



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-218

Appeal M-9300013

City of Mississauga



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ORDER

BACKGROUND:

The City of Mississauga (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the contents of all files concerning renovation work performed on a named estate since 1988, including a particular numbered file, as well as copies of materials which the requester provided to the City. The City advised the requester that the time limit for responding to the request was extended beyond the 30 days for an additional 21 days, due to the volume of records and the various locations where the records could be held.

The City then produced for the requester a fee estimate of \$2600.00. This estimate was broken down as follows:

Search Time	\$ 660.00	(22 hours)
Preparation Time (photocopying)	510.00	(17 hours)
Photocopies (approx. 6,000 pages)	1,200.00	
Reproduction of Drawings	225.00	
TOTAL	\$2,595.00	(rounded to \$2,600.00)

The City did not indicate whether access would be provided on payment of the fee. It merely stated that "In accordance with Section 47 of the Act (Regulation 7(1)), we are requesting a deposit of 50% or \$1,300. We must receive this deposit before actual preparation of the records will commence." The requester appealed the fee estimate. He subsequently requested a fee waiver as well.

In response to the Confirmation of Appeal forwarded by the Commissioner's office, the City indicated that the request entailed searches of nine divisions or departments, and that the records were contained in approximately eight storage boxes, excluding plans and drawings. It stated that a review had been made of the files, and that the opinion was that "little material would be exempted." The City pointed out that considerable time had been spent in preparing the estimate.

The Appeals Officer noted that the City had not made a decision on access to the records. The City was advised of its obligations under the Act, and asked to issue a decision letter to the appellant. In response, the City issued a revised fee estimate and interim decision, and rejected the requested fee waiver. It indicated that, upon payment of the fee, access would be provided to several files which were generally described, and that access to some of the records would be denied pursuant to sections 7, 10(1)(a) and 12 of the Act. The City provided a revised fee estimate in the amount of \$5,139.00.

Notice that an inquiry was being conducted was then sent to the City and the appellant. Representations

were received from both parties.

PRELIMINARY ISSUE:

Because of the nature of the City's decision to the requester, the preliminary issue in this appeal is whether the City fulfilled its obligations under the Act when it responded to the request for access to the records.

In cases such as this, in which an institution receives a request for a large volume of records or records that are unduly expensive to produce, an institution may proceed to issue a final decision and, if applicable, a final fee estimate. The final decision and fee estimate are based on looking at all the records. The rules for processing these requests are set out in sections 19 and 22 of the Act. The majority of access requests will be processed in this manner.

Where the request is for a large number of records or necessitates a search through a large number of records, the institution, pursuant to section 20(1) of the Act, may extend the 30-day time limit for responding to the request for a period that is reasonable in the circumstances. This may be done if meeting the time limit would unreasonably interfere with the operations of the institution. If an institution claims a time extension, it must review all the requested records and issue a final decision. If an institution is experiencing a problem because a record is unduly expensive to produce for inspection by a head in making a decision, it may not claim a time extension and then issue an interim decision (Orders 81 and P-243).

In cases where the records are unduly expensive to retrieve for inspection by the head in making a decision under section 22 of the Act, the institution may provide the requester with an interim decision and fee estimate within the original 30-day period. Order 81 of the Commissioner's office sets out the procedure for an institution to follow in such circumstances.

In this case, in its first response to the requester, the City appears to have gathered and actually reviewed the record. Nevertheless, it extended the time period and made no decision on access, it merely issued a fee estimate. In its revised response, which contained both a fee estimate and an **interim** decision, the head still did not feel that it was possible to reach a final decision on access, although all of the records were apparently available to be reviewed.

As I indicated in Order P-502, it is my view that an institution must make a decision on whether (or not) access will be granted when it issues a fee estimate. A requester should be in a position to know whether he or she will receive access to the requested records upon payment of the fee estimate. If the requester applies for a fee waiver pursuant to section 45(4) of the Act, the head must know whether access has been granted in order to consider this factor when deciding whether to waive the fee.

Accordingly, it is my view that when the City issued its initial fee estimate it was required to issue an access decision. Moreover, it is also my opinion that this is not a situation in which the City should have issued an "interim" decision when it wrote the second letter to the appellant. As I indicated above, at this time, all the responsive records were apparently available for review by the head in order to make a final decision.

Accordingly, it is my view that the City has not fulfilled its obligations under the Act in response to the request. Given my decision under Issue A, it is strictly speaking not necessary for the City to issue a final decision in this matter at this time. However, as I feel that this matter should now proceed as expeditiously as possible, I order the head to issue to the appellant a final access decision which conforms to the requirements of section 22 of the Act.

ISSUES:

The remaining issues arising in this appeal are:

- A. Whether the amount of the estimated fee was calculated in accordance with section 45(1) of the Act.
- B. Whether the City's decision not to waive the fee was proper in the circumstances of this appeal.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the amount of the estimated fee was calculated in accordance with section 45(1) of the Act.

Section 45(1) of the Act reads as follows:

If no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours 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; and
- (d) shipping costs.

Section 6 of Reg. 823, R.R.O. 1990, reads, in part:

The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act:

- 1. For photocopies and computer printouts, 20 cents per page.
- 3. For manually searching for a record after two hours have been spent

searching, \$7.50 for each fifteen minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each fifteen minutes spent by any person.
6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying of the record if those costs are specified in an invoice received by the institution.

The revised fee estimate issued by the City was broken down as follows:

Search Time - 60 hours - 2 hours = 58 hours	\$1,740.00
Preparation Time - Photocopying (70 hours)	\$2,100.00
Photocopies - 5,370 pages	\$1,074.00
Drawings - reproduction	\$225.00
TOTAL	\$5,139.00

In the affidavit of the Freedom of Information Coordinator of the City which accompanied the representations, the charges were detailed as follows:

Search Time:

60 hours - 2 hours = 58 hours at \$7.50 for each 15 minutes per person

A search was conducted involving 3 persons in addition to the Freedom of Information Coordinator as follows:

March 31, 1993	18 hours
April 1, 1993	20 hours
April 2, 1993	21 hours
April 5, 1993	1 hour

Photocopies:

The number of photocopies (5,370) is estimated on approximately 100 pages per inch of material. Double-sided copies were not a consideration.

Preparation Time:

Preparation time is based on copying approximately 77 copies per hour. Again, this is estimated on single sided copies. Severing time not included as separate item.

Drawings:

\$225.00

Purely an estimate based on actual costs incurred through other FOI requests.

The City indicated that its fee estimate was calculated on the basis of a random review of all records provided by the various departments involved. I note that this estimate is considerably higher than, in fact almost double, the estimate it originally provided to the appellant. The City does not indicate that more records were located, and it would seem that it had already reviewed the records when it first considered the request, however, no explanation is offered for the discrepancy.

In reviewing the City's fee estimate, my responsibility under section 45(5) of the Act is to ensure that the amount estimated is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the City. In my view, this burden can be discharged if the City provides me with detailed information as to how the fee estimate has been calculated, and if it produces sufficient evidence to support its claim.

I will now examine each element of the City's fee estimate.

SEARCH CHARGES

In its affidavit, it would appear that the City based its search time on an actual search which was conducted, since it states that "all records [were collected] from the various departments in order to determine volume and contents of the records [requested]." The City has provided no evidence as to the manner in which the requested records are kept and maintained and what actions were necessary to locate and retrieve the requested records. In other words, it did not justify why the search was so lengthy and how this portion of the fee was calculated.

The City's position as stated in its letter of April 5, 1993 to this office, and on which it relies in its representations, is the following:

Because of the extremely large volume of records involved (approximately 105 file folders), it is unduly expensive to review them by April 12 in order to make a final decision regarding disclosure. We are, therefore, issuing a revised fee estimate and interim decision in accordance with guidelines provided by the Privacy Commissioner's Office.

In order to arrive at a fee estimate and interim decision, we have collected all records from the various departments in order to determine volume and contents of the records you are requesting. It is not possible for us to categorize the types of records due to the broad scope of the request; therefore, we have completed a random review of documents

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provided by the various departments ...

As I have indicated, Order 81 addresses the situation in which a record may be "unduly expensive to produce for inspection by the head in making a decision ... whether the undue expense is caused by either the size of the record, the number of records or the physical location of the record within the institution." In this case, the head can issue an interim decision indicating to the requester the likely access he or she would receive, together with a reasonable estimate of the proposed fees. Former Commissioner Sidney B. Linden added the following:

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: (1) 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 (2) 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. For example, subsection 57(1)(a) stipulates that the first two hours of manual search time required to locate a record must be absorbed by the institution and cannot be passed on to the requester.

The head's notice to the requester should not only include a breakdown of the estimated fees, but also a clear statement as to how the estimate was calculated (i.e. on the basis of either consultations or a representative sample.)

[emphasis added]

In this case, the head has failed to follow this procedure. First, it has based its estimate on what is stated to be a random review of the records, rather than on a representative sample. Moreover, it has not indicated the positions or responsibilities of the three other individuals who conducted the search in order to satisfy me that they are "employees who are familiar with the type and contents of the requested records".

Secondly, the amount of time claimed as search time strikes me as inordinately long. The City has not justified the search time or explained where the searches would be conducted and how extensive they are. I have not been provided with any evidence that this length of time would be required to **produce** the records, as stated in Order 81. Because the records seem already to have been produced in full, I can only conclude that the City has included as part of its "search" time, the time to conduct a review of the record in order to make an access decision. In fact, the City has asserted in its representations, as quoted above, that it is unduly expensive not to produce but to **review** the records. The time spent for a review of the responsive record in order to make an access decision once it has been located is not an allowable charge under the Act (Order 4).

Accordingly, because there is no evidence before me as to the details of the search conducted, I disallow this portion of the fees charged.

PHOTOCOPIES/PREPARATION TIME/DRAWINGS

In its calculation of preparation time, the City has not included any time for severing of the records. The City submits that the preparation time covers only the time required to photocopy the records, based on 77 copies per hour. This charge is \$2,100.00. However, it has also provided a separate charge for the actual copies themselves. This charge is \$1,074.00 based on 5,370 copies at \$0.20 per page.

In Order 184, then Assistant Commissioner Tom Wright stated the following:

In Order 2 ... dated June 9, 1988, Commissioner Sidney B. Linden considered this question, and stated the following at page 5:

I assume as a matter of policy that the institution does not wish to make any profit from charging for photocopies. Rather, the purpose of fees is to permit the institution to recover some of the actual costs and to have the people who use the system pay their fair portion. That being the case, in my view, the institution should consider \$.20 per page as a maximum and make an effort to determine the actual cost of photocopying. This is contemplated by subsection 57(3)(a) of the Act which refers to the "**actual** cost of processing, collecting and copying the record." If the actual cost is less than \$.20 a page then that is all requesters should be charged. It is important that every effort be made by an institution to prevent fees being used as a deterrent or impediment to use the Act.

I agree with Commissioner Linden's view of this matter, and adopt it in the present case. I feel that \$.20 per page is the maximum amount that may be charged for photocopying, which charge includes the cost of an individual "feeding the machine".

In my view, it is not proper to allow an additional charge for the process of photocopying since the maximum costs for copies, which includes "feeding the machine", have already been claimed.

Furthermore, the City has stated that some exemptions would apply, and presumably, some records may be exempted in their entirety. The City has apparently claimed photocopying charges for the total number of pages (5,370). Based on this information, the City may charge photocopying costs of \$0.20 per page for each page of the record **that is provided to the appellant.**

The City has also provided a fee estimate of \$225.00 for "drawings - reproduction". It states that such a figure is based on "other FOI requests." I have been provided with no evidence as to what charge this amount represents or how it was calculated. I do not know if this represents an additional photocopying charge and, if so, how this figure was derived. Nor do I know whether it represents costs to reproduce records which, because of their size or configuration, cannot be reproduced by conventional means.

Because I have been provided with no information as to how this element of the fee estimate was calculated, I will disallow it.

In summary, based on the evidence provided by the City, I find that it may only charge photocopying costs of \$0.20 per page for each page of the record that is provided to the appellant.

ISSUE B: Whether the City's decision not to waive the fee was proper in the circumstances of this appeal.

The appellant submits that he is entitled to a fee waiver on the basis of sections 45(4)(a), (b) and (d) of the Act. These provisions state:

A head shall waive the payment of all or any part of an amount required to be paid under this Act 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;
- (d) any other matter prescribed in the regulations.

Section 8 of Regulation 823 under the Act reads:

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 the payment.

It has been established in a number of orders that the person requesting a fee waiver has the responsibility to provide adequate evidence to support a claim for a fee waiver (Orders 4, 10 and 111).

As far as section 45(4)(a) is concerned, the appellant submits that the City has failed to disclose its actual costs of processing, copying and collecting the records. In addition, he notes that the City has not provided an explanation for the increased fee estimate. Moreover, he suggests that the City has already expended considerable search and preparation time to respond to the various lawsuits in which these records are at

issue.

In my view, in the circumstances of this appeal, I have already addressed the appellant's first two points under Issue A. I have no information before me to determine the relevance, if any, of the third point.

The appellant has also submitted that payment of the fee would cause financial hardship and provides some details as to his financial status. He takes the position that the City improperly terminated a contract with him, and failed to make payments which he alleges were due and owing by the City. As a result, he contends that many lawsuits were filed against him, resulting in substantial legal fees, and that the City owes him a large amount of money. He also argues that the City's actions, as well as the actions of the project architect, caused him to suffer substantial business losses, with resulting cash flow problems and the loss of most of his staff. The appellant was unable to pay rent on his premises and is carrying on his business from temporary facilities. Therefore, the appellant maintains that he does not have sufficient cash flow or resources to pay the amount requested by the City.

In its representations, the City states that its position "on money owed is quite different from the [appellant's] position. This issue will be addressed through litigation."

The intention of the Legislature to include a "user pay" principle is clear from the wording of the section (Order 111). In my opinion, the evidence provided by the appellant is insufficient to shift the financial burden to the government and, ultimately, to the public. Accordingly, I am unable to conclude that payment of the fee will cause a financial hardship for the appellant.

Finally, the appellant claims that he is entitled to a fee waiver on the basis that he has yet to receive access to any of the requested records. As I indicated under Issue A, the appellant will only have to pay photocopying charges of \$0.20 per page for each page of the record to which he receives access. I believe this disposition addresses this particular concern of the appellant.

In summary, I am satisfied that the City's decision not to waive the fee is fair and equitable in the circumstances of this appeal.

ORDER:

1. I order the City to make a final access decision with respect to the appellant's request within 20 days of the date of this order. This decision should be made in accordance with section 22 of the Act.
2. I allow the City to charge photocopying costs at a rate of \$0.20 per page for each page of the record to be disclosed to the appellant.
3. I do not uphold the search time, preparation time, and drawings-reproduction costs charged by the City.

4. I uphold the City's decision not to waive the fee.
5. In order to verify compliance with this order, I order the City to provide me with a copy of the access decision which has been issued to the appellant in accordance with Provision 1, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

November 19, 1993