

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4248

Appeals MA21-00274 and MA21-00276

Ausable Bayfield Conservation Authority

August 31, 2022

Summary: In February 2019, the Ausable Bayfield Conservation Authority (the authority) approved the final version of an updated shoreline management plan. The appellant made requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the authority's handling of public feedback during the update process and for earlier draft versions of the plan and records of revisions. The authority issued interim access decisions and fee estimates for the requests. The appellant requested fee waivers in respect of both fee estimates. The authority refused to grant fee waivers.

Regarding the request relating to public feedback, the appellant appealed the fee estimate and the authority's decision to refuse a fee waiver. Regarding the request relating to earlier versions of the shoreline management plan and records of revisions, the appellant paid the fees and the request was processed and partial access granted to responsive records. The appellant appealed the authority's decision to refuse a fee waiver and the reasonableness of the authority's search for responsive records. The appellant believes that additional records exist.

In this order, the adjudicator disposes of the issues arising in both appeals and upholds the authority's revised fee estimate and refusal to grant fee waivers. The adjudicator orders the authority to conduct a further search for final version 1 of SMP 2019 dated February 27, 2019 and records of its revisions, otherwise she finds that it conducted a reasonable search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17, 45(1) and 45(4), and Regulation 823, section 6.

Orders Considered: Orders P-81, P-474, M-909 and MO-1614.

OVERVIEW:

[1] This order disposes of the issues in two appeals arising from requests the appellant submitted to the Ausable Bayfield Conservation Authority (the ABCA or the authority) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The ABCA is a conservation authority with jurisdiction that includes a portion of the south eastern shoreline of Lake Huron. Pursuant to the *Conservation Authorities Act*¹ and *Ontario Regulation 147/06* (the Regulation), the ABCA has delegated responsibilities relating to the development of areas subject to natural hazards, for example flooding and soil erosion, within its jurisdiction.

[3] The ABCA commissions engineering studies and approves policies and by-laws that form part of its Shoreline Management Plan (the SMP) to aid the implementation of its responsibilities under the Regulation. The SMP includes guidelines that ABCA staff use when considering new development proposals under the Regulation. The authority approved an updated SMP in February 2019 (SMP 2019). The requests giving rise to these appeals relate to SMP 2019.

[4] The appellant is a member of a residents' association made up of approximately 120 individuals who represent around 75% of the Lake Huron shoreline property owners within the authority's jurisdiction. The background to each appeal is set out below.

Appeal MA21-00274

[5] In appeal MA21-00274, the appellant submitted a request under the *Act* for information relating to public feedback received by the ABCA during the development of SMP 2019, as follows:

During the process of creating the approved [SMP] 2019, the ABCA received public input on both the 2016 draft [SMP] and the various iterations of what eventually became the approved [SMP] 2019. The ABCA received feedback from the public on these documents and presumably had a process to 1) evaluate such feedback, 2) decide whether such feedback should or should not be incorporated into the next iteration of the documents; and 3) document the reasons for such decisions.

Please provide all Records (as that term is defined in the *Act*) regarding the feedback provided by the public (anonymized if required), the decision-making process utilized by ABCA to evaluate such feedback, and the decisions made by the ABCA regarding such feedback and the reasons thereto.

¹ R.S.O. 1990, c. C. 27.

[6] In correspondence, the appellant provided clarification regarding the scope and time frame of the request:

- Requests disclosure of "...all Records (as that term is defined by the *Act*) regarding the feedback provided by the public (anonymized if required) ...";
- Requests disclosure of "the decision-making process utilized by the ABCA to evaluate such feedback";
- Requests disclosure of the "decisions made by the ABCA regarding such feedback and the reasons thereto."
- It further specifies the time period for which these records are to be provided: January 1, 2015 through February 28, 2019.

This request therefore encompasses all specific written or emailed (or otherwise provided) feedback provided by the public, the records that show how each specific comment was evaluated for relevance or consideration by ABCA staff, and the specific decisions made by ABCA staff on each specific comment received and the reasons thereto.

[7] On February 4, 2021, the ABCA issued an interim access decision and fee estimate of \$1250.00 plus HST for processing the request. The fee estimate was broken down as follows:

- Search and preparation time – 35 hours @ \$7.50 per 15 mins \$1050.00
- Photocopying fee – 1000 pages (approx.) @ \$0.20 per page \$200.00

[8] The ABCA requested that the appellant pay a deposit of \$200.00 before it would begin work on the request but noted that owing to the impact on staff resources, it would not be able to process the request within the required 30 days.

[9] In response, the appellant paid the \$200.00 deposit and stated that they were reducing the scope of the request as follows:

Please provide all internal emails and memorandum regarding the feedback provided by the public (anonymized if required), the decision making process utilized by the ABCA to evaluate such feedback, and the decisions made by the ABCA regarding such feedback and the reasons thereto. Please only provide internal emails and memorandum that have not been publicly disclosed on the ABCA website.

[10] The appellant indicated that they did not require photocopies and that electronic copies of the records would suffice. The appellant also requested a fee waiver pursuant to section 45(4) of the *Act*.

[11] On April 26, 2021, the ABCA issued a revised fee estimate of \$1050.00 plus HST and refused the appellant's request for a fee waiver stating that it was not in a position to waive the fees and that the appellant had not substantiated their waiver request.

[12] In addition, the ABCA explained that due to limited staff resources and seasonal increases in workload, it would not be able to start work responding to the appellant's request until it had completed its responses to two other requests from the appellant.

[13] On May 6, 2021, the appellant appealed² to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to explore resolution.

[14] During mediation, the mediator had discussions with the appellant and the ABCA. On July 7, 2021, the ABCA issued a further revised fee estimate. The ABCA explained that in responding to other requests submitted by the appellant, it had become apparent that the costs of providing the records was greater than anticipated due to the number of pages of records located and the staff time associated with the searching, reviewing and preparing of the records. The authority stated that it anticipated there being a greater number of redactions due to the amount of personal information in the records responsive to this request.

[15] The ABCA stated that its further revised fee estimate of \$2700.00 plus HST was based on 90 hours of search and preparation time at \$7.50 per 15 minutes. The new deposit equal to 50% of the revised fee estimate was \$1350.00 and the ABCA requested that the appellant pay the outstanding deposit balance before it would begin work to process the request.

[16] During mediation the ABCA provided the appellant with sample representative records and re-affirmed its revised fee estimate in a letter of August 23, 2021.

[17] The appellant advised that they wished to proceed to adjudication in their appeal of the three interim access decisions issued on February 4, 2021, July 7, 2021 and August 23, 2021. The appellant maintains that the fee estimate of \$2700.00 plus HST is excessive and that they should be granted a fee waiver.

[18] The appellant also advised that they considered the authority's time extension for processing the request to be excessive and wished to pursue this to adjudication.

[19] As a mediated resolution was not achieved, the file was transferred to the adjudication stage of the appeal process, during which an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal decided to conduct a single inquiry into the issues arising in this appeal and Appeal MA21-00276.

² The appellant submitted an appeal notice in respect of four requests that they had made to the authority under the *Act*. This appeal notice included the two requests that give rise to this order, for which appeal files MA21-00274 and MA21-00276 were opened.

[20] The original adjudicator invited and received representations from the ABCA and the appellant and reply representations from the ABCA. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7. The original adjudicator made two preliminary findings:

- The only decision under appeal is the revised interim access decision and revised fee estimate, dated August 23, 2021, which superseded the earlier interim access decisions issued on February 4, 2021 and July 7, 2021.
- It would be premature to decide the issue of a time extension for the authority to process the appellant's request until after the issues of fee estimate and fee waiver are determined. Accordingly, the adjudicator removed the issue of time extension from the scope of this appeal.

Appeal MA21-00276

[21] In Appeal MA21-00276, the appellant submitted a request under the *Act* for the following:

Please provide versions A, B, C, 0, 1 and 2 listed on page i of the approved [SMP] 2019 and any Records (as that term is defined in the *Act*) regarding the revisions made to each of the 6 documents.

[22] The ABCA responded informing the appellant that the records being requested were publicly available on the authority's website. The appellant clarified that they had only been able to locate version 0 of SMP 2019 on the authority's website and versions A, B, C, 1 and 2 are not publicly available. The appellant stated that their request is for all records regarding each of the revisions and that this information is also not publicly available.

[23] On February 4, 2021, the ABCA issued an interim access decision and a fee estimate of \$795.00 plus HST for processing the request. The fee estimate was broken down as follows:

- Search and preparation time – 24.5 hours @ \$7.50 per 15 mins \$735.00
- Photocopying fee – 300 pages (approx.) @ \$0.20 per page \$60.00

[24] The ABCA requested that the appellant pay a deposit of \$100.00 before it would begin work on the request but noted that due to limited staff resources, it would not be able to complete the work within the required 30 days.

[25] In response, the appellant paid the \$100.00 deposit and indicated that they did not require photocopies. The appellant also amended the scope of their request and indicated that they did not require any records that had already been disclosed to the public on the ABCA website. The appellant requested a fee waiver pursuant to section

45(4) of the *Act*.

[26] On April 26, 2021, the ABCA issued a revised interim decision providing a new fee estimate of \$735.00 plus HST and refusing the appellant's request for a fee waiver. The authority stated that it was not in a position to waive the fees and that the appellant had not substantiated their fee waiver request.

[27] In addition, the ABCA explained that due to limited staff resources and seasonal increases in workload, it would not be able to start work to respond to the appellant's request until July 15, 2021.

[28] As noted above, the appellant appealed to the IPC and a mediator was appointed to explore resolution. During mediation, the mediator had discussions with the appellant and the ABCA.

[29] On July 7, 2021, the ABCA issued a final access decision to the appellant stating that it was providing partial access³ to the responsive records and the records would be disclosed upon receipt of the balance of the fee. The appellant paid the balance of the fee and the authority disclosed the responsive records.

[30] During mediation, the mediator held discussions with the appellant and the authority. The appellant advised that they believed that responsive records exist in addition to those disclosed by the ABCA. The authority stated that it had conducted a fulsome search and provided access to the responsive records. The authority stated that no further records exist. The appellant believes that they should be granted a fee waiver and that additional records exist. However, as the final access decision had been issued, the appellant advised that the time extension issue had been resolved.

[31] As a mediated resolution was not achieved, the file was transferred to the adjudication stage, when an adjudicator may conduct an inquiry. The adjudicator originally assigned to the appeal decided to conduct a single inquiry into the issues arising in this appeal and MA21-00274.

[32] The original adjudicator invited and received representations from the ABCA and the appellant and reply representations from ABCA. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

Summary

[33] After reply representations were received from the authority in both appeals, the two files were transferred to me to continue the adjudication. I have reviewed the complete file material in both appeals, including the representations from the ABCA and

³ The ABCA withheld information from some records and cited the discretionary draft by-law exemption in section 6(1) and the discretionary advice or recommendation exemption in section 7(1) of the *Act*. The application of these exemptions is not an issue that is before me in this appeal.

the appellant and the documentation submitted by both parties in support of their respective positions. I have concluded that I do not need any further information before rendering a decision. In this order, I dispose of the issues arising in both appeals MA21-00274 and MA21-00276.

[34] In appeal MA21-00274, I agree with and adopt the original adjudicator's preliminary findings. From my review of the authority's interim access decisions and fee estimates, I am satisfied that the only decision under appeal is the revised interim access decision, dated August 23, 2021, which supersedes the earlier interim access decisions. This revised interim access decision contains the revised fee estimate and the authority's refusal to grant a fee waiver, which are the two issues to be adjudicated in Appeal MA21- 00274.

[35] In addition, I agree with and adopt the original adjudicator's preliminary finding that it is premature to determine the issue of whether to uphold the authority's time extension for responding to the request in Appeal MA21-00274 at this stage. This issue is therefore removed from the scope of the appeal.

[36] For the reasons that follow, I uphold the ABCA's revised fee estimate for \$2700 plus HST to process the appellant's request in Appeal MA21-00274.

[37] I uphold the ABCA's decisions not to waive its fees in both Appeals MA21-00274 and MA21-00276 and find that the appellant has not established a basis for waiving the fees under the criteria listed in section 45(4) of the *Act*.

[38] Finally, I find that the ABCA has not demonstrated that it has expended reasonable effort to conduct a search to locate final version 1 of SMP 2019, dated February 27, 2019 and listed on page i of SMP 2019 published on the authority's website and records of its revisions. I therefore order the ABCA to conduct a further search to locate these records in response to the appellant's request giving rise to Appeal MA21-00276.

ISSUES:

- A. Should the authority's fee estimate in Appeal MA21-00274 be upheld?
- B. Should the authority's fees be waived in either or both Appeals MA21-00274 and MA21-00276?
- C. Did the authority conduct a reasonable search for the records in response to the request giving rise to Appeal MA21-00276?

DISCUSSION:

Issue A: Should the authority's fee estimate in Appeal MA21-00274 be upheld?

[39] In relation to Appeal MA21-00274 only, the appellant is appealing the reasonableness of the fee estimate of \$2700 plus HST set out in the authority's revised interim access decision on August 23, 2021.

[40] Institutions are required to charge fees for requests for access to information under the *Act*. Section 45 governs fees charged by institutions to process requests and these provisions are premised on a "user pay" principle whereby requesters are expected to carry a portion of the cost of processing a request. This principle is subject to section 45(4) which requires that an institution waive fees, in whole or in part, in certain circumstances.⁴

[41] Section 45(3) states that where a fee exceeds \$25, an institution must provide the requester with a fee estimate. 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.⁵

[42] In all cases, an institution must include in the fee estimate: a detailed breakdown of the fee and a detailed statement as to how the fee is calculated.⁶ The purpose of the 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 A fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.⁸

[43] In deciding whether to uphold the authority's fee estimate, I must consider whether it is reasonable. The burden is on the ABCA to provide detailed information to establish that the revised fee estimate of \$2700.00 plus HST was calculated in accordance with the applicable provisions of the *Act* and to support its position.⁹

[44] Section 45(1) provides the fees that institutions must charge for requests and states:

⁴ The waiver provisions are discussed in relation to Issue B below.

⁵ Order MO-1699.

⁶ Orders P-81 and MO-1614.

⁷ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁸ Order MO-1520-I.

⁹ See Orders P-86 and M-549.

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.

[45] The prescribed amounts of the fees to be charged under section 45(1) are found in section 6 of Regulation 823, which states:

The following are the fees that shall be charged for the purpose 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.

[46] Regulation 823 also provides for circumstances when an institution may require a requester to pay a deposit before it takes further steps to process a request¹⁰ and when an institution may require a requester to pay a fee prior to giving access to records.¹¹

¹⁰ See Regulation 823, section 7.

¹¹ See Regulation 823, section 9.

Representations

[47] The ABCA submits that the revised fee estimate of 90 hours for search time and preparation time totalling \$2700 plus HST is reasonable and should be upheld.

[48] The ABCA submits that prior to issuing the revised interim decision on August 23, 2021, it sought to work with the appellant to clarify the scope of the request.

[49] As already noted, the appellant has submitted two requests to the ABCA. The ABCA explains that when it calculated the fee estimate for the work to be done to respond to the appellant's request in Appeal MA21-00274, it relied on the advice of an individual familiar with the type and contents of the records and was guided by the actual work that it had done to respond to the appellant's other request in Appeal MA21-00276.

[50] The ABCA submits that it provided this explanation to the appellant in its letter of July 7, 2021 setting out the revised interim access decision. The ABCA stated that staff located more than 1,500 pages of records when responding to the request in Appeal MA21-00276 and the staff time associated with searching for, reviewing and preparing the responsive records was also more than anticipated. The authority relies on this actual work done as the basis for revising its fee estimate in the request giving rise to Appeal MA21-00274, the fee estimate that is before me in this appeal.

[51] The ABCA states that it anticipates that there will be more pages of records and more redactions to be made as a result of the amount of personal information in the responsive records to the appellant's request in this appeal. The ABCA explains that in preparing the fee estimate it contacted all the staff involved in the SMP 2019 project who might have records responsive to the request. There were nine staff identified and seven are still employed by the authority.

[52] The ABCA states that the relevant staff were asked to provide information of the efforts required to search their records and identify responsive records. The staff members report needing to conduct manual searches for handwritten file notes of meeting discussions, telephone messages and searches of incoming and outgoing emails that have been archived. The ABCA estimates that each staff member receives between 20,000 and 25,000 incoming emails per year, which need to be searched.

[53] The ABCA submits that it agreed to provide the records in digital form to the appellant in an effort to reduce costs but noted that when it was preparing records in response to the request in Appeal MA21-00276, producing records in digital form only had not actually saved costs. The ABCA states that it does not have the resources to permit bulk preparation of documents and, in response to the request in Appeal MA21-00276, numerous email records had to be individually prepared.

[54] The ABCA states that preparation of each of the responsive records would be carried out by a single staff person. The ABCA submits that although it has not broken

down the estimate to show search time and preparation time separately, when preparing hard copies of records for release two minutes per page is reasonable.

[55] The appellant's position is that the revised fee estimate of \$2700 plus HST is unreasonable and the ABCA has not provided the information required by the fee provisions in section 45 of the *Act*. The appellant submits that the revised interim access decision of August 23, 2021 does not contain a detailed statement as to how the fee was calculated, it is not based on actual work done in respect of the request to which it relates nor a representative sample of responsive records. The appellant states that the ABCA has not reviewed a sample of the emails and handwritten notes maintained by staff members, which are the records it has specifically identified as representing the type of records that are responsive to the request.

[56] The appellant submits that in its revised fee estimate the authority has not provided detailed information on the types of records to be searched and prepared nor has it broken down the fees to account for these two separate tasks nor indicated the approximate number of responsive records it anticipates will be disclosed and the proportion of the records that will require redactions. It is the appellant's position that this additional information would have enabled them to consider whether some tasks could be dispensed with or revised to reduce the work necessary to respond to the request. Without this information, the appellant states they were unable to make an informed decision about paying the deposit and pursuing the access request.

[57] The appellant states that they relied on the ABCA's first revised interim access decision and the fee estimate of \$1050.00 plus HST and decided to proceed with their access request. At that time, April 2021, the appellant states that the residents of the Lake Huron shoreline were facing high water levels and a resulting increased risk of shoreline hazards lending urgency to their desire to have the request processed. The appellant states that they therefore agreed to proceed with the request despite the inadequacies of the interim access decision.

[58] The appellant acknowledges that some of the information missing from the fee estimate has been provided in the ABCA's representations in this appeal but maintains that it is still unclear how the representations about the work translate to 90 hours of search and preparation time.

[59] It is the appellant's position that the authority's failure to comply with Order P-81¹² is relevant to the assessment of the reasonableness of the fee estimate. The appellant submits that

In none of the three interim access decisions did the ABCA provide any information regarding how the records are kept, how the records are maintained, the actions necessary to locate the requested records, the

¹² In Order P-81, former Commissioner Sidney Linden provided guidance for the issuance of final and interim access decisions, fee estimates and time extensions.

estimated time for each action, the estimated number of records, the estimated number of records that need redaction, the type of personal information that they expect to be redacted, the estimated number of records that need multiple redactions, the preparation time that is earmarked for running reports from computer systems, time spent to scan paper records into electronic media, the actions required to prepare the records for disclosure and the estimated time for each action. Granted not all these items are mandatory, but surely some of them must be required in order for a requester to be able to make an informed decision about whether to proceed and/or change the scope of the request.

[60] The appellant also cites Order MO-1614 in which former Assistant Commissioner Tom Mitchinson found an institution's interim decision was inadequate because, among other things, it did not provide sufficient detail to substantiate the fee estimate. The appellant asks me to disallow the ABCA's fee estimate for 90 hours of search and preparation time for failing to comply with the *Act*.

Analysis and findings

[61] For the reasons that follow, I find that the authority has provided sufficient information to support its fee estimate and to demonstrate that it has been calculated in accordance with the fee provisions of the *Act*. Accordingly, I uphold the revised fee estimate of \$2700 plus HST for the authority to process the appellant's request.

[62] As already noted, where an institution estimates that its fee for processing an access request will be more than \$100, it may choose to do all the work necessary to respond to the request at the outset and issue a final access decision. Alternatively, an institution may choose not to do all the work necessary to respond to the request initially, in which case it must issue an interim access decision, together with a fee estimate.¹³

[63] A fee estimate, by its very nature, is not based upon the actual work done to respond to a request but an estimate of the work that an institution anticipates will be necessary to process a request. An interim access decision and fee estimate serve two purposes: they provide the requester with sufficient information to make an informed decision as to whether to pay the fee and pursue access. In addition, a fee estimate also protects the institution from expending undue time and resources on processing a request that may ultimately be abandoned.¹⁴

Search time

[64] In Order P-81, former Commissioner Sidney Linden considered the responsibilities of an institution when preparing a fee estimate and said:

¹³ Order MO-1699.

¹⁴ Order MO-1699.

How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (i) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (ii) the head can base the estimate on a representative (as opposed to a random) sample of the records. Admittedly, the institution will have to bear the costs incurred in obtaining the necessary familiarity with the records, however, this is consistent with other provisions of the *Act*.

[65] The former commissioner's guidance to institutions in preparing fee estimates has been adopted in subsequent orders of the IPC.¹⁵ I also adopt this approach and apply it in this appeal. In my view, to be reasonable, the ABCA's fee estimate need only be based on a preliminary familiarization with the records, not an exhaustive review.

[66] The ABCA has provided information about the steps taken to estimate the work that will need to be done to locate records responsive to the appellant's request. I find that the ABCA has based its fee estimate for locating responsive records on a preliminary familiarization with the records as suggested in the guidance set out in Order P-81. The authority identified the staff members familiar with the requested records, namely staff who had been involved with SMP 2019. Those staff members were asked about the work to be done to locate the responsive records and the authority explains that this work will involve searching through handwritten meeting notes and telephone messages and emails. The authority states that there were 9 staff members involved in the SMP 2019 (7 of whom remain employed with the authority) and each one received between 20,000 and 25,000 emails per year. The ABCA has established that it anticipates that a substantial volume of records will need to be searched to locate responsive records. The ABCA has also provided information about how it plans to conduct the searches, being a combination of manual searches and searches through computer files, archived emails, and the type of records to be searched.

[67] I am satisfied that the authority has provided sufficient information to support spending time searching for responsive records. The fee estimate does not provide a breakdown between search time and preparation time and I will return to this point below.

Preparation time

[68] It is the appellant's position that the ABCA's fee estimate is unreasonable because the ABCA has not provided the detailed information necessary for the appellant to make an informed decision about whether to proceed with or change the scope of the request. I agree that the revised fee estimate in the ABCA's letter of August 23,

¹⁵ See for example, Order MO-1699, MO-1520-I and MO-2071.

2021 does not provide a full breakdown and explanation for the calculation of the fees. However, I find that the ABCA has remedied this deficiency in its representations in this appeal.

[69] The authority has explained how the work done to process the request giving rise to Appeal MA21-00276 informed its estimate regarding the work to be done to process the request in this appeal. The authority states that it anticipates that personal information will need to be severed from the responsive records. The subject matter of the request is the feedback received from the public by the ABCA during the update of the SMP 2019 and the request itself states that records may need to be "anonymized if required".

[70] During mediation, the authority provided the appellant with a sample responsive record, which contained redactions. The appellant has also attached sample records containing public feedback as exhibits to their representations and these pages contain redactions. I am satisfied that the responsive records may require severances prior to disclosure to the appellant and it is reasonable for the authority to include a fee for preparation time in its fee estimate.¹⁶

[71] The ABCA has explained that it expects that its searches will locate more pages of records in response to the request giving rise to this appeal than were located in the request in Appeal MA21-00276. The ABCA states that there were in excess of 1,500 pages of responsive records. The ABCA explains that a single member of staff will prepare each of the records for disclosure.

[72] The IPC generally accepts that it takes two minutes to sever a page that requires multiple severances.¹⁷ The ABCA states that this is the rate it has used to calculate the preparation time estimate, although it accepts that it has not broken down the 90 hours between search time and preparation time. Applying the rate of two minutes per page to the minimum estimate of pages in the responsive records (1,500) gives a time estimate of 50 hours for preparation time. This estimate is close to half the total fee estimate for search and preparation time combined.

Breakdown of fee estimate

[73] I have found that the ABCA has provided information to support the work that it anticipates having to do to locate responsive records and to prepare them for disclosure. Based upon the authority's estimate that its searches will locate more than 1,500 pages of responsive records and these pages will all require redactions, I have determined that a fee estimate for 50 hours of preparation time is reasonable. I therefore uphold 50 of the 90 hours of the fee estimate for preparation time.

¹⁶ The ABCA's interim access decisions do not explicitly state whether it intends to provide the appellant full or partial access to the responsive records nor do they cite any exemptions that will be relied upon for withholding portions of the records.

¹⁷ Orders MO-1169, PO-1721, PO-1384 and PO-1990.

[74] The ABCA has not provided a breakdown between the search time and preparation time. However, I find that this is not fatal to my assessment of the reasonableness of the total fee estimate. Previous orders of the IPC have considered combined fees for “search and preparation time” in appeals concerning fee estimates and determined the reasonableness of the combined fee estimate by reviewing the evidence in respect of the separate fees.¹⁸ I agree with this approach and will adopt it in this appeal.

[75] Having found that a fee estimate of 50 hours of preparation time is reasonable, I must now consider whether the remaining 40 hours of the combined 90 hours of estimated work is supported by the information provided by the ABCA in relation to the search time.

[76] I am satisfied that 40 hours is reasonable for the search time described by the ABCA to locate records responsive to the appellant’s request in this appeal. The appellant’s request specifies a time period of four years from January 1, 2015 to February 28, 2019. The ABCA has identified 9 staff members who were involved in SMP 2019, each of whom received between 20,000 and 25,000 emails per year. This gives a conservative estimate of 720,000 emails to be searched for responsive records. This is in addition to the manual searches of physical records of meetings notes and telephone messages. In my view, it is reasonable to estimate that the remaining 7 staff members who were involved in SMP 2019 and are still employed by the authority will spend the estimated 40 hours searching for responsive records.

Summary of findings

[77] I find that the ABCA has discharged its burden of demonstrating that the fee estimate of 90 hours of search and preparation time is reasonable and is calculated in accordance with the fee provisions of the *Act*. I therefore uphold the ABCA’s revised fee estimate of \$2700 plus HST.

Issue B: Should the authority’s fees be waived in either or both Appeals MA21- 00274 and MA21-00276?

[78] As noted above, the fees provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request. The fees referred to in section 45(1) of the *Act* and outlined in sections 6 and 6.1 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.¹⁹

[79] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part,

¹⁸ See for example Orders PO-1962 and MO-3492.

¹⁹ Order PO-2726.

in certain circumstances:

45. (4) a head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed by the regulations.

[80] Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Section 8 provides:

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

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

[81] Before the IPC will consider whether an institution's fees should be waived, a requester must first ask the institution for a fee waiver and provide detailed information to support the request. The IPC may then review an institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.²⁰

Representations

[82] The appellant has requested fee waivers in both appeals. In Appeal MA21-00274, the appellant requested a waiver of the fee estimate of \$2700 (plus HST) and in Appeal MA21-00276, the appellant requested a waiver of the fee of \$730.00 (plus HST) for the work that has been done. The appellant set out the bases for the fee waivers in the request, as follows:

²⁰ Orders M-914, P-474, P-1393 and PO-1953-F.

- that the payment of the fees would cause a financial hardship for the appellant because their income had been negatively impacted due to the global pandemic;
- that the subject matter of the requests was a matter of public, not private, interest;
- that the subject matter of the requests will benefit public health and safety, specifically in regards to the control and management of shoreline hazards;
- that the requests were being made and paid for by the appellant as part of a delegation of over 60 shoreline property owners and the disclosed records would be disseminated to shoreline property owners who are concerned about the public health and safety associated with shoreline hazards.

[83] The appellant submitted the same reasons to support both fee waiver requests.

[84] In these appeals, the appellant submits that they are no longer pursuing the fee waivers on grounds of financial hardship and maintain that they have provided information substantiating the public health or safety basis for their waiver requests.

[85] The appellant makes three submissions in support of their appeal of the ABCA's refusal to grant a fee waiver: first, the appellant states that the authority failed to advise them of the type of evidence that was required to make a fee waiver determination or to requests those documents from the appellant; second, the appellant submits that the subject matter of their requests is of public interest and relates directly to issues of public health and safety; finally, the appellant submits that they intend to disseminate the disclosed records among other interested stakeholders and to post them on the shoreline residents' association website.

[86] Regarding the public interest in SMP 2019, the appellant explains the extensive public consultation process that led to the updating of the SMP in February 2019, which is outlined on the ABCA website and identifies 533 interested parties. The appellant states that there was "public outcry" in response to earlier versions of SMP 2019 so that it was rejected by the ABCA board and the updating process had to begin again afresh.

[87] The appellant refers to the fact that the ABCA has published a more recent update of the SMP made in 2021 on its website, including public feedback. The appellant submits that this demonstrates that the ABCA considers this information to be in the public interest.

[88] The appellant further submits that the disclosure of the requested records relates directly to public health or safety. In this regard, the appellant explains the shoreline hazards set out in SMP 2019 and submits that although the shoreline properties include privately owned land, during times of low water members of the public walk along the shoreline near the water. The appellant argues that this use of the shoreline gives rise to public health and safety issues that are directly related to the development guidelines

that are set out in SMP 2019. In addition, the appellant argues that disclosure of the requested records would provide public scrutiny of the authority's decisions in relation to the implementation of SMP 2019.

[89] The appellant submits that there are other relevant factors that make it fair and equitable for the ABCA to waive its fees: the manner in which the ABCA responded to the requests, the fact that the ABCA has not worked constructively with the appellant to narrow or clarify the scopes of the requests and instances of "misleading, inaccurate or outright fall statements" made by the ABCA. The appellant submits that denial of the requests for fee waivers would shift an unreasonable burden of the cost to the appellant.

[90] The ABCA's response to the appellant's requests for fee waivers in respect of both appeals was that the need for a fee waiver had not been substantiated.

[91] In response to the appellant's representations in these appeals, the ABCA submits that it has no concerns about providing disclosure of the responsive records pertaining to the draft versions of SMP 2019 but it disputes that these records share the same level of public interest as the final approved documents and by-laws, which are publicly available. It is the authority's position that the appellant has not provided substantive evidence to demonstrate that the disclosure of the requested records serves a public interest nor that it would yield a public benefit related to public health and safety.

[92] The ABCA submits that the shoreline of Lake Huron that is within its jurisdiction is almost entirely in private ownership and the delegation to which the appellant belongs represents a small number of those landowners. The authority argues that there is no evidence that dissemination of the responsive records to this focused group would serve any greater public interest. The authority states that SMP 2019 is already publicly available on its website.

[93] The ABCA submits that it would not be fair and equitable for it to waive its fees and states that doing so will simply serve to further shift a disproportionate burden of the costs of processing the requests onto the authority. The ABCA also submits that in relation to the request giving rise to appeal MA21-00276, it has effectively waived a portion of its fees. In its letter to the appellant of August 9, 2021, the authority explained that the actual cost to search, review and prepare the requested records was approximately double the amount of the fee estimate. The ABCA submits that it has waived its fees by not seeking to recover those additional costs from the appellant.

Analysis and findings

[94] For the reasons that follow, I uphold the authority's decision not to waive its fees. As I will explain, I find that the appellant has not established a basis for the fee waiver under the criteria listed in section 45(4). I do not agree with the appellant's

submission that the dissemination of the responsive records will yield a benefit to public health or safety. As the appellant has not established a basis for granting a fee waiver in either appeal, I have not considered whether it would be fair and equitable for the ABCA to do so.

[95] The appellant requests fee waivers under section 45(4)(c) of the *Act* and submits that the dissemination of the requested records in each appeal will benefit public health or safety.

[96] The IPC has previously held that benefitting public health or safety within the meaning of section 45(4)(c) is not established merely because a record contains information relating to health or safety matters.²¹ Factors relevant to determining whether dissemination of a record will benefit public health or safety include the following:

- whether the subject matter of the record is a matter of public rather than private interest,
- whether the subject matter of the record relates directly to a public health or safety issue,
- whether distribution of the record once disclosed would yield a public benefit
 - a. by disclosing a public health or safety concern; or
 - b. by contributing meaningfully to the development of understanding of an important public health or safety issue, and
- the probability that the requester will share the contents of the record with others.²²

[97] The IPC has previously held that the dissemination of a record will benefit public health or safety under section 45(4)(c) where, for example, the record relates to:

- compliance with air and water discharge standards²³
- a proposed landfill site²⁴
- a certificate of approval to discharge air emissions into the natural environment at a specified location²⁵

²¹ See Order P-2 in which former Commissioner Sidney Linden considered the meaning of the same expression in the equivalent section of the provincial *Freedom of Information and Protection of Privacy Act*.

²² Orders P-2, P-474, PO-1953-F and PO-1962.

²³ Order PO-1909.

²⁴ Order M-408.

- environmental concerns associated with the issue of extending cottage leases in provincial parks²⁶
- safety of nuclear generating stations²⁷
- quality of care and service at group homes.²⁸

Waiver request in respect of Appeal MA21-00274

[98] I am not satisfied that the dissemination of the records responsive to the request giving rise to appeal MA21-00274 will benefit public health or safety. The appellant is requesting access to records pertaining to the ABCA's handling of and decisions relating to public feedback received during the upgrading of the SMP, which received approval in February 2019.

[99] The appellant explains the public interest in the implementation of SMP 2019 reflected in the extensive public engagement in the process leading up to its approval and the public interest in decisions being made under SMP 2019. The appellant has also explained public health and safety concerns that can arise from public use of the shoreline, including the use described on privately owned land when water is low.

[100] While the appellant is seeking access to records relating to the upgrading of the SMP, from my review of the appellant's request and the subject matter of the records to which access is sought, the focus of the appellant's request is the ABCA's handling of public feedback it received during the upgrading process. In my view, the appellant's request is directed at the ABCA's decisions regarding incorporating public feedback in the upgrade of the SMP and I am not satisfied that the focus of the request is a matter of public rather than private interest nor that it relates directly to a public health or safety concern.

[101] I accept the appellant's submission that the delegation of shoreline property owners and, more recently, the residents' association has an interest in protecting and preserving the shoreline environment. In my view, this interest is in the content and operation of SMP 2019 and decisions made by the ABCA pursuant to SMP 2019 when exercising its duties under the Regulation. However, this does not appear to me to be the essence of the information that is being requested in the access request. The request relates to records pertaining to the authority's handling of public feedback. There is no information before me that there is stakeholder interest (beyond the residents' association) in the ABCA's handling of and decisions made in respect of feedback received during the SMP upgrade.

²⁵ Order PO-1688.

²⁶ Order PO-1953-F.

²⁷ Orders P-1190 and PO-1805.

²⁸ Order PO-1962.

[102] The appellant states that they will disseminate the records among the association of property owners and publish them on its website. However, I am not persuaded that this distribution of the records will yield a public health or safety benefit. I note that SMP 2019 is published on the ABCA website, including Appendix G, which outlines the public engagement process. The appellant has not identified any aspect of the public feedback or concern regarding public health or safety that will be disclosed in the dissemination of the responsive records or how their distribution will contribute meaningfully to the development of understanding of a public health or safety issue in relation to SMP 2019 and the preservation of the shoreline environment. The appellant has not established that the disclosure of the responsive records will benefit public health or safety beyond the information already disclosed in SMP 2019.

[103] Accordingly, I uphold the authority's decision to deny the fee waiver request in respect of its fee estimate to respond to the request in Appeal MA21-00274.

Waiver request in respect of Appeal MA21-00276

[104] The request giving rise to Appeal MA21-00276 relates to earlier draft versions of SMP 2019 and revisions made during the upgrade process. I am not persuaded that the dissemination of these records will benefit public health or safety. I agree with the appellant's submission that access to these records provides transparency about the upgrade process and that this public scrutiny of the SMP upgrade process is a matter of interest to stakeholders. However, in my view, the stakeholders' interest in the transparency of the upgrade process is insufficient to establish a public health or safety benefit in the disclosure of the responsive records.

[105] The appellant cites Order P-474 as raising similar issues in respect of public scrutiny of decision making and when the dissemination of records will benefit public health or safety. Order P-474 concerned the disclosure of records that were considered for inclusion in the rehabilitation plan for the Bruce-A-Nuclear generating station, but which were subsequently rejected. Former Assistant Commissioner Irwin Glasberg noted that there was a public debate regarding the safety of the facility and that Ontario Hydro and various different interest groups had taken divergent positions on the subject of the facility's safety. These divergent positions were difficult for the public to reconcile and the disclosure of the requested records, if disseminated, were found to contribute to the development of public understanding on the subject of the maintenance of aging nuclear reactors.

[106] I do not agree with the appellant's submission that the arguments put forward in the appeal leading to Order P-474 are similar to or applicable in the appeal before me. There is no evidence before me of a public debate around the subject matter of the records being sought in the appellant's request, namely revisions made to the SMP during the upgrade process.

[107] In Appeal MA21-00276, the ABCA has provided disclosure of the responsive

records and the appellant has not identified the information in the disclosed records that will benefit public health or safety when disseminated. I am not satisfied that the appellant has demonstrated how the publication of the responsive records will make a meaningful contribution to the public understanding of an important health or safety issue. There is no information before me of the disseminated information on the residents' association website or of public comment or discussion arising from its publication.

[108] Accordingly, I uphold the ABCA's decision to deny the request to waive its fees for the actual work done to respond to the appellant's request in Appeal MA21-00276.

Issue C: Did the authority conduct a reasonable search for the records in response to the request giving rise to Appeal MA21-00276?

[109] In relation to Appeal MA21-00276 only, the ABCA has processed the appellant's request and, with the exception set out in the overview above, provided full access to the responsive records. The appellant states that they believe that additional records exist beyond those disclosed by the ABCA. The issue to be decided is therefore whether the authority conducted a reasonable search for records as required by section 17 of the *Act*.²⁹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the ABCA's decision. Otherwise, I may order the ABCA to conduct another search for records.

[110] A requester will rarely be in a position to indicate precisely which records an institution has not identified but they must still provide a reasonable basis for concluding that such records exist.³⁰

[111] The *Act* does not require an institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;³¹ that is, records that are "reasonably related" to the request.³²

[112] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.³³

Representations

[113] The request giving rise to appeal MA21-00276 is for earlier iterations of the updated shoreline management plan, which are listed on page 1 of SMP 2019 (versions

²⁹ Orders P-85, P-221 and PO-1954-I.

³⁰ Order MO-2246.

³¹ Orders P-624 and PO-2559.

³² Order PO-2554.

³³ Orders M-909, PO-2469 and PO-2592.

A, B, C, 0, 1 and 2). The request is also for access to records regarding revisions made to those earlier versions of the shoreline management plan before it was approved in February 2019.

[114] The appellant believes that additional records exist beyond those disclosed by the ABCA. The appellant submits that the following additional records exist:

- i. Version 1 of SMP 2019 (referred to on page 1);
- ii. Records of revisions made to version 1 or 2;
- iii. Records dated between November 28, 2018 and March 1, 2019. The appellant submits that during this time period public consultation, receipt of comments, evaluation and decision making regarding public comments, drafting of revisions (specifically revisions 1 and 2) and ABCA Board reporting occurred;
- iv. Email attachments and other records referenced in the disclosed records;
- v. Updates regarding the development of SMP 2019 provided to the ABCA Board on February 15, 2018, March 22, 2018, June 21, 2018, July 19, 2018, September 20, 2018, November 22, 2018 and February 21, 2019. The appellant refers to the ABCA Board minutes from these meetings posted on the ABCA website; and
- vi. Revisions made as a result of public comments.

[115] The appellant submits that these records exist in addition to those that have been disclosed by the ABCA. The appellant submits that some numbers are missing in the sequential numbering of emails disclosed by the ABCA. The appellant has concluded that these missing numbers represent missing records that are responsive to the request and ought to be disclosed. The appellant does not address the reasonableness of the authority's searches in their representations.

[116] The ABCA states that all of the requested records have been disclosed to the appellant. In the ABCA's letter to the appellant on September 28, 2021, it set out its response to the appellant's belief that additional responsive records exist. The ABCA stated that "a fulsome search was undertaken by multiple ABCA staff – all of whom are familiar with the records in question." The ABCA explained that it had undertaken reasonable searches including the following:

- a search of all ABCA computer files associated with the matter in question;
- a manual and automated search of e-mails of those staff members involved in the matter of concern;
- a manual search of handwritten file notes/telephone records etc. for the period in question; and

- a manual search of all paper records associated with the matter in question.

[117] In the letter, the ABCA stated that the disclosed records included emails showing the receipt of the draft reports from the consultant and staff comments in response. The ABCA also referred the appellant to a revisions table included in each of the draft versions of SMP 2019.

[118] In response to the appellant's belief that additional records exist relating to public comments on revisions to the draft versions of the shoreline management plan, the ABCA stated that public feedback is outside the scope of this request. The ABCA stated that this request is for previous versions of SMP 2019 that are listed on page 1 of the published version on the ABCA website and records related to revisions made to each version. The ABCA stated that the evolution of draft versions of SMP 2019 were not subject to public consultation until after it was received by the ABCA Board.

[119] The ABCA relied upon the contents of this letter as its representations on the issue of reasonable search in Appeal MA21-00276.

Analysis and findings

[120] With one exception, I find that the ABCA has discharged its responsibilities under section 17 of the *Act* and conducted a reasonable search for all records responsive to the appellant's request in Appeal MA21-00276. The ABCA has provided information about the searches that have been carried out by staff who are familiar with the records in question to locate responsive records including searches of computer files, emails, handwritten file notes and telephone records.

[121] In Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records:

In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[122] I adopt this approach set out in this finding in this appeal. I am satisfied that the ABCA has provided sufficient information to support its position that experienced employees have expended a reasonable effort to conduct searches in different areas where responsive records are likely to be located.

[123] From my review of the appellant's representations, I note that they focus on an analysis of the disclosed records to identify gaps in the data leading them to conclude that records are missing. With the exception of final version 1 of SMP 2019, the appellant has not provided evidence to establish a reasonable basis for concluding that

these additional documents exist. I am also not persuaded that there is a reasonable basis for concluding that the referenced documents, missing emails, records of public comments or updates on the development of SMP 2019 made to the ABCA Board pertain to the revisions made between the earlier iterations of SMP 2019. The appellant has not stated a basis for believing that these documents exist beyond those that have been disclosed. There is no information before me, for example, that updates on the development of SMP 2019 presented to the ABCA Board at their meetings include revisions made to the different draft versions of the plan.

[124] I note that records relating to ABCA's handling of public feedback and decisions made in relation to public comment are the subject of the appellant's request giving rise to appeal MA21-00274. In their representations, the appellant accepts that public comments on revisions to the draft versions of the SMP are within the scope of the other request. I accept the ABCA's evidence that draft versions of the SMP 2019 were not subject to public consultation until after they were finalised by the ABCA Board. The ABCA has therefore provided an explanation for there not being additional records as described by the appellant.

[125] With respect to final version 1 of the shoreline management plan, this record is listed on page 1 of SMP 2019, which is published on the ABCA website. I find that regarding this record the appellant has demonstrated a reasonable basis for believing that this version of SMP 2019 exists. This record is specifically identified by the appellant in their request and on the ABCA website. The authority has not provided any explanation about its search for this specific record and there is no information for me to conclude that it has expended reasonable efforts to locate it. In addition, the ABCA has not provided an explanation as to why it has been unable to locate version 1 of the SMP 2019 or records of the revisions made to it.

[126] On page 1 of SMP 2019, published on the ABCA website, there are two final versions of SMP 2019. Final version 1 of SMP 2019, the one sought by the appellant, is listed as dated February 27, 2019. Final version 2 of SMP 2019, the final version published on the ABCA website, is dated the following day, February 28, 2019. The appellant is seeking access to final version 1 and records relating to its revision(s).

[127] I find that the ABCA has not discharged its obligations under section 17 of the *Act* and has not demonstrated that it has expended reasonable efforts to search for final version 1 of SMP 2019 dated February 27, 2019 and records relating to its revision. I will therefore order the authority to conduct a further search to locate these records.

ORDER:

1. I uphold the ABCA's revised fee estimate of \$2700 plus HST in Appeal MA21-00274.

2. I uphold the ABCA's decisions to refuse the appellant's request for fee waivers in Appeals MA21-00274 and MA21-00276.
3. I order the ABCA to conduct a further search in response to the appellant's request for access to final version 1 of Shoreline Management Plan 2019 dated February 27, 2019 and records relating to its revision.
4. The ABCA is to update the appellant in writing of its further search within 21 days of this order and, in the event that the ABCA is unable to locate final version 1 of Shoreline Management Plan 2019 as described in provision 3 above, to provide the appellant with an explanation as to why it has not been located.

Original Signed by: _____
Katherine Ball
Adjudicator

_____ August 31, 2022