



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

ORDER MO-2595

Appeal MA10-262

Municipality of North Perth



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NATURE OF THE APPEAL:

The Municipality of North Perth (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the corporate and personal emails of four named individuals (a councillor, a named individual, an employee and a former employee) over an identified time period (greater than 4 years). The request also stated:

... I am requesting copies of these on a portable hard disk or a USB drive of which I will supply. ...

In addition to the above, I am requesting all deleted emails for the same period [of] time stated ... which can be obtained through ghosting the computer hard drives or the email server storage system or drives.

The Municipality's initial decision letter in response to the request stated that it did not have access to the email account of the named councillor, and that these records were not, accordingly, within its custody or control. With respect to the remaining requested records, the decision provided a large fee estimate to deal with the request, and indicated that the timeline to respond to the request would be approximately eight months.

The requester then submitted a revised request for just the emails of the councillor and the named individual covering a period of time of approximately 10 months.

The Municipality issued a second decision in which it confirmed that the named councillor's emails are not in its custody or control. With respect to the request for the named individual's emails for the identified period, the Municipality provided a revised fee estimate of \$6,470.00. The Municipality also advised that it would need to hire additional staff to fulfill the request and that the timeline to respond would be approximately three months.

The requester, now the appellant, appealed the Municipality's decision.

During mediation, the Municipality issued a revised, interim access decision, which included additional information. The appellant subsequently decided to expand the scope of the request to include the e-mails of the identified employee for the newly-identified time period.

In response, the Municipality issued a further revised interim access decision (dated October 28, 2010). In that decision, the Municipality stated that it was likely that third party notification would be required since the responsive records relate to other individuals and/or third parties. The Municipality also indicated that, based on a review of a representative sample of the records, it estimated that partial access would be granted to the responsive records, but that access to portions of them would be denied on the basis of a number of identified exemptions in the *Act*. The Municipality also stated that the fee estimate for the records (based on a representative sample) was \$7,285.50, and that the anticipated time to compile the records would be 60 days. Finally, the Municipality reiterated its position that emails relating to the named councillor are not in its custody or control.

The appellant confirmed that he was appealing the fee estimate of \$7,285.50 and the 60-day time extension, as well as the decision that the emails of the named councillor are not within the custody or control of the Municipality.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the Municipality, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the Municipality's representations, to the appellant, who sent in representations which only addressed the issue of the amount of the fee estimate.

PRELIMINARY MATTER

In his representations, the appellant argues that, because of the actions of the Municipality, including the amounts of fees charged and the time this matter has taken, any fees should be waived. Section 45(4) of the *Act* deals with the subject of fee waiver, and previous orders have confirmed that a requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted [See orders M-914, P-1393, PO-1953-F]. Accordingly, I will not address this issue in this order. Furthermore, the basis of the appellant's interest in a fee waiver appears to be the amount of the fees charged and the time this matter has taken. I address both of these issues below, and also note that, in the course of this appeal, the appellant amended his request a number of times, including once after the Mediator's Report was prepared and issued.

DISCUSSION:

FEE ESTIMATE

General principles

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

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

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

- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in section 6 of Regulation 823 made under the *Act*. That section reads:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Where the fee exceeds \$25, an institution must provide the requester with a fee estimate. Section 7 of Regulation 823 states that, where the fee is \$100 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the appeal.

A fee estimate of \$100 or more must 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.

[Orders P-81, MO-1699]

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 [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699]. The fee estimate also assists requesters in deciding whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. In all cases, 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 823, as set out above.

The Municipality's revised fee estimate decision

As set out above, the Municipality provided a revised fee estimate decision, in which it described the costs which form the basis of the fee estimate of \$7285.50 as follows:

Description	Time	Total
Search time	3 hours	\$ 90.00
Preparation time	180.57 hours/\$30.00 per hour	\$ 5417.10
Photocopying charges	5,417 pages @\$0.20 per page	\$ 1083.40
Computer consultant		\$ 695.00
Total		\$ 7285.50

Representations and findings

The Municipality's representations provide specific information supporting the itemized fees, and these are addressed under the headings below.

The appellant's representations also address some of the specific fees, and these are also identified below. However, the appellant also takes the position that the costs are excessive and that, as at taxpayer, he ought to have access to the information. I will address the specific costs below. I also note, however, that although the legislation allows fees to be waived, section 45(1) requires an institution to charge fees for requests under the *Act*.

Based on the information before me, including the revised fee estimate, as well as the representations of the parties, I make the following findings regarding the fee estimate in this appeal.

Search time

The Municipality's revised fee estimate identifies that three hours are designated for search time; however, its representations do not identify what is included in this search time. Furthermore, on my review of the Municipality's representations, it appears that the computer consultant's costs include costs for search time.

In light of the fact that the searches appear to be covered by the consultant's identified fees, and in the absence of specific information regarding what activities contributed to the fee estimate for the three-hour search time, I am unable to determine precisely what the Municipality is charging the appellant for in this regard. As a result, I do not uphold this portion of the fee estimate.

Preparation time

Previous orders have addressed the issue of what types of activities can be included in "preparation time." This includes time for severing a record [Order P-4] and, generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990].

In its representations, the Municipality states that it:

... based its preparation fee on a representative sample based on other similar requests allowing 2 minutes per record as accepted in IPC Orders It should be noted that all records require severances. The estimated quantity of records was determined by counting the number of emails received in a one-week period multiplied by the number of weeks requested in the request.

The appellant does not address the issue of the preparation time in his representations.

Based on my review of the Municipality's representations, I am satisfied that it properly estimated the time required to prepare the records. Accordingly, I uphold the fee estimate of \$5417.10.

Photocopying

The photocopying charges set out in the Municipality's decision are calculated at the rate of \$0.20 per page, in accordance with item 1 of section 6 of Regulation 823 made under the *Act*. Therefore, I uphold the photocopy charges.

As an additional matter, I note that the appellant has indicated his interest in receiving the records in electronic format. Although this suggests that photocopying costs might not be relevant, the Municipality has also stated that it will be severing the records, and that all records require severances. In these circumstances, and in the absence of information suggesting that the Municipality has the capability to provide severed versions of electronic records, I uphold the identified photocopy costs.

Costs specified in an invoice

The Municipality states that it received a fee estimate from a computer consulting firm in the amount of \$695. It attached to its representations a copy of this fee estimate, which was also shared with the appellant.

The consultant's fee estimate is set out in an email. In this email, the consultant specifically identifies the work that is required to search for and retrieve the information. It states that this includes copying 3 different email PST files and 2 existing email accounts to an external USB hard drive (ensuring real time copies are maintained); locating and saving relevant emails to a separate folder; and then exporting these emails to another USB drive (to be provided by the appellant).

The consulting firm then itemizes the \$695 costs as follows:

It will take us approximately one hour to transfer and copy the existing accounts to a USB drive. ... I would estimate about an hour per account to search, forward, save and export to a deliverable USB drive.

As such let me quote you as follows:

1 x USB hard drive Western Digital 320GB -	\$95
One hour transfer existing accounts to USB drive -	\$100
One hour search and export for each email account x 5 @ \$100 -	\$500
(USB drive to be provided by the appellant)	

The appellant addresses the consultant's fee in his representations. The appellant states that, as he is providing the media for copying the file (the USB drive), there should be no costs associated with that item. In addition, the appellant states:

It has been quoted that that it will take one hour to copy the files at \$100. It is respectfully suggested that personnel would not be required to attend the computer while the file is being copied and that again this cost is excessive and unwarranted. A test reveals that to copy files to a USB hard drive is estimated to take no more than 15 minutes.

Findings

On my review of the fees relating to the computer consulting firm's estimate, I find that some of these costs are not chargeable, as they appear to relate to an earlier version of the request.

The 3 different email PST files all relate to the former employee, whose records are no longer requested. As a result the one-hour search and export fees relating to each of these files is not chargeable. In addition, three-fifths of the one-hour time to transfer the existing accounts is also not chargeable.

I am satisfied that the remaining estimates for the two existing email accounts are appropriate. In addition, I am satisfied that the fee for the USB drive is reasonable. The media provided by the appellant relates to the information that the appellant hopes to obtain on that USB drive. The cost for the additional USB drive required to transfer, locate and save relevant emails (and ensure real time copies are maintained) is, in these circumstances, upheld.

Accordingly, I find that the following costs in the invoice are chargeable:

1 x USB hard drive Western Digital 320GB	\$95
24 minutes transfer existing accounts to USB drive @ \$100	\$40
One hour search and export/email account x 2 @ \$100	<u>\$200</u>
Total	\$335

Summary

In conclusion, I am satisfied that the Municipality's fee estimate for preparing and photocopying are appropriate. I also find that the Municipality can charge the amount of \$335 as identified in the invoice. However, I do not uphold the Municipality's fee estimate for searching for the records, nor do I uphold the portions of the amounts identified in the invoice that relate to information the appellant is no longer requesting. Accordingly, I uphold the fee estimate of \$6835.50 for processing this request.

TIME EXTENSION

General principles

Once an institution has received a request and, if necessary, clarified it with the requester, section 19 of the *Act* prescribes a 30-day time limit in which the institution must respond to the request:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

Section 20(1) of the *Act* allows an institution to extend the 30-day time limit for responding to a request in prescribed circumstances. This provision states:

A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or

- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

In its decision letter, the Municipality stated that it anticipated that it would take 60 days to compile the requested records. Its decision to identify the need for a time extension in the interim access decision follows the suggested approach to this issue as set out in Order PO-2634. In its representations, the Municipality reviews the background to the request, and then states that the requested 60-day time extension is reasonable in the circumstances. It identifies that the estimated 180 hours of time required to prepare the record could be allotted to regular staff who could dedicate 15 hours per week to the request (while completing their other staff duties). The Municipality identifies the other duties conducted by staff, including the legislated requirements that must be met, and then states that meeting the ordinary time requirements would unreasonably interfere with the operations of the Municipality. It also identifies that consultations with the computer consultants also need to be arranged.

The appellant does not address this issue in his representations.

In the circumstances, and based on the representations of the Municipality, I am satisfied that the 60-day time extension identified by the Municipality is reasonable, and I uphold the time extension.

CUSTODY OR CONTROL

Section 4(1) of the *Act* limits the application of the *Act* to records that are in the custody or under the control of an institution. The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

The Municipality has indicated that it does not provide corporate email addresses for municipal councillors. Rather, the councillors provide their own personal email addresses as a courtesy to assist them in receiving concerns from residents within the Municipality. Furthermore, the Municipality states that any concerns received by municipal councillors may be forwarded to Council for its consideration.

The appellant does not address this issue in his representations.

Based on the representations of the Municipality, and in the absence of any representations suggesting that responsive records would exist in the custody or control of the Municipality, I am satisfied that, in these circumstances, the emails residing in the councillor's personal email address are not in the custody or under the control of the Municipality.

ORDER:

1. I uphold the Municipality's fee estimates for preparation time of \$5417.10, photocopy costs of \$1083.40, and the amount of \$335 as specified in an invoice.
2. I do not uphold the Municipality's fee estimate for search time, or for the other costs specified in an invoice.
3. I uphold the Municipality's time extension and custody or control decisions.

Original signed by: _____
Frank DeVries
Adjudicator

February 3, 2011
