



REVIEW REPORT 306-2017

R.M. of Rosthern #403

June 6, 2018

Summary:

The Applicant requested records from the R.M. of Rosthern #403 (Rosthern). Rosthern responded by issuing a fee estimate and a time extension. Upon review, the Commissioner found that the fee estimate was reasonable. Further, the Commissioner found that the time extension applied by Rosthern was premature and not necessary. The Commissioner recommended that for future requests, where a fee estimate is issued, Rosthern wait to extend the response time until an applicant has signaled a desire to proceed by payment of the 50% deposit.

I BACKGROUND

- [1] On October 13, 2017, the R.M. of Rosthern (Rosthern) received an access to information request from the Applicant for:

All Council meeting minutes from November 2014 inclusive to today's date including all supporting documentation. All records of all payments made to RM Councilors, employees of RM, contractors, legal counsel, R.M Reeve, and family members of the previous listed.

- [2] By letter dated October 27, 2017, Rosthern sought clarification from the Applicant as to whether he sought every record from November 2014. In addition, it asked if the Applicant could be more specific on the contractor's invoices. Rosthern advised the Applicant that if it had not heard from him by October 31, 2017, it would proceed on the basis that the Applicant wanted everything. In addition, Rosthern advised that it would be extending the response time an additional 30 days pursuant to subsection 12(1) of *The Local Authority*

Freedom of Information and Protection of Privacy Act (LA FOIP) due to the large number of records requested and the breadth of the search that would be involved.

[3] Having received no clarification from the Applicant, Rosthern sent a follow-up letter to the Applicant dated November 9, 2017. Rosthern advised the Applicant that the estimated fee for processing the request was \$594. Rosthern advised the Applicant that in order to proceed, it would require a deposit of \$297.00.

[4] On November 19, 2017, my office received a Request for Review from the Applicant. The Applicant disagreed with the fee estimate and the extension applied.

[5] On December 15, 2017, my office notified Rosthern and the Applicant of my office's intent to conduct a review and requested a submission from both parties. A submission was received from Rosthern on January 5, 2018.

II RECORDS AT ISSUE

[6] There are no records at issue in this review. This review will address the fee estimate and time extension applied by Rosthern.

III DISCUSSION OF THE ISSUES

1. Do I have Jurisdiction?

[7] Rosthern is a "local authority" pursuant to subsection 2(f)(i) of LA FOIP. Thus, I have jurisdiction to conduct this review.

2. Are the fees estimated by Rosthern reasonable?

[8] Subsection 9(2) of LA FOIP requires a local authority to provide a fee estimate where the cost for providing access exceeds \$100. Fees are intended to provide for reasonable cost

recovery associated with providing individuals access to records. Subsection 9(2) of LA FOIP provides:

9(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

[9] In a review, fee estimates are generally judged on the basis of whether they are reasonable. A fee estimate is *reasonable* when it is proportionate to the work required on the part of the public body to respond efficiently and effectively to an applicant's request.

[10] Fees encourage responsible use of the right of access by applicants. However, fees should not present an unreasonable barrier to access. Therefore, fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights. As a best practice, where an estimate of costs is being issued, the public body should take steps to contact the applicant in an attempt to narrow the scope of the request to reduce work and costs (Review Reports 064-2016 to 076-2016 and 078-2016 to 091-2016).

[11] It appears Rosthern followed best practice in this case by contacting the Applicant in an effort to narrow or clarify the access request. It does not appear the Applicant provided any clarification or narrowing options that might have reduced the fee. The Applicant's access request was broad and captured close to three years of records.

[12] There are three kinds of fees that a local authority can include in its fee estimate:

- (1) fees for searching for responsive records;
- (2) fees for preparing the record for disclosure; and
- (3) fees for the reproduction of records.

(1) Fees for searching for responsive records

[13] Subsection 5(3) of *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) provides the ability for Rosthern to recover costs associated with searching for responsive records. Where the search for responsive records exceeds one hour, Rosthern can charge \$15.00 for every half hour after that. Rosthern appropriately deducted one hour of time from its fee estimate. In fact, it deducted two hours; one hour off search and one hour off preparation. However, only one hour in total is required to be deducted. Subsection 5(3) of the LA FOIP Regulations provide:

5(3) Where time in excess of one hour is spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of \$15 for each half-hour or portion of a half-hour of that excess time is payable at the time when access is given.

[14] Search time consists of every half hour of manual search time required to locate and identify responsive records. For example:

- staff time involved with searching for records;
- examining file indices, file plans or listings of records either on paper or electronic;
- pulling paper files/specific paper records out of files; and
- reading through files to determine whether records are responsive.

[15] Search time does not include:

- time spent to copy the records;
- time spent going from office to office or off-site storage to look for records; or
- having someone else re-review the results of the search.

[16] The tests related to a reasonable search are:

- Generally, it should take an experienced employee one minute to visually scan 12 pages of paper or electronic records to determine responsiveness;

- Generally, it should take an experienced employee five minutes to search one regular file drawer for responsive file folders;
- Generally, it should take three minutes to search one active email account and transfer the results to a separate drive.

[17] In instances where the above tests do not accurately reflect the circumstances, the public body should test a representative sample of records by timing the process. The time can then be applied to the responsive records as a whole.

[18] Rosthern estimated that the total time to search for records would be seven hours. Further, it advised that the cost for staff time for searching would be \$180. Rosthern broke down its calculations for search and appropriately used \$15 per half hour after the first free hour ($\$15 \times 12 = \180). The calculations appear correct. I will now determine whether the estimated seven hours for search is reasonable.

[19] Rosthern advised that all responsive records would be paper records which are kept in Rosthern's vault. The files to be searched consist of the following for a three-year period (November 1, 2014 to October 13, 2017):

- Minute Binding Cases – 2 binding cases for the minutes and supporting documentation;
- Binding Cases for the Accounts Payable
 - 2014 – total of three binding cases November to year end;
 - 2015 – total of six binding cases;
 - 2016 – total of seven binding cases; and
 - 2017 – total of seven binding cases January to October.

[20] Subsections 117(1)(d), (2) and (3) of *The Municipalities Act* provides that any person is entitled at any time during regular business hours to inspect the minutes of council after they have been approved by council:

117(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:

...
(d) the minutes of the council after they have been approved by the council.

...
(2) Within a reasonable time after receiving a request, the administrator shall furnish the copies requested on payment of any fee that the council may fix.

(3) For the purposes of subsection (2), the fee set by council must not exceed the reasonable costs incurred by the municipality in furnishing the copies.

[21] My office asked Rosthern if it had a bylaw related to fees associated with access to minutes. In addition, whether its minutes were available on its website for citizens to access. Rosthern responded to these inquires indicating that it only had a policy which upon review relied on the fees set out in the LA FOIP Regulations. This is perfectly acceptable. Further, Rosthern does not post any minutes on its website. All minutes are available at the municipal office once they have been approved by Council. If copies are requested, the LA FOIP fees are relied upon.

[22] Rosthern advised that for previous access requests, searching these binding cases took the Acting Administrator approximately 10 minutes per binding case, searching for one name only. However, for this Applicant, it asserted, it would be searching back to 2014 for eight Councilors, six office staff, 10 outside employees and family members for all of these individuals, contractors and legal invoices. So, it would take much longer than the 10 minutes from earlier access requests. Rosthern added that the inclusion of family members would mean that rather than scanning pages for the names of known individuals, the Acting Administrator would need to consider each account paid by Rosthern and to determine whether the payee was a family member of any of the specified individuals.

[23] Rosthern estimates there are 936 pages responsive to the request. Using the test of 10 minutes per binding case that Rosthern had previously found, the following calculation is made:

$$25 \text{ binding cases} \times 10 \text{ min/binding case} = 250 \text{ minutes or } 4.2 \text{ hours}$$

[24] 4.2 hours is below the seven hours Rosthern has quoted. However, Rosthern has indicated that reviewing the records to determine responsiveness will be more difficult in this case

given the need to determine if there are family members involved. Therefore, the test of 10 minutes per binding case to find one name only, would likely not be appropriate.

[25] Reasonableness would suggest that if a search for one name took 10 minutes, multiple names would take more. If one used 15 minutes per binding case that would be 375 minutes or 6.25 hours. As Rosthern already deducted one hour on the preparation fee, there is no need to deduct one hour from the search fee. Therefore, I calculate the fee estimate for search to be \$187.50 (6.25 hrs at \$15 per half hour).

[26] For future requests, where a fee estimate is issued and the search may be complicated, Rosthern should conduct a sample test and document it in the event the fee estimate goes to review. As the fee estimate cannot be increased once it has been issued in accordance with subsection 9(2) of LA FOIP, it is too late for such a test in this case.

(2) Fees for preparing the record for disclosure

[27] Preparation includes time spent preparing the record for disclosure including time anticipated to be spent physically severing exempt information from records.

[28] Preparation time does not include:

- Deciding whether or not to claim an exemption;
- Identifying records requiring severing;
- Identifying and preparing records requiring third party notices;
- Packaging records for shipment;
- Transporting records to the mailroom or arranging for courier service;
- Time spent by a computer compiling and printing information;
- Assembling information and proofing data;
- Photocopying; and
- Preparing an index of records.

[29] Generally, the test related to reasonable time spent on preparation is it should take an experienced employee two minutes per page to physically sever.

- [30] In instances where the above test does not accurately reflect the circumstances (i.e. a complex record), the public body should test the time it takes to sever on a representative sample of records. The time can then be applied to the responsive records as a whole.
- [31] Rosthern asserted that in many cases, personal information of third parties would likely be included in the responsive records and would need to be redacted. It asserted that this will be particularly so with respect to the payments made to contractors, employees or other individuals, where their home addresses, phone numbers, etc., may be included on documentation. Rosthern estimated seven hours to prepare the records for disclosure. However, it only charged for six hours as it gave another free hour to the Applicant which is only required once. The first hour was deduced off the search time.
- [32] My office expects that since the issuing of Investigation Report 237-2016, there should be somewhat less personal information in its minutes. The Commissioner recommended that Rosthern provide notice to the public about how personal information can become part of a public council or committee agendas or meetings, and could also be published to Rosthern's website.
- [33] Rosthern estimates there are 936 pages responsive to the request. Using the test of two minutes per page to physically sever, the following calculation is made:

$$936 \text{ pages} \times 2 \text{ min/page} = 1872 \text{ minutes or } 31 \text{ hours}$$

- [34] The seven hours estimated by Rosthern is well below what it could have estimated. At 31 hours at \$15 per half hour the fee could have been \$930.00 for preparing the record.

(3) Fees for reproduction of records

- [35] Subsection 5(2)(a) of the LA FOIP Regulations is explicit with regards to the fees allowable for the reproduction of records. The allowable fee is \$0.25 per page.

[36] In this case, Rosthern estimated 936 pages of photocopying at \$0.25 per page totaling \$234. I find that this is in compliance with subsection 5(2)(a) of the LA FOIP Regulations.

[37] In conclusion, I find that the fee of \$594.00 is reasonable.

3. Was the extension applied by Rosthern compliant with LA FOIP?

[38] As noted above, Rosthern received the access request on October 13, 2017. It responded seeking clarification on October 27, 2017. Its fee estimate was issued on November 9, 2017. In its fee estimate letter, Rosthern advised the Applicant that:

...Pursuant to s. 9(3), further action by us on your request will be suspended until we receive written confirmation that you wish us to proceed. If you should so inform us, you will be required to deposit the sum of \$297.00 before our search will commence.

[39] When it comes to processing an access request, the statutory 30-day timeline for responding to an applicant is stopped where a fee estimate is issued pursuant to subsection 9(3) of LA FOIP. This provision provides as follows:

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

[emphasis added]

[40] In compliance with LA FOIP, the fee estimate was provided to the Applicant within the initial 30-day timeline as required. In addition, the 50% deposit requested was also compliant with LA FOIP. Subsection 9(4) of LA FOIP provides a discretionary authority for the head to require a deposit prior to commencing a search for records. Subsection 9(4) of LA FOIP provides:

9(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

[emphasis added]

[41] An applicant paying a deposit, signals to the local authority that the applicant wishes to proceed with the request. Once an applicant pays the deposit, the clock continues from where it left off. In this case, the Applicant provided no clarification or deposit so the clock stopped on November 9, 2017 when the fee estimate was issued. Rosthern was appropriately awaiting action from the Applicant.

[42] Before the Applicant provided the 50% deposit, Rosthern applied a 30-day extension appearing to cite subsection 12(1)(a)(i) of LA FOIP which provides as follows:

12(1) The head of a local authority may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records;

...

and completing the work within the original period would unreasonably interfere with the operations of the local authority;

[43] Such an extension was premature. Pursuant to subsections 9(3) and (4) of LA FOIP, the clock had stopped and the search for records was to commence after the deposit was paid. It is at that point that Rosthern could issue a notice of time extension. Therefore, I find that the extension applied by Rosthern was premature and not necessary.

[44] For future requests, where a fee estimate is issued, I recommend Rosthern wait to extend the response time until an applicant has signaled a desire to proceed by payment of the 50% deposit. This is, of course, only where an extension is warranted by subsection 12(1) of LA FOIP.

IV FINDINGS

[45] I find that the fee estimate was reasonable.

[46] I find that the extension applied by Rosthern was premature and not necessary.

V RECOMMENDATION

[47] I recommend that for future requests, where a fee estimate is issued, Rosthern wait to extend the response time until an applicant has signaled a desire to proceed by payment of the 50% deposit.

Dated at Regina, in the Province of Saskatchewan, this 6th day of June, 2018.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner