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

ORDER M-726

Appeal M_9500589

City of Oshawa

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Oshawa (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to information which the requester listed in 10 numbered paragraphs. These paragraphs itemized various subjects, including the requester's personnel records, personnel records of other individuals, records relating to specific developments taking place in the City, legal fees incurred on specific projects, retirement benefits paid by the City to named employees, records relating to lawsuits between the City and former employees, and confidential reports relating to the Office of the City Solicitor. The requester is a former employee who is currently involved in litigation with the City.

The City responded by providing the requester with a fee estimate of $4,895.20, and asked for a deposit of 50%, as provided by R.R.O 1990, Reg. 823, which was in force at that time.

[By separate letter, the City advised the requester that it was extending the time for responding to his request by an additional 90 days, due to the large volume of records, the need to retrieve records from off-site storage facilities, and the need to consult with others prior to reaching a decision on access. The requester did not appeal the time extension, and the City ultimately provided an access decision within the extended time frame. This access decision also was not appealed by the requester and will not be addressed in this order.]

The requester filed an appeal with this office, claiming that the request contained 10 separate items which should have been treated separately for the purpose of calculating fees, and also that the fee estimates were excessive.

After receiving the initial response from the City, the requester submitted nine separate request letters to the City, each one containing the same wording as one of the paragraphs from the original request letter (one paragraph in the original letter was not repeated). The City advised the requester that, because the City was already in the process of responding to his original request, it considered the new letters to be duplications of the original, and the City would not be responding separately to them.

As far as the fee estimate was concerned, the City sent a subsequent letter to the requester reducing the fee estimate to $2,001, having removed any costs relating to the requester's personal information and photocopy estimates for records which the City did not intend to disclose. The City again requested payment of a deposit to cover 50% of these revised estimates.

By the time the response letter containing the access decision was issued, the City had completed all required searches, and further reduced the fee to $922.50. This figure was calculated on the basis of 32.75 actual hours of search time, taking into account the two free hours provided by regulation. The City advised the requester that any required photocopy charges would be added to the total fee, and that none of the search fees related to his personal information. The City also notified the requester that he could obtain his personnel records once the fee had been paid.

Mediation was not successful and a Notice of Inquiry was sent to the requester (now the appellant) and the City. Representations were received from both parties.

The issues I will address in this order are:

1. Whether the fees charged by the City were calculated in accordance with the Act and regulations.

2. Whether the City is entitled to delay access to the appellant's personnel records until the fees have been paid.

This request and appeal were both filed prior to the enactment of Bill 26, which changed the fee structure of the Act. My decisions in this appeal will be made under the statutory and regulatory provisions in force at the time the request and appeal were filed.

DISCUSSION:

FEES

The dispute in this appeal relates to the calculation of chargeable search time. The City's position is that the appellant is only entitled to two hours of free search time because he submitted only one request. The City acknowledges that the request included 10 items, but submits that the 10 items are linked by virtue of the appellant's litigation with the City.

The appellant's position is that the City should be required to deal with each of the numbered items in his original request separately, resulting in an allocation of two free hours of search time per item listed in the request. He submits that had the City particularized the amount of search time associated with each item, he would have been in a position to decide how he wanted to proceed with each item before any costs were incurred by the City in retrieving the records.

At the time of the appellant's request, the relevant statutory and regulatory provisions of the Act read as follows:

> **Section 45(1)(a)**
>
> 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 search charge for every hour of manual search required in excess of two hours to locate a record;
>
> **R.R.O 1990, Reg. 823, section 6**
>
> The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act:

3. For manually searching for a record after two hours have been spent searching, $7.50 for each fifteen minutes spent by any person.

In my view, the appropriate calculation of chargeable search time is based on the activity of manually searching for records, not on the wording of a particular request. It is not appropriate to require an institution to calculate free search time by counting items listed separately in a request, nor to penalize a requester for listing multiple requests in one letter.

Some of the items in the original request appear to deal with separate and discrete subject matters. The City argues that each item is linked by the ongoing litigation between the City and the appellant.

It is clear that the records relating to this litigation have not been consolidated by the City, and that the searches required to locate all responsive records involved a number of different departments and employees. Based on the evidence before me in this appeal, in my view, the fact that the appellant is involved in litigation has had little effect on the actual activity required by the City to locate responsive records, and is not the appropriate factor to consider for the purpose of calculating chargeable search time.

In the circumstances of this appeal, the City proceeded to complete the searches required for all 10 items in the original request, and itemized them in its representations. The City identified eight separate departments where searches were required, and indicated which of the 10 items were searched for in each department. These searches were undertaken by different employees, again broken down by department. It is clear that the area of search for some items overlapped with others, while some items involved discrete and separate searches. Based on this information, in my view, the most reasonable way of breaking down the search activity in the circumstances of this appeal is by department. Therefore, I find that the 10 items in the original request required eight distinct searches, and it is on this basis that chargeable search time should be calculated.

The City's representations provide a detailed outline of the various searches undertaken with respect to the 10 items listed in the original request letter. Because the final fee calculations are based on actual costs rather than estimates, the component costs are clearly identified and allocated to each of the various items. The City points out that it does not have a centralized filing system, and that the records responding to the various items identified by the appellant "... were "scattered" throughout the City's information files." The City points out that no staff time was included for reviewing individual documents to determine whether or not exemptions applied, or for severing, photocopying, creating indices, or any other similar activities. Search fees were also not included for time spend responding to the item requesting access to the appellant's own personnel file.

The City also points out that the total search time is an accurate record of the actual time expended, which is more than the original estimate provided to the appellant.

I have reviewed the departmental search fees contained in the City's representations. In the case of the Department of Development & Planning Services, the Department of Public Works, the Department of Corporate Services (City Clerk's Branch), and the City Manager's Office, no more than two hours of search time was required in order to complete all required searches in each of these departments. Because the wording of section 45(1)(a) which was in force at the time this request and appeal were filed provided for two free hours of search time per record, I find that no search fees are chargeable for searches relating to these four departments. Accordingly, the total chargeable search time is reduced from 32.75 hours to 29.5 hours.

As far as the remaining four departments are concerned, I find that the search fees identified by the City are reasonable in the circumstances, with one exception which I will discuss below. Again, based on the relevant wording of section 45(1)(a), I find that the appellant is entitled to two free hours of search time for each of these requests. The total chargeable search time for these four departments is thereby reduced as follows:

- Department of Corporate Services (Treasury and Finance Branch) - from 14.5 hours to 12.5 hours.
- Department of Legal Service - from 3 hours to 1 hour.
- Mayor's Office - from 6.5 hours to 4.5 hours.
- Department of Community Services - from 5.5 hours to 3.5 hours.

The total chargeable search time is therefore further reduced from 29.5 hours to 21.5 hours.

The appellant's original request contained 10 items. However, when he broke these items into separate requests and re-filed them with the City, only nine items were included. In my view, at a minimum, it was incumbent on the City at that point to contact the appellant to determine whether the tenth item, records relating to the City's proposed development of a Slo-Pitch facility, had been removed from the scope of the request. The City did not do so, and a significant portion of the search costs incurred by the City relate to this item. In the circumstances, I find it is not reasonable to require the appellant to pay the portion of the fees allocated to this tenth item, unless he continues to want access to these records. Based on the outline provided by the City, I have identified a total of 7.75 hours of chargeable search time related to the proposed development of the Slo-Pitch facility, totalling $232.50, and this figure should be deducted from the total fee, unless the appellant decides he wants access to records relating to this part of his original request.

ACCESS TO APPELLANT'S PERSONNEL FILE

One of the items listed in the original request letter was copies of all of the appellant's personnel records.

These records were identified by the City, and excluded from any fee calculations, as required by the statutory and regulatory provisions in place at that time. However, these records were not

disclosed to the appellant, and in its final correspondence to the appellant, the City states "Upon receipt of payment for processing the request, your personnel records may be picked up in the City Clerk's Office."

I find that the City has no basis for tying the disclosure of the appellant's personnel records to the payment of fees for access to general records. As soon as the personnel records were located by the City, they should have been disclosed to the appellant without charge. I find that the City's actions in delaying disclosure of these personnel records are both regrettable and not supportable, and I order these records to be disclosed forthwith.

ORDER:

1. I uphold the City's fee allocation in the reduced amount of $412.50, or $645 should the appellant decide he wants access to records which relate to the proposed development of a Slo-Pitch facility by the City.

2. I order the City to disclose copies of all personnel records of the appellant by **March 18, 1996**.

Original signed by: March 7, 1996
Tom Mitchinson
Assistant Commissioner

POSTSCRIPT:

There is no clear obligation under the Act for an institution to clarify the scope of the request in situations such as those present in this appeal. However, it is certainly in the interests of institutions to do so.

If the scope of the request and the potential costs to the requester are not clarified at the front end of the process, institutions may end up incurring search and preparation costs which the requester is unprepared to pay, a situation which is clearly not in the interest of either party.

As the appellant in this appeal pointed out in his representations:

> Had this [clarification] occurred in this instance, a decision could have been made by me to proceed with some items, appeal some items, and perhaps abandon some items, or attempt to particularize the request time and copying. For the purposes of this appeal, particularization of the search time to each item, is my main concern.

If a requester advises an institution that he/she is not prepared to pay the original fee estimate, it should serve as a signal that both parties would benefit from the type of discussions envisioned by this appellant and quoted above. If institutions undertake these consultations, in my view, this will make the process more straightforward and less expensive to all concerned.