

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3962

Appeal MA19-00142

Tay Valley Township

October 7, 2020

Summary: The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* to the township for records using the phrase "community service." The township granted him access to some of the responsive records and issued a fee of \$523.20. The township had not previously provided a fee estimate. The appellant appealed the township's fee. During mediation, the appellant also raised the issue of whether the township's decision was made by a properly designated or delegated head as required by the *Act*.

In this order the adjudicator finds that the clerk was validly delegated to issue the township's access decision and she orders the township to refund part of the fee paid by the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2 "head", 3, 45(3) and 49(1).

Orders and Investigation Reports Considered: Orders M-971, MO-2663-I, MO-2355, PO-2299, MO-1980, and P-81.

OVERVIEW:

[1] The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Tay Valley Township (the township) for records using the phrase "community service." The initial request sought records referring to "community use" but the township understood that the appellant sought records referring to "community service" a term proposed to be included in the township's Zoning Bylaw.

[2] The township granted the appellant access to some of the responsive records, withholding one record from disclosure under the discretionary exemption in section 12 (solicitor-client privilege) of the *Act*.

[3] In its access decision, the township requested payment of a final fee amount of \$523.20, including \$163.50 of photocopying costs.

[4] The appellant paid the fee and received the records, but also appealed the fee to this office.

[5] During mediation, the appellant raised the issue of whether the township's decision was made by a properly designated or delegated head for the purpose of making decisions under the *Act*. In his appeal, the appellant stated,

1. The township clerk, who was delegated by the powers to act as MFIPPA head via a bylaw ([township] bylaw 2014.011), has exercised this power unlawfully in choosing to withhold some records, as powers may be delegated under MFIPPA only by the designated MFIPPA head, in writing. No such delegation was given.

2. Therefore, I request that the records currently being withheld be turned over to the MFIPPA head (who is, under the township's bylaws, the Reeve), for his decision as to the release of the withheld documents.

[6] Mediation could not resolve the issues under appeal, the file was transferred to the adjudication stage of the appeal process, and a written inquiry occurred. The parties submitted representations in the inquiry, which were shared in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[7] In this order I find that the clerk was validly delegated to make the township's access decision and I order the township to refund part of the fee paid by the appellant.

ISSUES:

- A. Was the individual who made the township's access decision properly authorized to make that decision?
- B. Should the fee be upheld?

DISCUSSION:

Issue A: Was the individual who made the township's access decision properly authorized to make that decision?

[8] The decision at issue in this appeal was made by the township's clerk. The appellant takes the position that the clerk was not properly designated or delegated to

make the decision.

[9] Section 19 of the *Act* states the head of an institution is responsible for giving notice as to whether or not access is given in response to a request. Section 2(1) provides that the head of an institution is the individual or body determined to be the head under section 3. Relevant parts of section 3 state:

Designation of head

3(1) The members of the council of a municipality may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipality for the purposes of this Act.

...

If no designation

(3) If no person is designated as head under this section, the head shall be,

(a) the council, in the case of a municipality; ...

[10] Section 49(1) of the *Act* concerns the delegations of the head's powers. It states,

A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

The township's representations

[11] The township refers extensively to its By-Law No. 2014-011, referred to in this order as the By-law. It explains that section 1.1 of the By-law designates the reeve as the head within the meaning of section 3(1) of the *Act*. It also says that section 1.2 of the By-law delegates "all powers and duties" under the *Act* to the clerk.

[12] The township states that the By-law is a valid exercise of the council's authority to govern the township. It states that the fact that the By-law simultaneously designates the reeve as head and delegates authority to the clerk does not undermine or render the clerk's authority invalid.

[13] The township states that it is common practice in smaller municipalities for the clerk to be delegated authority under the *Act* and it points to other examples within Lanark County, the upper tier municipality to which it belongs. Further, it states that it is common for municipalities of all sizes to designate the clerk as having "all powers and duties" under the *Act*.

[14] The township submits that there is nothing in the *Act* or prior IPC orders that prohibits an institution from simultaneously designating and delegating in the manner

that the township has. It says that if there were, it would improperly undermine the objectives of the *Act*.

[15] The township states that because the clerk is an employee of the township there is nothing improper about the township's delegation to the clerk.

[16] The township provided affidavit evidence from the reeve who attests that he and council together intended to delegate all of the head's duties under the *Act* to the clerk and that the clerk has accordingly been responding to access requests since 2014. As I understand this argument, the township submits that even though the reeve was designated as the head, the clerk was exclusively carrying out all of the head's duties, pursuant to the delegation in the By-law.

[17] The township provided additional context. It says that since 2008, pursuant to a predecessor by-law, the township had similarly delegated all authorities under the *Act* to a city employee who held the title, CAO/Clerk. When the CAO/Clerk role was modified to split the duties, the By-law was enacted to assign duties under the *Act* to the clerk.

[18] In sum, the township states that the By-law is a valid delegation to the clerk that has been in place since April 8, 2014.

[19] As an alternative argument, the township states that it is "open to the Reeve to formalize his existing affirmation of the [By-Law] through the execution of a new delegation under the *Act*."

[20] The township also states that if the appellant is correct that the delegation is improper and wishes for a new access decision to be issued, little useful purpose would be served because there are no exemption claims at issue in this appeal and, in any event, the reeve agrees with the clerk's decision in this appeal.

The appellant's representations

[21] The appellant accepts that the township designated the reeve as the head pursuant to section 3(1) of the *Act* through the enactment of the By-law. He notes that section 3(1) of the *Act* requires the designation to be "by by-law".

[22] However, the appellant does not accept the "sub-delegation" to the clerk within the By-law because the delegation was "not done by the Reeve."

[23] The appellant points to section 49(1) that he says, "specifically indicates that the delegation must be 'in writing.'" The appellant says that the choice of different words in the *Act* ("in writing" vs. "by by-law") must be given meaning and, as I understand the argument, that therefore it is not possible to delegate any duties pursuant to a by-law under section 49(1). Further, the appellant says that the clerk is not "an individual or a committee of the council" as contemplated by section 3(1) of the *Act* meaning that delegation to the Clerk "by by-law of Council" is not authorized under the *Act*.

[24] The appellant also addresses why he believes that it is important for the

“designated” head to have the ability to flexibly “delegate” whenever needed without seeking a by-law of council. The appellant explains,

Should delegation to the Clerk ever need to be revoked or amended, it is not actually within the Reeve’s power as head to do so; rather, Council as a whole must do so by repealing section 1.2 [of the By-law] and allowing the Reeve to exercise its authority under Section 49, or by repealing Section 1.2 [of the By-law] and replacing it with a new delegate. In either case, it is in Council’s hands when it ought to be entirely in the Reeve’s.

[25] The appellant states that the clerk has been granted duties beyond those which are contemplated by section 3(1) of the *Act*, including the power to sub-delegate, which it says is beyond the purview of the *Act*.

[26] In sum, the appellant states that section 1.2 of the By-law is not contemplated by the *Act* and that therefore that section of the By-law is voidable.

[27] The appellant accepts the township’s representations that municipal clerks, in general, are “frequently and properly delegated duties under” the *Act*. The issue the appellant has is that the delegation in the township is, as he asserts, not valid.

[28] Regarding remedy, the appellant states that a finding that the delegation is not valid “would require [the township] to correct its [...] procedures, thereby giving [the township] more flexibility going forward.”

[29] Furthermore, the appellant states that this appeal “is not an application to quash a by-law for illegality pursuant to Section 273 of the *Municipal Act*,” but that if I am persuaded by the appellant’s argument, the township would “be wise to make the necessary corrections.”

The township’s reply

[30] In reply, the township submits that the IPC “does not have the authority to make decisions with respect to the validity of municipal by-laws, or to render portions of such by-laws voidable.” However, the township submits that it would welcome the IPC’s guidance on best practices for delegation of the head’s authority.

[31] The township submits that because the appellant has acknowledged that a determination of this issue will have no bearing on the exemption claims made in the present access decision, “the purpose of the appeal is unclear” and that the concerns raised by the appellant are hypothetical which need not be resolved by this office. It says that the IPC needs only to decide whether the township’s designation and delegation meet the requirements of the *Act*, which – it says – they do.

Finding and Analysis

[32] This office has reviewed and adjudicated the validity of designations and

delegations under the *Act*.¹ When doing so, the purpose of the review is further to one of the requirements of the *Act*, that access decisions are to be made by properly designated or delegated individuals.² As noted by the adjudicator in Order MO-1221, “[t]he proper delegation of the ‘head’ of an institution is a crucial first step in a valid decision.” IPC adjudicators have found that challenged delegations are both invalid³ and valid.⁴ Orders M-971 and MO-2663-I are of relevance to this appeal.

[33] In Order M-971 involving the former city of Etobicoke, all issues regarding the exemptions claimed were resolved; however, the appellant alleged that the city employees who issued the decisions leading to the appeal did not have valid delegations to permit them to make decisions under the *Act*.

[34] The adjudicator first stated that he could decline to consider this part of the appeal because the exemption claims were now moot. However, he stated, “I have decided to take this opportunity to deal with the appellant’s concerns in this regard, since this issue may arise again.” The adjudicator’s analysis was brief:

The City has provided me with by-laws and other documentation, and has referred me to section 73 of the *Municipal Act*, to support the validity of the delegation of authority to the individual who signed the decision letters which are before me in this appeal.

I find that under section 49(1), City Council, as ‘head’, is entitled to delegate its powers under the *Act*. Based on Council’s decision (dated January 7, 1991) to adopt the resolutions of the Administration Committee about administration of the *Act*, By-law 1994-145 and section 73 of the *Municipal Act*, I also find that the individual who signed the decision letters had lawful authority to do so. Accordingly, this appeal will be dismissed.

[35] In Order MO-2663-I involving the town of Aurora, the appellant claimed that the CAO’s actions in relation to his request were improper because he was not properly designated or delegated. In addition, the appellant argued that the scope of authorities of the clerk and deputy clerk did not include making access decisions, but rather were limited to processing inquiries.

[36] Dealing with the CAO first, the adjudicator concluded that he was acting in accordance with the decisions made by the clerk and deputy clerk. Regarding the clerk and deputy clerk, the adjudicator found that they exercised valid authority having been granted the authority pursuant to two by-laws of the town.

[37] Neither of the adjudicators in orders MO-2663-I or M-971 specifically discussed the issue raised by the appellant in this appeal – whether a delegation may be made by

¹ Orders MO-1221, MO-3220, MO-2663-I, MO-3434-I, M-809, M-971, and MO-3955.

² Order 3434-I at para 25.

³ Orders MO-3220, MO-1221 and MO-3434-I.

⁴ Orders M-809, M-971, MO-2663-I and MO-3955.

by-law – but as is clear, upheld such delegations when they occurred.

[38] Like the adjudicator in Order M-971, I considered whether the issue was moot and that I should not therefore consider the issue. Indeed, the appellant appears only to seek that the township be asked to rectify the situation going forward. I am also aware that the appellant has other appeals before me with the township and there is a live issue in this appeal (the fee). In my view, there is merit in reviewing this issue and as noted by other adjudicators, when raised, the validity of the decision is fundamental to the access to information process.

[39] Unlike some prior orders⁵ of the IPC dealing with proper designation or delegation, there is no issue in this appeal of a late or after-the-fact delegation. The issue in this appeal is whether the delegation of the clerk, which had been in place since 2014 and long before the present appeal is valid within the meaning of the *Act*. For the following reasons, I find that it is.

[40] Relevant excerpts from the By-law are [emphasis added]:

BY-LAW NO. 2014-011

[...]

WHEREAS, under Section 3(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. Chapter M.56, the council of a municipality may by by-law designate from among themselves an individual or a committee of the council to act as head of the municipality for purposes of the Act;

AND WHEREAS, under Section 49(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O., Chapter M. 56, a head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation;

AND WHEREAS, the Council of the Corporation of Tay Valley Township deems it necessary and expedient to delegate certain powers and duties for the purposes of the Act;

NOW THEREFORE BE IT RESOLVED THAT, the Council of the Corporation of Tay Valley Township enacts as follows:

1. General Regulations

⁵ For example, Order MO-1221.

1.1 That, the Reeve be designated as the head of the municipality for the purposes of the [*Act*].

1.2 That, the Clerk be delegated all powers and duties under the [*Act*].

[41] The appellant accepts the validity of section 1.1 but not section 1.2.

[42] As I understand the appellant's representations, he says that section 1.2 is not valid for the following reasons:

- Only the reeve, the properly designated head, may delegate, meaning that it may not be by council resolution or bylaw, but otherwise simply in writing. Further to this point, the appellant states that designation under section 3(1) – through a by-law – is only available when the designation is given to a member or committee of council, of which the clerk is neither.
- There are strong policy reasons why a designated head should have the ability to delegate without needing to bring such a decision to city council: expediency and flexibility. Further, that it is somehow improper for council as a whole to exercise authorities under the *Act* ("In either case, it is in Council's hands when it ought to be entirely in the Reeve's.")
- That the scope of the delegation is improperly broad.

[43] The township stands by the By-law. It says there is nothing improper in the simultaneous designation of the reeve and delegation of the clerk. When distilled down, the appellant is making different points: that once the township designated the reeve as the head, only the reeve could then delegate in accordance with section 49(1); and that the form of delegation is not proper.

[44] In my view, the delegation to the clerk is proper and valid.

[45] I start from the first principle that if no delegation is made under section 3(1), the head is the council as a whole (section 3(3)(a)). At the time the By-law was enacted, the council was acting as both the council and the head, and accordingly duly able to both designate under section 3(1) and delegate under section 49(1). I have been provided with no rationale or basis to conclude, nor does it logically follow, that the designation to the reeve occurred prior to the delegation of the clerk; on the face of the By-law they occurred simultaneously.

[46] The heart of the appellant's representations is that there are policy considerations that may suggest that delegations under the *Act* should not be subject to the full council decision-making process. However, the *Act* does not in fact require any designation or delegation, meaning that the default is that the head is the council as a whole. In any event, the clear intention of the *Act* is to reserve this policy analysis for the council of the township to decide what is best for the township, not this office.

[47] I also do not accept the appellant's argument that the delegation is not able to be

made through a By-law. As noted above, previous adjudicators have concluded that such delegations are valid⁶, albeit without examining the finer points raised by the appellant in this case. In my view, the findings in these prior orders are correct because a delegation made in a by-law is merely a type of written delegation contemplated by section 49(1). Requiring that the delegation be in writing serves the policy objective that the delegation is clear and transparent.

[48] I am also not persuaded by the appellant's argument that the clerk's delegation was overly broad. While section 49(1) contemplates that the delegation may be limited, there is no requirement that it be limited in any way.

[49] The delegation in this case is clear and plain to see and was in place well prior to the decision at issue. I find that it is valid and dismiss this aspect of the appeal.

Issue B: Should the fee be upheld?

[50] The township assessed a fee of \$523.20 that has been paid by the appellant. The appellant appeals the photocopying part of the fee on the basis that the township was not permitted to assess the fee because he was not provided with an estimate pursuant to section 45(3) of the *Act*. He also, and in the alternative, disputes that the township had the right to assess part of the photocopying fees in relation to some of the records because they were records otherwise available to the public. The township concedes that it did not provide a fee estimate, offers an explanation for why, and stands by its photocopying fee assessment.

[51] Section 45(3) of the *Act* provides that where a fee exceeds \$25, an institution must provide the requester with a fee estimate. 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.⁷ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁸

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

[53] Section 45(1) permits an institution to charge for photocopying fees for requests under the *Act*. Regulation 823 sets out the rates for photocopying costs. There is no dispute between the parties about whether the township charged the permitted rate for photocopying and there is no need therefore to detail that part of the *Act* or Regulation 823 in this order.

Representations

[54] The township's initial representations provide information about the steps it took to search for, complete and prepare responsive records and its justification for the fees

⁶ Most recently, see Order MO-3955.

⁷ Orders P-81, MO-1367, MO-1614 and MO-1699.

⁸ Order MO-1520-I.

that it assessed.

[55] In response, the appellant states that he disputes the fees related to photocopying, which comprise \$163.20 of the total fee. The appellant argues that because the following three records that the township disclosed were otherwise available in the public record, it was not appropriate for the township to charge any fees to reproduce those records: (1) Zoning By-law 02-121 (October 12, 2017); (2) Zoning By-law 02-121 (March, 2018) marked 'redline version for public open house'; and, (3) Zoning By-law 02-121 (October 26, 2018).

[56] This argument is based, in part, on section 15(a) of the *Act* that provides institutions with discretion not to disclose records that are available to the public. Here the appellant argues that the township should have exercised its discretion not to disclose those records, thereby limiting the volume of the records subject the disclosure.

[57] The appellant also argues that he did not receive a fee estimate from the township as required by section 45(3). He submits that this office has previously held that fee estimates are essential to assist the requestor with scoping their request as needed and he refers by footnote to Order MO-2355.

[58] The appellant sums up the overall argument as follows, "The appellant did not request copies of [the publicly available by-laws], and they ought to have been considered responsive. Even if they could be considered responsive, it was not an appropriate exercise of discretion under section 15(1) to release and charge for them as readily available public documents particularly in light of the [township's] failure to provide a fee estimate."

[59] In reply, the township concedes that it did not provide a fee estimate because it says it "was not possible in the circumstances." It says that due to the nature of the request, it would have been impossible to do so and that there were opportunities for the appellant to narrow the scope of his request. As I understand the township's latter point, the ability to narrow is germane because one of the purposes of a fee estimate is to provide the appellant with an opportunity to narrow the scope of a request.

[60] The township points to letter sent to the appellant confirming that it would conduct the requested search.

[61] Further, the township states that the appellant did not dispute the fee when he picked up the records or at any other time. It says that it is too late for the appellant to raise this concern now.

[62] The township says that contrary to the appellant's submissions, two of the three records were not available to the public at the time – that is, older versions or drafts of the by-law that it concedes is available to the public. Further, the township states that in any event section 15(a) provided it with discretion to disclose responsive records and that it decided to disclose those records and that therefore it was "within its rights" to assess a fee in relation to those records.

Analysis and finding

[63] Section 45(5) of the *Act* permits this office to review any fee required to be paid under section 45(1). In this appeal, the appellant disputes the photocopying component of the fee. For the reasons that follow, I order that the township reduce the fee by \$163.50, the photocopying component of the fee.

[64] The order referenced by the appellant, Order MO-2355, is a good place to start to discuss the issues at play in the present appeal. The adjudicator in Order MO-2355 considered the importance of the fee estimate contemplated by section 45(3). After reviewing this office's significant rulings⁹ on the issue, the adjudicator concluded that, "In order to meet the requirements of section 45(3), the [institution] was required to inform the appellant of the amount of the fee estimate at the time it determined that it would be charging a fee, and prior to providing access." What happened instead was that the institution provided the records and, to use the language of the adjudicator, "what was effectively an invoice for their disclosure at the same time."

[65] Having concluded that the institution failed to meet the requirements of section 45(3), the adjudicator in Order MO-2355 considered the appropriate remedy. To do so, the adjudicator considered the prejudice experienced by the appellant because a fee estimate had not been provided and considered the unique circumstances of the appeal. The adjudicator limited the fee to \$25, the maximum fee allowable to be assessed without a prior fee estimate.

[66] In the present appeal there is no dispute that the township did not provide a fee estimate as required under section 45(3) of the *Act*. Taking into account the prior orders of this office, with which I agree, I must determine therefore whether there was any prejudice to the appellant and if so, determine the appropriate remedy in the circumstances of this case.¹⁰

[67] In this appeal the appellant only takes issue with the photocopying costs associated with the three by-laws described above. Although the parties have not provided me with specific representations about how many pages are in each record, I conclude on the basis of their descriptions that the pages for the by-laws are the most voluminous and make up the bulk of the photocopying costs but not all.

[68] Much of the appellant's representations focus on whether the township ought to have exercised its discretion not to disclose, or to deem not responsive, records that the appellant says were already available to the public. In making these arguments, the appellant unusually asks this office determine that township failed to withhold certain records on the basis of a discretionary exemption – in this case, section 15 (information published or available to the public). I have not been provided with any prior orders of this office or other jurisprudence to suggest that this is a relevant consideration in the

⁹ MO-1980, PO-2299, M-1123 and MO-1520-I.

¹⁰ Order MO-1614 (upheld by the Divisional Court on judicial review: *Toronto (City) v. Humane Society of Canada*, [2004] O.J. No. 659).

review of a fee assessed.

[69] In my view, it is not necessary for me to determine whether a failure to withhold a record may be relevant to a fee appeal or whether the section 15 exemption applies in this appeal. When viewed against the totality of the appellant's arguments, I understand his submissions on this point to be illustrating the prejudice that he faced because he was not provided with a fee estimate. Had he been aware of the potential volume of the photocopying that would be provided, the appellant could have narrowed his request.

[70] Considering these and the appellant's other submissions relating to the purpose of the fee estimate, I am persuaded and I find that the appellant was prejudiced because he was not able to make an assessment about whether to follow through with the request or modify it with the benefit of the estimate.

[71] I have considered but do not accept the township's argument that the prejudice was mitigated or addressed because it sent the appellant a letter to confirm his request. I acknowledge that the township appears to suggest that it ought to have been obvious to the appellant that the request, as broadly stated as it was, would yield some records that were already available to the public. I reject this argument because it improperly shifts the responsibility of responding to a request to the appellant.¹¹

[72] The appellant seeks only to review the photocopying component of the fee and he has presented evidence of other prejudice that he faced in relation to this aspect of the fee only, which I have accepted. In my view, the appropriate remedy in this case is to order a refund of the total photocopying costs, including those parts of the costs that are not associated with the records that are publicly available.

[73] In sum, I order the township to reduce the fee and refund the appellant in the amount of \$163.50.

ORDER:

1. I find that the clerk had lawful authority to issue the access decision in this appeal.
2. I order the township to refund the amount of \$163.50 to the appellant.

Original signed by _____
Valerie Jepson
Adjudicator

October 7, 2020 _____

¹¹ A similar principle underpins the order in MO-2355.