenced by the appellant against the county and, as a result, all files associated with this individual require both search and review for release.

[24] The county states that it cannot verify that there are any files that would be deemed personal information under the *Act*. It notes that the appellant does not have an employment file, medical file or Ontario Works client file and, as the appellant does not own any property in the county, there are no property files, tax files or any other personal information bank records, other than the legal action files.

[25] In sur-reply, the appellant merely repeats that no fees can be charged for records containing his personal information. He does not dispute the county's claim that it does not have any files that contain information that it would deem as containing the appellant's personal information. Nor does the appellant explain how any of his information in the responsive records would constitute his personal information.

Analysis/Findings

[26] In this appeal, the county based its fee estimate on the advice of individuals who are familiar with the type and contents of the requested records.

[27] In its decision letter, the county estimated the search and preparation time as 93.25 hours at the cost of \$2,797.50 using the rate allowed by section 6 of Regulation 823 of \$7.50 per 15 minutes.

[28] In its representations, the county provided copies of two detailed memorandums it sent, as follows:

To: Corporate Leadership Team

⁶ Freedom of Information.

From: [name], Records Management/FOI Coordinator

...

Re: Freedom of Information Request [#]

A request has been made under [MFFIPA] and it concerns records which we believe to be in the custody of your department or division.

Please conduct a complete and thorough search for all information within your department that relates to the following FOI request: [wording of request]...

[29] It sent the same memorandum to the "Norfolk County Councillors."

[30] The county also provided an Index of Records that it has on file for this request. The county indicated on the index its searches for the following records:

Emails from Staff Members - No Records Found

[Names and titles of 17 staff members and five councillors]

Emails with Attached Records or Other Related Information

[Names and titles of seven staff members]

[This] is a list of emails that included documents that are related to the request that were received by the Records Management/FOI Coordinator.

Emails Containing Written Estimates of Search Time for Related Records to Request

[Names and titles of six staff members]

7. No Date - FOI Coordinator to Review and Redact

[31] I find that I have conflicting evidence as to whether actual searches were conducted by the county for responsive records.

[32] The county appears to have conducted searches as evidenced by its Index of Records. For example, regarding the heading "Emails with Attached Records or Other Related Information," the county states that this list of emails that includes documents that are related to the request that were received by the Records Management/FOI Coordinator. [Emphasis added by me].

[33] However, the county also states in its representations that:

Because of the significant hours of staff time needed to conduct the search for records related to this request no search has been undertaken at this time. Staff has estimated the number of hours it would take to search through the respective under the department/division's control or custody. [Emphasis added by me].

[34] The county states that where there are responsive records that may be housed in a specific area, an estimate was given on how much time it would take to search and retrieve those records. Despite this statement, however no estimates of time were actually provided for searches in specific areas. As well, the county did not provide a breakdown of how it arrived at its fee time estimate of 93.25 hours.

[35] As well, the county's Index of Records includes a listing of the FOI Coordinator's records to process the request. There is no indication as to whether the time needed to locate these non-responsive records was included in the county's 93.25 hour fee estimate.

[36] I find that I do not have sufficient evidence to support a finding that a fee estimate of 93.25 hours is reasonable. In making this finding, I have taken into account that the county does not have the type of TOMRMS search software referred to by the appellant in part 2 of his request.

[37] Nevertheless, I find that due to the scope of the request, the county is entitled to charge a fee estimate.

[38] I had added the issue of the scope of the request to this appeal and asked the appellant in the Notice of Inquiry to address this issue. The appellant did not respond to this issue. Therefore, the request is as set out above, namely:

...all materials, correspondence, emails, minutes of meetings of council and staff that directly or indirectly reference [the appellant] collected or generated by staff or members of council and outside agencies or persons between the years of 2007 and March 31, 2016...

[39] I find that this is quite a broad request for numerous records covering a nine-year period. The appellant was offered an opportunity to clarify or narrow his request by the county or define the scope of the request in response to the Notice of Inquiry, but did not do so.

[40] The appellant maintains that no search fee should be charged as the records contain his personal information. The county disputes this and indicated that the appellant did not have an employment, medical, Ontario Works, property file, or tax file with the county. In his sur-reply representations, the appellant did not dispute this claim by the city or provide any evidence of what type of responsive county record

would contain his personal information.

[41] I find that I do not have sufficient evidence to find that the records contain the personal information of the appellant and that the fee estimate should be disallowed on the basis of section 6.1 of Regulation 823. Therefore, the applicable section is section 6 of Regulation 823 which allows for a search and preparation fee.

[42] The county in its decision letter advised that "...it has been estimated that it will take approximately 93.25 hours to search, retrieve and review all the emails, electronic records and paper records."

[43] In the Notice of Inquiry, the county was asked regarding the search time:

How are the requested records kept and maintained?

What actions are necessary to locate the requested records? What is the estimated or actual amount of time involved in each action?

[44] The county was also advised concerning the preparation time that section 45(1)(b) does not include time for

- deciding whether or not to claim an exemption⁷
- identifying records requiring severing⁸
- identifying and preparing records requiring third party notice⁹
- removing paper clips, tape and staples and packaging records for shipment¹⁰
- transporting records to the mailroom or arranging for courier service¹¹
- assembling information and proofing data¹²
- photocopying¹³
- preparing an index of records or a decision letter¹⁴

⁷ Orders P-4, M-376 and P-1536.

⁸ Order MO-1380.

⁹ Order MO-1380.

¹⁰ Order PO-2574.

¹¹ Order P-4.

¹² Order M-1083.

¹³ Orders P-184 and P-890.

¹⁴ Orders P-741 and P-1536.

- re-filing and re-storing records to their original state after they have been reviewed and copied¹⁵

[45] The county did not respond to these questions regarding either the search time or the preparation time.

[46] The county indicates that its 93.25 hours includes time for "reviewing" the records. The county was asked regarding section 45(1)(b):

What actions are required to prepare the records for disclosure? What amount of time is involved in each action?

[47] I cannot ascertain from the county's representations if its review of the records includes time for non-allowable time under section 45(1)(b) as set out above.

[48] The county has not provided me with a breakdown as to how much time it estimates spending to search for responsive records, nor how much time it actually has spent on any search for records. Nor has the county indicated what actions are necessary to locate the requested records, including what searches need to be undertaken for electronic records and for paper records.

[49] As well, the county has not provided details as to what time it estimates for preparation time and what actions it needs to undertake to prepare the records for disclosure.

[50] The county has indicated in its Index of Records that there are responsive records and that 13 staff members should have responsive records.¹⁶

[51] In the circumstances of this appeal, taking into account the wording of the request and the county's representations and its Index of Records, I find that a reasonable search and preparation fee time estimate for the 13 people who may have responsive records is 26 hours, being two hours per person, which at a fee of \$7.50 per 15 minutes equals \$780.00.

[52] Section 45(1)(c) allows an institution to charge for the cost of CD-ROMs. The appellant has sought to receive copies of the records on a USB instead of a CD-ROM. The county has agreed to do this.

[53] Section 6.1 of Regulation 823 allows an institution to charge \$10.00 per CD-ROM for records provided on CD-ROMs. In Order PO-3818, the institution in that appeal was allowed to charge \$10.00 for records on a USB stick. Therefore, I will allow the county to charge this fee to the appellant. Concerning the fee estimate, I do not have evidence

¹⁵ Order PO-2574.

¹⁶ As per the county's Index of Records under headings "Emails with Attached Records or Other Related Information" and "Emails Containing Written Estimates of Search Time for Related Records to Request."

from the county as to how many USB sticks it will require. Therefore, for the fee estimate, I will also allow a fee of \$10.00 for one USB stick.

Conclusion

[54] In conclusion I have reduced the fee estimate to \$790.00, representing 26 hours of estimated time for search and preparation time, being \$780.00, and \$10.00 for one USB, for a total of \$790.00.

ORDER:

I order a reduction in the county's fee estimate from \$2,797.50 to \$790.00.

Original Signed by: _____
Diane Smith
Adjudicator

_____ August 21, 2018