

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3854

Appeals MA18-212, MA18-217, MA18-218 and MA18-369

Municipality of Lambton Shores

October 25, 2019

Summary: The Municipality of Lambton Shores (the municipality) received four requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to various by-laws, planning matters and an event held by the municipality. The municipality issued four interim access decisions with fee estimates. The appellant appealed the municipality's decisions. During mediation of the four appeals, the municipality completed the work to respond to the requests and issued revised fees. The appellant continued to dispute the fees. The sole issue in this inquiry is whether the fees should be upheld pursuant to the *Act*. In this order, the adjudicator upholds all four of the municipality's fees and dismisses the appeals.

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

OVERVIEW:

[1] This order addresses four separate appeals of fees charged by the Municipality of Lambton Shores (the municipality) for responding to requests made by the same organization under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The requests, which are each set out in full later in this decision, are for various records that generally relate to the matters described in the following table:

Request Number	File Number	Overview of Request
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1	MA18-212	Records about an "Annual BBQ" held by the municipality
2	MA17-217	Records associated with the preparation of a specific report and a procedural by-law
3	MA17-218	Records related to a street enhancement project and specific by-laws and policies
4	MA17-369	Records related to planning matters connected to the development of a specified plan revision

[3] The municipality issued an interim access decision with a fee estimate in response to each of the four requests. The requester, now the appellant, appealed all four decisions to this office. The same mediator was appointed to explore whether the appeals could be resolved.

[4] Following discussions between the mediator, the appellant and the municipality, the municipality agreed to revisit its fee estimates. It completed searches for records in relation to each of the four requests and issued a revised fee for each. The total amounts of the municipality's fee estimates and revised fees are set out in the table below:

Request Number	File Number	Fee Estimate	Revised Fee
1	MA18-212	127.50	30.00
2	MA17-217	207.50	214.00
3	MA17-218	150.00	125.00
4	MA17-369	230.00	165.40

[5] The appellant was not satisfied with the municipality's revised fees and it was not possible to achieve a mediated resolution of the four appeals. The appeals were then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*.

[6] I began an inquiry into each of the appeals by sending a Joint Notice of Inquiry to the municipality initially, seeking representations in support of its fees. The municipality provided representations in response. Those representations, along with a

Joint Notice of Inquiry, were shared with the appellant, who submitted representations in response. Those representations were shared with the municipality and the municipality provided brief representations in reply. The appellant also provided a sur-reply to the municipality's representations.

[7] In this order, I uphold all of the municipality's fees and I dismiss the appeals.

DISCUSSION:

[8] The only issue to be determined in this appeal is whether the municipality's fees for Requests 1 through 4 should be upheld. Under section 45(1) of the *Act*, the municipality is required to charge fees for processing access to information requests according to the following framework:

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.

[9] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 823. Those relevant portions of Regulation 823 state:

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.

[10] The IPC may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and in Regulation 823.

[11] I will now review each of the municipality's decisions and the parties' representations, starting with Request 1.

Request 1 – MA18-212

[12] The appellant requested the following information:

All factual material and reports that state the overall cost to the municipality for hosting the Lambton County Councillors Annual Steak BBQ held on September 7, 2016 at the Port Franks Community Centre including an itemized account for expenses paid to each member of the Lambton Shores Council that attended the event as well as the cost for staff time that was committed to event preparation and cleanup.

The minutes from the Lambton Shores council meeting at which the resolution to approve the hosting of the Lambton county Councillors Annual Steak BBQ by the mayor and council was approved prior to taking place.

[13] The municipality initially estimated that it would take approximately 4.25 hours to collect and compile the responsive information. It estimated the fee would be \$127.50 for search time, plus photocopying.

[14] During mediation, the municipality completed the search for records and it advised the mediator and the appellant that the fee was reduced to \$30.00.

The parties' representations

[15] The municipality submits its \$30.00 fee for responding to the appellant's request is based on one-hour of search time at \$7.50 per quarter hour. It provided the following information in support of its fee:

- A clerk employed by the municipality searched for "minutes of Council" approving the event and found no responsive records (1/4 hour);
- The municipality's treasurer was asked for records related to the cost of the event. The treasurer stated that there was no official "statement" for the function "as that is not how municipal accounting works." She said that she could create a statement of revenue and expense and that it would take approximately one hour;
- An administrative assistant to the municipality's Chief Administrative Officer searched for records that included the names of the attendees to the event and found no responsive records (1/4 hour);

- The treasurer “confirmed” that there were no records of expenses for council or of staff time charged for the event (1/4 hour).

[16] The municipality says that its minutes and financial records are kept electronically. It says those records were searched using keywords and dates. With regard to the financial records, the municipality says that those records were searched and the information was compiled into a new record based on what it found in its search.

[17] The appellant says that the municipality’s fee is excessive. The appellant points to various provisions of the Ontario *Municipal Act* and asserts that that legislation requires the municipality to keep records in an accessible manner and that as a result, it should have been able to access the requested information in a more cost-effective way.

[18] The majority of the appellant’s representations do not address the issues set out in the Joint Notice of Inquiry and as such, I will not reproduce them in their entirety. In summary, the appellant asserts the following:

- The municipality could not have completed “substantial work” on this file to lower the fees since the barbeque that is the subject of the records was not authorized by the Lambton Shores Council;
- It should not have taken the over an hour and a half for the Finance Department to locate the one record to be disclosed, given the specificity of the date of the unauthorized event;
- A change in a procedural by-law has diminished transparency regarding the municipality’s financial activities, and that this change is costly to both requesters of information and the municipality; and
- Given the direction in the Municipal Act with regard to record keeping and financial administration, the requested information should have been produced in a far more cost-effective manner.

[19] The appellant also asserted that the municipality has failed to advise how it intended to disseminate the information to the appellant.

[20] The relevant portion of the municipality’s reply was that although it was not required to create a record where one did not already exist, the record had been prepared would be provided on paper. The municipality stated that it did not include a charge for photocopying the record it created.

[21] In sur-reply, the appellant referred again to the procedural by-law that was changed and says that it is improper for the municipality to demand that it pay for information pertaining to an unauthorized event, given the requirement for

transparency and accountability under the *Municipal Act*. The appellant also says that it does not understand why the municipality stated that it is not required to create a document where one does not exist.

Findings and analysis for Request 1

[22] For the reasons that follow, I uphold the municipality's fee. In my view, it is reasonable to expect that it would take the treasurer an hour to locate and compile the information the appellant requested and to create the statement of revenue and expense that would provide some of the information sought by the appellant.

[23] I note that previous orders have concluded that an institution may charge fees in relation to preparation time required to create a record, even though the *Act* does not require an institution to create a record in response to a request.¹

[24] In my view, the circumstances here are similar to the orders outlined in order MO-3017. In order MO-3017, an adjudicator concluded that an institution's decision to create a record was reasonable in light of the relatively short time it took to create it and considering that severing the responsive records and providing severed copies to the appellant would have likely resulted in a greater fee.

[25] In this case, the municipality said that if it were to provide copies of the records it used to compile the record it created in response to Request 1, it would have taken four hours, as opposed to the one hour it charged to create the record. In my view, creating the record was a reasonable approach.

[26] I also note that municipality charged only \$30.00, despite the fact that it recorded an additional 45 minutes of search time that did not produce any responsive records. The municipality also did not charge any photocopying fees.

[27] I have considered the appellant's assertion that the municipality should not be able to charge fees for responding to its request because it believes the event it is seeking information about was unauthorized. I disagree. In my view, the issue of whether the event that is the subject of the request was authorized is irrelevant to the amount of the fee the municipality is required to charge for responding the appellant's request under the *Act*. Institutions subject to the *Act* are obligated to respond to requests and to charge fees in accordance with section 45(1). The fact that an event may or may not have been authorized does not affect the municipality's duties under the *Act*.

[28] I also note the appellant's submission that the municipality failed to comply with requirements in the *Municipal Act* to store records in a particular manner and that this

¹ See paragraphs 41 to 49 of Order MO-3017.

resulted in excessive fees. Although I accept that there could be a scenario where the manner in which an institution maintains its records causes it to spend an unreasonable amount of time responding to a request, I am satisfied that that is not the case in this instance. The appellant's request related to a single event, but it had multiple parts. The municipality charged one hour of time for locating and compiling the information and in my view, it is reasonable to expect that it would take approximately that amount of time.

[29] Based on my review of the municipality's breakdown of the fee and its statement of how the fee was calculated, I am satisfied that the fee should be upheld.

Request 2 – MA18-217

[30] The appellant requested the following information:

1. All factual material, reports or studies and field research that contributed to the preparation of report CL 06-2017, specifically the information from the 20 municipalities referred to in the report, the comments for municipal staff as part of the Council process that were considered for the procedural by-law review and the information gleaned from a review of Bill 68 (the Modernizing Ontario's Municipal Legislation Act 2016), in particular, the information on changes necessary for the future that were referred to in the report that formed the basis for the new procedural by-law (By-law 14 of 2017).
2. All factual material, reports or studies and field research that was used to shape the spirit and direction of Section 12.2 of Procedural By-law 14 of 2017.
3. All correspondence addressed to the municipal Clerk, Mayor or Council, that was sent to the municipality, but not published on any Council meeting agenda, either special or regular, in keeping with the direction of Section 12.2 of the Procedural By-law 14 of 2017, from March 29, 2017 to February 13, 2018, inclusive.

[31] The municipality issued an interim access decision in which it stated that it would be granting the appellant partial access to the records, but would withhold some information pursuant to the mandatory exemption in section 14(1) of the *Act* (personal privacy). The municipality provided a fee estimate of \$207.50.

[32] During mediation the municipality completed the work required to respond to the request and advised the mediator and the appellant that the revised fee was \$290.80 based on the following:

- \$75.00 for search time based on 2.5 hours of time at \$7.50 per quarter hour;
- \$215.80 for photocopying based on 1079 pages of records at 20 cents per page.

[33] Following further discussions with the mediator, the municipality agreed to

provide the records that were already in electronic form on a USB key. It issued the following supplemental revised fee:

- \$75.00 for search time based on 2.5 hours of time at \$7.50 per quarter hour;
- \$129.00 for photocopying based on 645 pages of records at 20 cents per page;
- \$10.00 for USB containing part of the document requested in the third part of the appellant's request.

[34] The total amount of the municipality's fee is \$214.00.

The parties' representations

[35] The municipality submits that fee should be upheld. The municipality says that it has completed the work required to respond to the request and as a result, the fee represents the actual cost. It provided the following information in support of its fee in relation to Part 1 of the appellant's request:

- A clerk spent one hour searching through electronic and paper files and located a file that contained several documents, including research conducted by a previous clerk who had prepared the by-law in question.
- The materials in the working file contained examples from other municipalities, draft versions of the document with staff comments and other research conducted regarding the by-law.
- The Director of Community Services, the Treasurer and the Chief Administrative Officer were all asked to search for any additional information or comments provided on the proposed procedural by-law and a half an hour of search time was claimed for all three individuals.

[36] In relation to Part 2 of the appellant's request, the municipality says that although the request in Part 2 was somewhat redundant to Part 1, the same clerk spent 15 minutes searching electronic and paper files for any records that would relate to the "shaping of the spirit of the by-law." The municipality says the clerk did not locate any responsive records.

[37] Finally, with regard to Part 3, the municipality says that the clerk spent one hour searching electronic and paper files for correspondence provided to council prior to her employment with the municipality. The municipality says that it also sent the request to its senior management team and treasurer and asked them to locate correspondence they received prior to the clerk's employment. The municipality said those searches took 45 minutes in total.

[38] The appellant submits that the municipality's fee is unreasonable. It asserts that the fee estimates for Request 2 have been "all over the map and without explanation."

It also says that 1079 pages of responsive records is excessive since the by-law the request related to was only 19 pages in length. The appellant also questions why the last estimate by the municipality stated that there were 645 pages and says that the municipality has not explained the 400 page discrepancy.

[39] The appellant says that the records responsive to Part 1 of Request 2 should have been easily accessible with the use of electronic records, particularly given the specificity of the subject matter and the fact that there was only "one working file."

[40] With regard to Part 2 of Request 2, the appellant says that the information it requested should have been readily accessible from the information it requested in Part 1. It also says that the municipality's record keeping should not be impacted by the transition of employees and that it should maintain secure record keeping processes that anticipate a change in employees so that the public is not disadvantaged.

[41] In summary, the appellant says that the records located in response to Parts 1 to 3 should have been provided in a more cost-effective manner.

[42] In reply, the municipality denies that its fee estimate and revised fee decisions were "all over the map." It says that there was one fee estimate, a revised fee, and then a further revised fee that resulted from the mediation process and the decision to provide some of the information on a USB key. In response to the appellant's assertion that there is an unexplained discrepancy of 400 pages, the municipality says that there is no discrepancy as the number of responsive records remains the same, but approximately 400 pages of those records will be provided electronically, on a USB key.

[43] Finally, the municipality denies that its record keeping has been impacted by the historical transition of employees and submits that the search for records would have been conducted in the same manner, regardless of who searched for the records.

[44] In its sur-reply, the appellant repeats its concern that the search was inefficient. It also expresses concern that the municipality has not provided a description of the information in the responsive records.

Findings and analysis for Request 2

[45] For the reasons that follow, I uphold the municipality's fee of \$214.00.

[46] First, I note that the appellant's request had three separate parts and 1079 pages of records were located as a result of the municipality's search efforts. Four employees were asked to search for records, in addition to a request sent to the "Senior Management Team" to look for specific correspondence within a six-month period. Given the nature of the appellant's request and the number of staff involved in the search, I am not convinced that 2.5 hours of search time is unreasonable.

[47] Furthermore, I find that there is a lack of evidence to support the appellant's

suggestion that the search took an unreasonable amount of time due to the transition of employees or because of poor record keeping.

[48] I also do not agree with the appellant that the fee estimates and revised fees were "all over the map." As explained by the municipality, the change in the number of responsive records to be provided by photocopy is a result of the decision to provide records already in electronic form on a USB key in order to save photocopying costs. As such, I will uphold the municipality's fee for its search time.

[49] With regard to the other fees charged by the municipality, I find that \$129.00 for photocopying 645 pages at 20 cents per page complies with Regulation 823, as does the \$10.00 it charged for the USB containing the remaining responsive records.

[50] Finally, I do not accept the appellant's assertion that the municipality has not provided a description of the responsive records. The municipality says that the records are comprised of research conducted by a previous clerk who had prepared the by-law in question, examples from other municipalities and draft versions of the document with staff comments. In my view, this is a satisfactory description of the types of records the municipality determined were responsive to the appellant's request and it should allow the appellant should be able to make a determination about whether it wants to pursue access to the records.

[51] As such, I will uphold the municipality's fee of \$215.00 for Request 2.

Request 3 – MA18-218

[52] The appellant requested the following information:

The warranty and/or maintenance service agreement between the municipality and contractor that installed the paving stones used in the Grand Bend Main Street Enhancement project as approved by the Lambton Shores Council resolution 09-0928-01.

The Lambton Shores' municipal by-law or policy which outlines the manner in which the municipality tries to ensure that it is accountable to the public for its actions and the manner in which the municipality tries to ensure that its actions are transparent to the public.

All factual material, reports or studies and field research used to shape the municipal by-law or policy which tries to ensure that it is accountable to the public for its actions and tries to ensure that its actions are transparent to the public before said by-law or policy was implemented.

[53] The municipality issued an interim access decision indicating that it would grant the appellant access to the responsive records and provided a fee estimate of \$150.00, based on \$7.50 for each 15 minutes of search time. It said that the estimate did not

include photocopying costs.

[54] During mediation, the municipality completed the work to respond to the request and provided the following breakdown of its fee:

- \$105.00 for search time based on 3.5 hours of time at \$7.50 per quarter hour;
- \$20.00 for photocopying based on 100 pages of records at 20 cents per page.

[55] The total amount of the municipality's fee is \$125.00.

The parties' representations

[56] The municipality says its fee of \$125.00 should be upheld. It provided the following information in support of its fee:

- The Director of Community Services searched through paper files related to a contract from 2009 for a copy of the maintenance service agreement;
- The contract documents were found in the attic of a works garage storage location and the director spent three hours looking through several banker boxes to locate the records; and
- The municipality's clerk and treasurer both searched the municipality's electronic records for responsive records for 15 minutes each.

[57] The appellant submits that the municipality's fee of \$125.00 is unreasonable. It asserts that the municipality has not complied with the Ontario *Municipal Act*, which requires that records be kept in a "secure and accessible manner." The appellant says it not reasonable that the Director was sent to the "attic of a works garage storage location to search through banker boxes to locate a maintenance service agreement for a multi-million dollar infrastructure project that had been significantly funded by upper government grants."

[58] The appellant also asserts that it is under the impression from previous correspondence with the municipality that original by-laws are kept in a "by-law book" and that it does not understand why the specific by-law in question would not be published on the municipal website for the public to access without incurring any cost.

[59] Finally, the appellant questions whether the 100 pages of responsive records located by the municipality are relevant and asks why the information could not be provided on a USB key to save photocopying costs.

[60] In reply, the municipality says that the records containing the information have already been prepared. It says that "the 9 year old records for this project are kept in an appropriate location allowing for the retrieval of these old records in a reasonable length of time." The municipality says its archiving of records is based on the age of the

record.

[61] The appellant was offered an opportunity to reply. It reiterates its reliance on the *Municipal Act* and asserts that records should be stored in a manner that allows for retrieval within a reasonable time frame. It repeats its assertion that the Director should not have had to search through the attic to find the records.

Findings and analysis for Request 3

[62] For the following reasons, I uphold the municipality's fee of \$125.00. The municipality has provided a sufficiently detailed description of the steps taken and the time it took for three staff members to complete the search for records responsive to Request 3.

[63] Given the age of the records requested, I do not accept the appellant's assertion that they were kept in an unreasonable or inappropriate location. Without making any determinations about what other legislation may or may not require with regard to storing records, I find that the steps taken by the municipality to respond to the appellant's request under the *Act* were reasonable.

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

[65] Finally, I am satisfied that the appellant has sufficient information to determine whether or not to pursue access to the information it has requested. The municipality says the responsive record for Item 1 is the warranty information contained in the contract documents. With regard to Item 2, the appellant requested a specific item and the municipality says that there is one responsive record. I am not convinced that further explanation is required.

[66] For these reasons, I uphold the municipality's fee of \$125.00 for Request 3.

Request 4 – MA18-369

[67] The appellant submitted the following request to the municipality:

Factual material between the municipal planner and municipal aboriginal communities which indicate a coordination of planning matters in the development of Draft 7 of Lambton Shores official plan revision.

[68] The municipality issued an interim access decision advising it would grant the appellant access to the records but would withhold some information pursuant to the mandatory exemption in section 14(1) of the *Act* (personal privacy). The municipality provided a fee estimate of \$230.00.

[69] During mediation, the municipality completed the work to respond to the request and it provided the following breakdown of its fee:

- Search: 4 hours at \$30.00 per hour for a total of \$120.00;
- Preparation: 1 hour at \$30.00 per hour for severing 30 pages of records;
- Photocopying: 77 pages at 20 cents per page for a total of \$15.40.

[70] The total amount of the municipality's fee is \$165.40.

The parties' representations:

[71] The municipality submits that its fee of \$165.40 should be upheld. In support of its fee, it says that a Senior Planner conducted a manual search of records between 2008 and 2009. It says that the records were contained in banker boxes in a storage location in the basement of an administration building. It says it took the Senior Planner four hours to locate 77 pages of responsive records.

[72] The municipality submits that a clerk redacted personal information on mailing lists and charged the prescribed fee under the *Act*. Finally, the municipality says it charged photocopying costs for the number of pages provided in accordance with the *Act*.

[73] The appellant says the fee charged is not reasonable. It asserts that the records it requested related to a meeting that was held in 2015 and that as such, it did not make sense for the Senior Planner to conduct a search of records from 2008 and 2009.

[74] The appellant then quotes a number of passages from "Draft 7" of the adopted plan and says that this information could have been obtained from a history book. The appellant says that it questions why the municipality's search for records "yielded such a diverse range of documentation to be photocopied as well as varying fee estimates given the specific nature of the request." It also asserts that the "data generated for this FOI request should have been produced in a far more cost-effective manner."

[75] In reply, the municipality says that records it has identified are responsive to the request. It denies that it produced varying fee estimates, as asserted by the appellant. The municipality sates that it issued a fee estimate, followed by a revised fee once it had completed the work to respond to the request.

[76] The appellant provided a sur-reply that reiterates its initial submission, which I have outlined above.

Findings and analysis

[77] For the reasons that follow, I uphold the municipality's \$165.40 fee. In my view, it is reasonable to expect that it could take four hours to search through banker boxes containing two years of records to locate the specific items requested by the appellant. I note that upon receiving the request, the municipality initially estimated that it would take seven hours.

[78] The appellant asserts that there was no reason for the municipality to search the 2008 to 2009 records because the records it sought related to a meeting held in 2015. I have no basis upon which to assess this assertion. The municipality submits that it has identified the responsive records and completed the work to respond to the request. It says there are 77 pages of records and it has indicated that they include mailing lists.

[79] I understand the appellant to be suggesting that these are not the correct records. If the appellant believes there are other responsive records, it was open to it to appeal the reasonableness of the municipality's search. With regard to the 77 pages the municipality has identified as responsive, if, for whatever reason, the appellant does believe these are relevant and does not wish to obtain copies, it is not obligated to pay the fee and the municipality is not obligated to provide copies.

[80] As prescribed in Regulation 823, the municipality may charge \$7.50 per quarter of an hour for severing the records in accordance with the *Act* and preparing them for disclosure. Generally, this office has accepted that it takes two minutes per page to sever exempt information on pages requiring multiple severances.² I see no basis to depart from that approach here. As a result, I accept the municipality's fee of \$30.00 for completing severances on 30 pages of records.

[81] Finally, I find that the \$15.40 in photocopying costs have been calculated in accordance with Regulation 823 and I uphold that fee as well.

ORDER:

I uphold the municipality's fees and dismiss all four appeals.

Original signed by _____
Meganne Cameron
Adjudicator

_____ October 25, 2019

² Orders MO-1169, PO-1721, PO-1834 and PO-1990.