

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3940

Appeal MA19-00479

Township of North Dumfries

August 4, 2020

Summary: The Township of North Dumfries (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records relating to a specific property, the requester and/or a named company. The township issued a final access and fee decision granting partial access to the responsive records. In this order, the adjudicator adjudicates upon the fee issue and reduces the final fee.

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

Orders Considered: Orders MO-2530 and PO-3152.

OVERVIEW:

[1] The Township of North Dumfries (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records relating to a specific property, the requester and/or a named company from January 1, 2009 to the date of the request. The requester went on to specify as follows:

This is including, but not limited to, any and all records or documents related to:

- Importation of dumping or fill;
- Importation of chemical fill; and/or

- Alteration of grade to the Property.

Such documents include, but are not limited to, any:

- Plans;
- Drawings;
- Licenses;
- Applications;
- Drafts;
- Hand-written notes;
- Permits or letters of permission;
- Letters;
- Emails;
- Internal correspondence;
- Correspondence with the Region of Waterloo;
- Correspondence with [specified group];
- Correspondence with [second specified group];
- Correspondence with [specified conservation authority]; or
- Correspondence with any transportation companies.

[2] The township issued an interim decision that included a fee estimate in the amount of \$4,435 and a time extension. The requester, now the appellant, appealed the township's decision and Appeal MA18-00732 was opened. During mediation, the township issued a revised fee estimate, reducing the fee estimate to \$1,875. The appellant paid the requested 50% deposit and agreed to the time extension. As a result, Appeal MA18-00732 was closed.

[3] The township subsequently issued a second interim decision that included an increased fee estimate in the amount of \$5,520 and sought an additional time extension. The appellant appealed the township's revised fee estimate and time extension and Appeal MA19-00332 was opened.

[4] Subsequently, the township issued a final access decision granting partial access to the requested records. The remaining records were withheld under sections 6(1)(b)

(closed meeting), 8(1) (law enforcement), 10(1) (third party information), 12 (solicitor-client privilege), 14(1) (personal privacy) and 15 (relations with other governments) of the *Act*. The township also provided a final fee breakdown for processing the request, totaling \$5,520.

[5] The appellant appealed the final access decision and the final fee of \$5,250. As a result, Appeal MA19-00332 was closed, and a new appeal, Appeal MA19-00479, was opened to deal with both the township's access decision and final fee.

[6] During the course of mediation, the appellant requested that the adjudicator address only the fee issue at this time. The township did not object. Therefore, the file was transferred to the adjudication stage for an inquiry.

[7] I agreed to consider only the fee issue, initially. The application of the claimed exemptions to the records, therefore, will only be adjudicated upon request by the appellant following this order determining the fee.

[8] Representations on the \$5,250 fee issue were sought from, and exchanged between, the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[9] In this order, I reduce the township's fee to \$2,445 from the final fee charged by the township of \$5,250, based on a reduction in the allowable preparation fee.

DISCUSSION:

Should the \$5,250 fee be upheld?

[10] 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.

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

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

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and

(e) any other costs incurred in responding to a request for access to a record.

[12] 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.

Representations

The township's representations

[13] By way of background, the township states that it has been involved in ongoing litigation with the appellant that has spanned a decade, and has included several different litigation hearings with the township, as well as the involvement of other outside agencies and organizations.

[14] The township states that since the township lawyer is an external lawyer, and was involved with the appellant for such a long period of time, many of the requested records were stored by the township lawyer off-site. The township did not charge a fee for the incurred additional costs associated with receiving legal advice pertaining to the records involved in this matter.

[15] The township states that the staff members responsible for the original fee estimates were newly employed with the township and did not understand the prolonged history of this request, which spanned numerous years and included detailed records with by-law enforcement and building department personnel. Once the task of identifying the responsive records commenced, two staff members were required to complete the task over a number of months due to the extensive record keeping by these staff. The building and by-law enforcement staff were no longer employed with the township so their extensive knowledge of the file details was not available for the estimate of time to be spent on the request.

[16] The township states that the fee estimate that accompanied the interim access decision was based on a representative sample of the records, whereas the final fee and access decision letter reflects the actual work required to complete this request.

[17] The township states that its staff did not anticipate just how much information would need to be redacted in accordance with the Act until it actually came time to begin severing the records.

[18] The township states that the records pertaining to this request included by-law

notebooks, notes by staff, correspondence, investigations and emails. Files were maintained by a number of different employees, as well as by a number of employees who are no longer with the township. Actions taken to locate requested records include: manually searching for records that had been filed in file rooms/boxes (8 hours), former employees' email and former employee's computer drives (4 hours) and reviewing notebooks for information relevant to the request (5 hours).

[19] The township states that the preparation time to prepare the records for disclosure included severing the records (123 hours), restoring records from a backup (4 hours) and scanning paper records (40 hours). The township states that the records have been scanned and saved on a USB for disclosure, as the appellant asked that he receive electronic copies of the records. As such, it states that, costs associated with scanning the records were included in the fee.

[20] The township states that there have been no shipping costs involved in this request, or correspondence to notify affected parties. Other costs associated with this request include overhead for the Chief Administrative Officer and Director of Corporate Services to review the process followed by staff in fulfilling the request.

The appellant's representations

[21] The appellant states that the township had knowledge of, or ought to have had knowledge of, the scope of the request at the time that the initial fee estimate was prepared.

[22] The appellant states that in its fee estimate, the township anticipated that there would be 1,201 more pages of responsive documents than it ended up locating. As such, he submits that the township was aware of the scope of the responsive records at the time it issued the revised fee estimate of \$1,875.

[23] In addition, the appellant states that the township knew or ought to have known of the significant redactions required at the time it issued the initial fee estimate and the revised fee estimate of \$1,875.

[24] The appellant submits that the township staff were aware of the ongoing litigation prior to issuing the fee estimates as its letters in September and October 2018 stated:

...the township has spoken to our lawyer, as there may be matters that fall within solicitor/client privilege...

...the review of documents for solicitor-client privileged documents is necessary given that there is currently ongoing litigation between the township and [the appellant].

[25] The appellant refers to the township's statement that many of the records at

issue have previously been provided to him in litigation proceedings, and he submits that this is evidence the township was clearly aware of the full scope of the ongoing and historical litigation at the time they prepared the revised fee estimate of \$1,875.

[26] The appellant submits that the township breached the settlement at mediation of the fee estimate of \$1,875, which resulted in his fee estimate appeal being closed at mediation.

[27] The appellant concludes that the township has acted in a procedurally unfair manner in that:

- a. He has a right to access the requested documents;
- b. The documents requested are of particular importance to him as these documents relate to him personally and to his property;
- c. He reasonably expected that the township would abide by the agreement when the revised fee estimate of \$1,875 was reached and mutually agreed to by both parties;
- d. The purpose of the interim access decision and fee estimate procedure is to provide the requester with sufficient information to make an informed decision regarding payment of fees; and
- e. The township has acted in a high-handed manner by grossly misrepresenting the revised fee estimate of \$1,875 to him.

[28] The appellant submits that the fee charged includes legal fees under the guise of administration fees.

[29] The appellant states that the township has included in its final fee decision 8 hours of search time and 27 hours of preparation time by its lawyer, which includes "reviewing documents, determining exemptions and applying redactions." The appellant notes that the fees for this work amount to \$1,050.00 and should not be allowed.

[30] The appellant notes the huge discrepancy between the 117 hours of preparation fee charged and its estimated preparation fee of 15 hours (which equates to a preparation fee of \$450).

[31] The appellant submits that the township was responsible for taking whatever steps were necessary to ensure that the fee estimate was based on a reasonable understanding of the costs involved and it failed to do so. As such, the appellant states that the township should not be able to charge the extensive preparation fees now being claimed.

[32] The appellant submits that as the fee estimate was inaccurate, I should reduce the township's fee from \$5,520 to the amount of the \$1,875 fee estimate.

The township's reply representations

[33] In reply, the township states that until it actually began reviewing each record one-by-one and applying redactions, it could not have foreseen the extensive work required for the records. It notes that several of the records are almost completely severed, with only a few words visible.

[34] The township submits that its lawyer's involvement was critical, as none of the staff involved in this request had the history with the township and its litigation with the appellant.

[35] The township states that it experienced extensive staff turnover in the past five years, including the Chief Administrative Officer, Clerk, Treasurer/Director of Corporate Services, Deputy Clerk, and by-law enforcement officers.

[36] The township disputes that it has breached a settlement agreement reached during mediation. It states that it is permitted to charge fees for preparing the records for disclosure. The township states that its fee estimate was based on a review of a representative sample of the records, since knowledgeable institution staff who were familiar with the type and content of records were not available.

[37] The township submits that the decision reached pertaining to the fee estimate was not a binding settlement as to the final fee, as the final fee is reflective of the actual work required to complete the work to process the request.

[38] The township maintains that the final fee provided to the appellant does not contain any legal fees incurred by it during this process. It states that the final fee provided to the appellant accurately represents all work completed by the township.

[39] The township states that the costs were broken down by the locations where records relevant to this request are housed, which included records held by the township's lawyer.

[40] The township states that it did not intentionally leave some fees out in the fee estimate with the intent to charge them in the final decision.

[41] The township submits that this case is distinguishable from Order MO-3360. It states that in Order MO-3360, the adjudicator found that the interim access decision was inadequate because of:

- the flawed nature of the representative sample of records on which it was based,
- it did not indicate whether any exemptions would be claimed, and
- a different fee structure should have been used.

[42] The township maintains that, in this case, a thorough review was conducted, it

provided as much information as possible at the time, and sufficient representative samples were used.

The appellant's sur-reply representations

[43] In sur-reply, the appellant submits that the township must consider the extent of redactions required when it prepares a fee estimate based on a representative sample. He states that it is not sufficient to only consider this when the township prepares the documents for disclosure.

[44] The appellant submits that whether the township staff had knowledge of the ongoing litigation is irrelevant because the fee estimate was prepared based on a representative sample.

[45] Finally, the appellant submits that in preparing its fee estimate, the township failed to consider the extent of redactions required, therefore, it could not possibly have prepared the revised fee estimate based on as much information as possible at the time.

Analysis/Findings

[46] In this appeal, the township's fee estimate was \$1,875 and its final fee was \$5,250. The final fee of \$5,250 comprises 17 hours for search time and 167 hours for preparation time.

[47] 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.¹

[48] 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.²

[49] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.³

[50] In all cases, the institution must include a detailed breakdown of the fee, and a

¹ Order MO-1699.

² Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

³ Order MO-1520-I.

detailed statement as to how the fee was calculated.⁴

[51] 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 above.

[52] I have not been provided with evidence that the information at issue in the records contains the personal information of the appellant. This being the case, there is no basis upon which to find that section 6.1 of Regulation 823 is applicable to the fee in this appeal. Section 6.1 dispenses with search and preparation fees for records that contain a requester's personal information. Both the township and the appellant were provided with a copy of section 6.1 and asked to provide representations on this section.

[53] In this case, the township based its \$1,875 fee estimate on a representative sample of records, not on the advice of individuals who were familiar with the type and content of the records. The fee estimate differs significantly from the township's final fee of \$5,250.

[54] Although the fee estimate differs significantly from the final fee, I am adjudicating upon the \$5,250 fee in this order, not the \$1,875 fee estimate, because it is the township's final fee decision that is before me in Appeal MA19-00479. Therefore, I will not be reducing the fee to the amount of the fee estimate, as requested by the appellant. I do not agree with the appellant that an agreement about a fee estimate at mediation should result in an automatic reduction of the fee at adjudication to the amount of the fee estimate.

[55] Nevertheless, given the lack of detail provided by the township as to how the various amounts in the final fee decision were calculated, I will take into account the evidence provided by the township about how it arrived at the fee estimate in my determination of whether the final fee was calculated in accordance with the fee provisions in the *Act* and Regulation 823.

[56] I agree with the appellant that, as the township based its fee estimate on a representative sample, the township's excuse that the staff members who prepared the fee estimate were unfamiliar with the litigation is irrelevant to how the final fee was calculated.

[57] The township was advised in the Notice of Inquiry that in the case of a fee estimate or an actual fee, it must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.

[58] The breakdown of the final fee of \$5,250 is set out in the township's final access

⁴ Orders P-81 and MO-1614.

decision, as follows:

...Based on records obtained from the Development Services Department, By-law Enforcement Division and the Township Lawyer, there were 3,066 pages of records responsive to your request and the total fees to process your request will be \$5,520.

Development Services Department (the DSD):

Search: 5 hours@ \$30 per hour= \$150.00

Preparation: 23 hours@ \$30 per hour= \$690.00

(includes restoring records from a backup, time spent reviewing documents, determining exemptions and applying redactions)...

By-law Division (the BD):

Search: 4 hours@ \$30 per hour= \$120.00

Preparation: 117 hours@ \$30 per hour= \$3,510

(includes restoring records from a backup, time spent reviewing documents, determining exemptions and applying redactions)...

Township Lawyer (the lawyer):

Search: 8 hours@ \$30 per hour= \$240.00

Preparation: 27 hours@ \$30 per hour: \$810.00

(includes restoring records from a backup, time spent reviewing documents, determining exemptions and applying redactions)...

Section 45(1)(a) - search

[59] In its final fee, the township charged the same 9 hours of search time for the DSD and the BD as it did in its fee estimate. However, its preparation fee for the DSD was increased by 13.5 hours (being \$405 at \$30 per hour) and its preparation fee for the BD was increased by 102 hours (being \$3,060 at \$30 per hour).

[60] Concerning the lawyer, the township's search fee was increased by 6 hours (\$180) and its preparation fee remained the same.

[61] The appellant does not appear to be challenging the total search fee of \$510 in the final access decision, as he did not provide representations challenging this. Based on my review of the wording of the request and the parties' representations, as well as the amount and type of records located, I find that the \$510 search fee (17 hours of

search time), which is the same as set out in the fee estimate, is reasonable. I uphold this search fee under section 45(1)(a) of the *Act*, considered with section 6 of the regulation.

Section 45(1)(b) - preparation

[62] In its representations, the township broke down its preparation fee of 167 hours in the final decision as follows:

- severing the records (123 hours),
- restoring records from a backup (4 hours), and
- scanning paper records (40 hours).

[63] Concerning the preparation fee, section 45(1)(b) of the *Act* includes time for:

- severing a record⁵
- a person running reports from a computer system⁶

[64] Generally, this office has accepted that it takes two minutes (or \$1 per page) to sever a page that requires multiple severances.⁷ There were 3,066 pages of records responsive to the appellant's request. The appellant was charged 123 hours (or \$3,690) for severing the records; this is the equivalent of severing 3,690 pages, which is more than the actual pages responsive to the appellant's request.

[65] Unlike the final fee decision, the fee estimate's preparation fee did not include "time spent reviewing documents, determining exemptions and applying redactions."

[66] Section 45(1)(b) does not permit time for deciding whether or not to claim an exemption.⁸ Therefore, the township cannot charge a preparation fee for the pages it has decided to withhold in their entirety due to the application of the claimed exemptions.

[67] Section 45(1)(b) also does not include time for identifying records requiring severing, but does include time for severing records.⁹

[68] The township provided an index of records identifying which pages of the

⁵ Order P-4.

⁶ Order M-1083.

⁷ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

⁸ Orders P-4, M-376 and P-1536

⁹ Orders P-4 and PO-2574.

records it is providing full or partial access to and which pages of the records it is denying access to completely. It appears to me from reviewing it that the township is granting partial access to, and will need to sever, no more than half of the 3,066 pages listed in the index. Taking into account the established fee of \$1 per page for severing, I am reducing the preparation fee for severing by 50% from 123 hours to 61.5 hours (\$1,845).

[69] Another charge that the township has set out in its final fee decision is a charge for restoring records from a backup. In its fee estimate, the township charged the appellant 2.5 hours of preparation time to restore 361 pages of records from a backup. This consisted of 351 pages from the DSD at 2 hours of preparation time and 10 pages of records at the BD at 0.5 hours, for a total of 2.5 hours.

[70] In its final fee, the township charged the appellant 4 hours of preparation time to restore records from a backup. In its final fee decision and its representations, it did not indicate how many pages of records were restored from the backup, only that these records were, as in the case of the fee estimate, located at the DSD and the BD.

[71] The township has not provided an explanation as to why the task of restoring records from the same two departments as before increased from 2.5 hours in the fee estimate to 4 hours in the final fee. The appellant did not dispute this 2.5 hours charge in his representations. I accept the fee estimate time of 2.5 hours (\$75), as reasonable. In the absence of evidence to support the increase in time for restoring records from a backup, I do not accept the township's increased time of 4 hours to perform this function.

[72] The final preparation fee item is for scanning paper records to a USB. In its final access decision, the township charged 40 hours (\$1,200) of preparation time for this item. It did not indicate how many pages were to be scanned by the DSD, the BD and the lawyer.

[73] In the interim access decision, the township estimated approximately 2,042 pages that would need to be scanned, as follows:

- 42 pages (from the DSD),
- 500 pages (from the BD), and
- 1,500 pages (from the lawyer).

[74] The township's fee estimate for these records was one minute (\$1.00) per page and a total of 34 hours (\$1,020) to scan the records.

[75] In the final access decision, the township indicated that there were 3,066 pages responsive to the appellant's request and that the records were to be disclosed electronically. It appears that the scanning fee was increased by 6 hours to scan an

additional 1,024 pages in addition to those accounted for in the fee estimate.

[76] The IPC has considered and established the fees applicable to the activity of scanning records to convert them to an electronic format for disclosure on a CD or USB. In Order MO-2530, the adjudicator observed that Regulation 823 does not specifically refer to scanning paper records to provide the information on CD or USB. However, because the activity is a necessary component of producing paper records in electronic format, the adjudicator found that scanning could be considered an activity that falls under section 6.4 of Regulation 823 as a charge "for preparing a record for disclosure." In Order PO-3152, the adjudicator concluded that an appropriate estimate of time required to prepare and scan paper records for disclosure on CD was 1,200 pages per hour.¹⁰ I adopt these findings in my analysis of the fee for the required scanning of records in this appeal.

[77] Relying on the findings in Order PO-3152 of allowing an hour of preparation time or \$30 for scanning 1,200 pages of records, and considering the number of records that may need to be scanned, and that there are three different locations where records would need to be scanned, I will allocate 3 hours of scanning time. Therefore, I will allow a total of \$90 for scanning the estimated 3,066 pages of records that require scanning.

[78] In conclusion, I allow the township to charge a final fee of \$2,445, calculated as follows:

- Search fee of \$510 (17 hours of search time),
- Preparation fee of \$1,845 (61.5 hours to sever records)
- Scanning fee of \$90 (3 hours to scan records)

Total fee - \$2,445 (81.5 hours of time)

[79] The appellant has paid the township \$937.50, which represents 50% of the \$1,875 fee estimate. Therefore, in order to have the records disclosed as per the final access decision the appellant must pay the balance of \$1,507.50.

[80] Once the appellant pays the township the balance of \$1,507.50 and receives access to the records, he can request within 30 days of receiving such access that the application of the claimed exemptions to the records be adjudicated upon by the IPC.

¹⁰ See Orders MO-3820, MO-3340, MO-3502 and PO-3855.

ORDER:

I uphold the township's fee in the reduced amount of \$2,445.

Original signed by _____

Diane Smith
Adjudicator

August 4, 2020 _____