

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3951

Appeals MA18-211 and MA18-216

Municipality of Lambton Shores

August 28, 2020

Summary: This order deals with two fees and fee estimates issued by the Municipality of Lambton Shores (the municipality) in response to two access requests made by the appellant. In this order, the adjudicator upholds the fees and fee estimates and dismisses the appeals.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 45(1) and section 6 of Regulation 823 made under the *Act*.

OVERVIEW:

[1] This order disposes of the issues raised as a result of two fee and fee estimate appeals arising from the same individual's requests (on behalf of an association) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Municipality of Lambton Shores (the municipality). The requests were for records relating to certain activities and communications of the municipality.

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[2] The request was for the following information:

- A compliance amendment application from the municipality to the Ministry of the Environment for permission to accept septage from independent wastewater haulers at the Grand Bend and Area Sewage Treatment Facility; and

- All factual material, reports or studies that include the suggested monetary charges for an independent wastewater hauler to discharge their septage load at the Grand Bend and Area Sewage Treatment Facility.

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[3] The request was for the following information:

- The minutes of the Lambton Shores Council meeting, as per the direction of Council resolution 13-1121-17, that awarded a Municipal Engineers Association type service contract to [a named company] for engineering design and administrative services for the Grand Bend and Area Sewage Treatment Facility mechanical upgrade project;
- A copy of the Municipal Engineers Association type service contract utilized by [a named company] to design and administer the Grand Bend and Area Sewage treatment facility mechanical upgrade project;
- Any feasibility study or other technical study, including cost estimate, relative to the post disaster design costs for the Grand Bend and Area Sewage Treatment Facility mechanical upgrade project;
- A copy of the errors and omissions insurance claim to the municipal insurance company for compensation to the municipal corporation for financial losses incurred as a result of the change in the design of the Grand Bend and Area Sewage Treatment Facility mechanical upgrade to accommodate a post disaster design specification to meet the requirements of the Ontario Building Code after the tender for the contract had been awarded;
- A report or study, including a technical study, which describes, in detail, the costs of the materials required to change the design of the Grand Bend and Area Sewage Treatment Facility mechanical upgrade to incorporate the post disaster requirements of the Ontario Building Code;
- The minutes of the Lambton Shores Council meeting at which a Council resolution approved the site plan agreement between the municipalities of Lambton Shores and South Huron for the Grand Bend and Area Sewage Treatment Facility mechanical upgrade project; and
- Any report or technical study which supported the cost of the of the post disaster design element for the Grand Bend and Area Sewage Treatment Facility mechanical upgrade to be considered an improvement expense to be reimbursed through the contingency funds rather than as a conventional requirement under the Ontario Building Code. A copy of the resolution by Lambton Shores Council which approved any aforementioned reports.

[4] In response, the municipality issued decisions to the requester with fee estimates. The requester, now the appellant, appealed the municipality's decisions to this office. The appeals proceeded to the mediation stage of the appeals process together.

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[5] Following discussions between the mediator, the appellant and the municipality, the municipality agreed to revisit its decision in MA18-211. It completed a search for records and issued a supplementary decision letter to the appellant. It advised the appellant that responsive records had been located and that access was being granted to them, in full. The municipality also advised the appellant that under the first part of the request, five records would be disclosed, and under the second part of the request, two records would be disclosed.

[6] Regarding the fee, the municipality advised the appellant that, while the fee estimate had originally been \$140.00, the actual fee for processing the request was \$108.00, broken down as follows:

- \$60.00 for search time based on two hours of time @ \$7.50 per quarter hour; and
- \$48.00 for photocopying based on 240 pages @ .20 cents per page.

[7] After receiving the supplementary decision, the appellant asked for an itemized list of the records. The municipality agreed to provide a list of the records at issue. In a second supplementary decision, the municipality provided the following list of the records and the fee. The records to be disclosed in response to the first part of the request were:

- the application and drawing (2 documents);
- acknowledgment of the application (1 document);
- question as a result of the application and answers (1 document); and
- the new ECA (1 document).

[8] The records to be disclosed in response to the second part of the request were:

- 2013 Water and Wastewater Study (130 pages - available on the municipality's website); and
- presentation to Lambton Shores Council (33 pages - available on the municipality's web site).

[9] Also during the mediation of the appeal, the municipality agreed to remove the

fee for records found on its website, and to decrease the fee for search time by one hour. As a result, the final revised fee was for one hour of search time (\$30.00) and 77 pages of photocopying (\$15.40), totaling \$45.40. The appellant advised the mediator that he would like the appeal to proceed to adjudication.

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[10] During the mediation of this appeal, the municipality estimated that it would take approximately 5 hours to collect and compile the requested information, advising the appellant that using the prescribed fee of \$7.50 per each 15 minutes spent to search for and compile the information, the cost to provide the information would be approximately \$150.00 plus any photocopying costs. The appellant advised the mediator that he would like the appeal to proceed to adjudication.

[11] The appeals then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator assigned to the appeals issued a Joint Notice of Inquiry regarding both appeals, and received representations from the municipality and the appellant, both at the first instance and on reply, which were shared amongst them. The appeals were then transferred to me to continue the inquiry.

[12] I note that both the municipality and the appellant have raised concerns in their representations that are not at issue in these appeals. For example, the municipality raised how many access requests the appellant had made in total. The appellant raised issues such as the retention and preservation of records by the municipality. The sole issue in these appeals I will be considering is whether the fees/fee estimates for each appeal should be upheld. I will not refer to the other issues raised by the parties that are not relevant to the issue that is the subject matter of these appeals, nor will I consider them.

[13] For the reasons that follow, I uphold the municipality's fees and fee estimates and dismiss the appeals.

DISCUSSION

[14] The sole issue in these appeals is whether the fee and fee estimate in each appeal should be upheld. An institution must advise the requester of the applicable fee where the fee is \$25 or less. Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.¹

[15] Where the fee is \$100 or more, the fee estimate may be based on either the

¹ Section 45(3).

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

[16] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.³ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

[17] 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

[18] 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.

[19] 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.

[20] A more specific provision regarding fees is found in section 6 of Regulation 823, which states:

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:

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.

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.

[21] Section 45(1)(b) does not include removing paper clips, tape and staples and packaging records for shipment,⁶ transporting records to the mailroom or arranging for courier service,⁷ assembling information and proofing data,⁸ photocopying,⁹ preparing an index of records or a decision letter,¹⁰ or re-filing and re-storing records to their original state after they have been reviewed and copied¹¹

[22] Section 45(1)(c) includes the cost of photocopies, computer printouts and/or CD-ROMs and developing a computer program.

[23] Section 45(1)(e) does not, for example, include time for responding to the requester,¹² time for responding to this office during the course of an appeal,¹³ or coordinating a search for records¹⁴

⁶ Order PO-2574.

⁷ Order P-4.

⁸ Order M-1083.

⁹ Orders P-184 and P-890.

¹⁰ Orders P-741 and P-1536.

¹¹ Order PO-2574.

¹² Order MO-1380.

¹³ Order MO-1380.

¹⁴ Order PO-1943.

Representations

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[24] The municipality submits that the fee estimate is now the fee because it completed the search for records responsive to the request, advising that the actual fee is \$108.00, which represents two hours of search time at the rate of \$7.50 per 15 minutes (\$60.00), and photocopying of 240 pages at the rate of 20 cents per page (\$48.00).

[25] The municipality advises that the search for records was conducted by the Director of Community Services, who searched the electronic and paper files for the subject matter of the request, which consisted of an amendment application, separate drawings, and responses to questions posed by the Ministry of the Environment after the initial application was received.

[26] The municipality further submits that, during the mediation of the appeal, it provided the appellant with specific information about the nature and content of the records, as well as agreed to decrease the fee for search time by one half.

[27] The appellant submits that it was his understanding that the municipality would provide the requested material on a USB key to eliminate photocopying costs. The appellant argues that they agreed to that proposed fee, i.e., the cost of the USB key, but not the cost of the photocopying, adding that they did not receive any further communication from the municipality on that issue.

[28] The appellant also argues that there was no indication from the municipality that the second part of their request (factual material suggesting monetary charges for independent wastewater haulers to discharge their septage load) would be provided in the information package, and that the municipality did not provide an explanation for that omission.

[29] In reply, the municipality confirmed that it has decreased the cost of the search time from two hours to one hour, even though the search actually took two hours, and that there were no discussions regarding the provision of a USB key. The municipality advises that should the appellant require the records on a USB key, the fee for that key is \$10.00, plus an additional fee of \$7.50 to transfer the records onto the key.

[30] In sur-reply, the appellant submits that they are unsure as to what fee the municipality is charging, nor has the municipality provided sufficient information about the nature and content of the records.

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[31] The municipality submits that the appellant's request was lengthy and difficult to understand to ascertain what records were being requested. The municipality submits

that the fee estimate was based on a search time of four hours and preparation time of one hour. The photocopying charges, the municipality submits, are unknown until clarification is received from the appellant regarding the specifics of the access request. However, the municipality then goes on to state that the search time could be reduced by one hour, should the appellant obtain records that are available on its website, for example, the minutes that were requested. The municipality also states that the preparation time could be "reduced" by one hour, as it is expected that the records will be disclosed in their entirety.

[32] The appellant submits that the Mediator's Report accurately reflects the information being sought, and does not refer to a request made by the municipality for clarification of the access request. The appellant also submits that if the municipality did not understand the specific information being requested, how was it able to provide a fee estimate. The appellant then goes on to explain, in detail, each part (or bullet) of the access request.

[33] In reply, the municipality submits that the appellant's representations were helpful, because staff were able to understand specifically what the appellant was requesting and were able to identify the records for release.

[34] The records at issue specifically relate to bullets #2 and #5 of the appellant's request. The municipality submits that there will be no exemptions applied to those records. The municipality also submits that, as indicated in its original representations, there are no records relating to bullets #4 and 6. Since the clarification on the request was received, the municipality states that staff can confirm that no records relate to bullets #1, 3 and 7.

[35] The municipality goes on to advise that the search was completed for records responsive to the request and the updated estimate is \$105.00 for search time based on 3.5 hours of time at \$7.50 per quarter hour and \$14.60 for photocopying based on 73 pages at 20 cents per page, totaling \$119.60.

[36] Lastly, the municipality argues that it does not keep all of its records in an electronic format, and is not required to do so.

[37] In sur-reply, the appellant submits that the records at issue should be on the municipality's website and, therefore, available to access at no cost.

Analysis and findings

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[38] As previously stated, prior to the completion of mediation and also confirmed in its reply representations, the municipality agreed to remove the fee for records found on its website, and to decrease the search time from two hours to one hour. The final revised fee was for one hour of search time (\$30.00) and 77 pages of photocopying

(\$15.40), totaling \$45.40. I have reviewed the Mediator's Report, which does not make reference to any discussions regarding the appellant obtaining the records on a USB key.

[39] I find, in the circumstances, that the fee for the search is reasonable under section 45(1) of the *Act*. From the evidence before me, I find that a two-hour search was conducted, and that the municipality has agreed to decrease the fee for search by one hour. Similarly, I find that the fee for photocopying at 20 cents per page complies with Regulation 823.

[40] With regard to the appellant's assertion that the records could have been provided electronically on a USB key, I accept the municipality's submission that the records have already been photocopied. I see no evidence that the appellant requested that the records be provided in electronic format prior to their representations in this inquiry and I find that the municipality's charge for photocopies complies with Regulation 823. In the circumstances, and after considering that the difference between the fees for the photocopies would not differ substantially from what the municipality would be entitled to charge for providing the records on a USB key, I will not interfere with this aspect of the fee.

[41] Finally, I do not accept the appellant's assertion that the municipality has not provided a description of the responsive records. In my view, during the mediation of the appeal, the municipality provided a satisfactory description of the types of records it determined were responsive to the appellant's request, which should allow the appellant to be able to make a determination about whether they want to pursue access to the records.

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[42] As previously stated, in its reply representations, the municipality advises that it completed the search for records responsive to the request and the updated estimate is \$105.00 for search time based on 3.5 hours at the rate of \$7.50 per fifteen minutes, and \$14.60 for photocopying based on 73 pages at the rate of 20 cents per page, totaling \$119.60. I note that it would have been preferable for the municipality to have sought clarification of the access request at an earlier stage in the access process, not during the reply stage of the inquiry.

[43] However, I find, in these circumstances, that the revised fee for the search is reasonable under section 45(1) of the *Act*. From the evidence before me, I find that a three and a half hour search was conducted, and that the rate the municipality is charging the appellant for this search is in compliance with Regulation 823. Similarly, I find that the fee for photocopying at 20 cents per page complies with Regulation 823.

[44] Regarding the appellant's position that the records should be accessible on the municipality's website at no cost, I note that section 45(1) requires an institution to charge fees for access requests made under the *Act*. In addition, the *Act* does not

mandate that an institution post its records on its website.

ORDER:

I uphold the municipality's fees and fee estimates, and dismiss the appeals.

Original signed by _____
Cathy Hamilton
Adjudicator

_____ August 28, 2020