Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1884

Appeal MA-030271-2

District Municipality of Muskoka

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NATURE OF THE APPEAL:

The District Municipality of Muskoka (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …a review of the printed email records maintained by or on behalf of the following individuals and containing the text [the requester's name]. [12 named individuals] any assistants each of the above may have to manage their email. Email sent by [the requester] or to [the requester] can be excluded from the responsive records.

This request is an amended version of an earlier request focusing on emails in the Municipality's email accounts, servers and archives being addressed in Appeal Number MA-030271-1.

The Municipality issued a fee decision in the amount of $495. It also located 11 responsive records and provided access to three of them. The undisclosed information was denied pursuant to the discretionary exemption in section 12 of the *Act*.

The requester, now the appellant, appealed the Municipality's decision on the basis that the search was inadequate, the fee was excessive and the exemptions claimed did not apply to the information.

During the mediation stage of the appeal, the appellant accepted the Municipality's position that the exempted emails were the records at issue in another appeal, MA-020185-2, and that access to these records would be addressed in that appeal. The appeal of the quantum of the Municipality's fee and the adequacy of its search remain unresolved. In a decision letter dated December 19, 2003, the Municipality provided the appellant with a detailed breakdown of the nature and extent of the searches undertaken for responsive records in the files maintained by each of the 12 named individuals. The 14.5 hours of search time identified gave rise to the fee provided of $495.

I initially provided a Notice of Inquiry to the Municipality, setting out the facts and issues in the appeal. The Municipality provided representations in response, which were shared with the appellant, who also made submissions in response to the Notice of Inquiry.

DISCUSSION:

FEES

Was the fee calculated in accordance with the *Act*?

When providing a requester with a fee, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below. Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

The Municipality's representations in support of the quantum of its fee state:

> Muskoka's fee is exclusively a search fee, since the photocopy costs were waived. The original estimate was an educated guess, based on our knowledge of the volume of files. We estimated it was a 2 day job to conduct the search. The final fee calculation was based on the actual number of hours required to conduct the search required to respond to the request.
>
> Muskoka has been involved in litigation and/or contemplated litigation since the end of 2000 and has literally thousands of records dealing with this matter. In order for us to deal with this issue, it has become necessary for us to maintain these files in a very organized manner. Some of the files relate to the litigation issue, some represent general engineering files for [a particular construction project] and some the FOI files.
>
> The bulk of the records have been consolidated and are located mainly in cabinets in Muskoka's Solicitor's office and a large file vault in the Public Works Dept. with some others located in personal offices.

As noted above, the decision letter provided to the appellant by the Municipality on December 19, 2003 described in greater detail the searches undertaken of the record-holdings of each of the individuals named in the amended request.

The appellant's representations do not address this aspect of the appeal other than to indicate that, because the searches undertaken were inadequate, in the appellant's view, the quantum of the fee is also improper.

Findings

Based primarily on the information contained in the Municipality's December 19, 2003 decision letter, I am satisfied that the fee of $495 representing 14.5 hours of search time was reasonable. In my view, the Municipality has provided me with sufficient information to conclude that the search time and the fee that supports its calculation were, in fact, required to locate and identify the records sought from 12 individuals. As a result, I uphold the fee and dismiss that portion of the appeal.

REASONABLENESS OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In the Municipality's representations, which were shared in their entirety with the appellant, I was provided with a detailed description of the work performed by the Municipality's staff in attempting to locate and identify responsive records. For each of the individuals identified in the request, the Municipality explained in detail where it conducted searches and the result obtained.

The appellant's representations focus primarily on the fact that, in his view, the Municipality does not treat electronic records, such as email, in the same fashion as paper records for the purposes of a request under the *Act*. He argues that in order to "avoid responsibility and accountability and to prevent the Institution from being open and transparent in its operations" the Municipality chooses not to conduct electronic searches of its databases for responsive records.

In my view, the Ministry's December 19, 2004 decision letter and its representations adequately answer the concerns raised by the appellant. I find that the Municipality has conducted a reasonable search of the record-holdings maintained by the 12 named individuals. Evidence of this lies in the fact that the records identified as responsive to the request consist of email messages involving these individuals. I find that the Municipality has conducted a reasonable search for responsive records and I dismiss this part of the appeal.

ORDER:

I dismiss the appeal.

Original signed by: December 16, 2004
Donald Hale
Adjudicator