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

ORDER MO-1699

Appeal MA-020258-1

City of Hamilton

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NATURE OF THE APPEAL:

The requester, a member of the media, made a request to the City of Hamilton (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> all records related to the current review/reform of the food premises inspection system in [the City]. Without limiting the generality of the foregoing, these records would include all records related to the development and implementation of the interim food premise disclosure program (green signs), all records related to the development of a permanent food premise inspection disclosure program, all records relating to public consultations, including summary reports flowing from public meetings and focus group sessions, all records related to possible or actual changes in food premise inspection procedures or staffing including deployment of staff, and all records related to the City's response to and/or evaluation of [a specified newspaper series appearing in November, 2001].

The City issued a decision letter to the requester, identifying a number of responsive records in the following three City departments: Legal Services & Corporate Counsel, Corporate Communications, and Social and Public Health Services. The City briefly described the records and gave the requester a fee estimate of $366 ($166 for copying and $200 for preparing the records for disclosure). The City asked the requester to pay a deposit equal to 50% of the estimate. The City's letter also included an interim access decision, advising the requester that some of the records may qualify for exemption under section 7 (advice or recommendations) and section 12 (solicitor-client privilege) of the *Act*. In addition, the City asked the requester to clarify part of his request, and indicated that it needed to review certain Social and Public Health Services records to determine if they could be disclosed.

The requester paid the full $200 fee estimate for preparing the records.

The City subsequently wrote to the requester, indicating that it was continuing to search for additional responsive records. Citing section 20(1) of the *Act*, the City extended the time limit for making an access decision by 34 days. The City indicated that it would allow the requester to review the records before deciding whether he wished to copy any of them.

The City then issued a third decision letter, identifying and describing additional responsive records in its Social and Public Health Services department. The City also indicated that two of its departments (Social and Public Health Services and Communications) had just informed the City of the time they had spent searching for responsive records. Based on this new information, the City charged a search fee of $469.80 in addition to the initial fee estimate of $366. It did not charge any fees for searches conducted by its Legal Services & Corporate Counsel department. As a result of the new search fee, the City asked the requester to pay a deposit of $217.60 in addition to the $200 he already paid. In this same letter the City gave the requester another interim access decision, advising him that the following exemptions would likely apply to some of the records: section 7 (advice or recommendations), section 11(g) (economic and other interests), section 12 (solicitor-client privilege) and section 14 (invasion of privacy). The City

also advised the requester that it would need to copy approximately 100 records in order to create severed versions that the requester could review.

The requester (now the appellant) appealed the City's search fee (but not its fee estimates for copying and preparing the records) and its interim access decision that some records would be exempt from disclosure.

During mediation, the appellant agreed that it was premature to appeal the City's interim access decision because the City had not rendered a final decision in this regard.

Mediation did not resolve this appeal, and the file was transferred to adjudication. This office sent a Notice of Inquiry to the City, initially, outlining the facts and issues and inviting the City to make written representations. The City submitted representations in response to the Notice. This office then sent a Notice of Inquiry to the appellant, together with a copy of the City's representations. The appellant, in turn, provided representations.

BRIEF CONCLUSION:

The City should not be permitted to charge a search fee in this case.

DISCUSSION:

SHOULD THE CITY BE PERMITTED TO CHARGE A FEE FOR SEARCH TIME?

General principles

The *Act* requires institutions to charge certain fees, prescribed by regulation, for processing access requests. Section 45(3) requires institutions to provide requesters with a "reasonable estimate" of any fee exceeding $25, prior to giving access. This office may review the amount of a fee.

Where the fee is $100 or more, the institution may choose to do all the work necessary to respond to the request at the outset. If so, it must issue a final access decision. Alternatively, the institution may choose *not* to do all the work necessary to respond to the request, initially. In that case, it must issue an interim access decision, together with a fee estimate, and may require the requester to pay a 50% deposit of the estimated fee (see section 7 of Regulation 823 made under the *Act*).

The purpose of the fee estimate, interim access decision and deposit process is to provide a requester with sufficient information to make an informed decision as to whether to pay the fee and pursue access, while protecting an institution from expending undue time and resources on processing a request that may ultimately be abandoned.

Representations

The City submits that it gave the appellant "two interim notices," each providing him with a description of the responsive records and an indication of which exemptions might apply. It submits that both notices contained "a breakdown of the fee and a clear statement as to how the fee was calculated." The City submits that based on these two notices, the appellant had no reason to believe that either of the notices contained a final decision.

The appellant asks that the City's search fee be disallowed, either in whole or in part. Among other things, he submits that fee estimates should "take into consideration all of the possible factors in play at the time the request [is] processed, including estimated search time, estimated preparation time and costs associated with producing records from machine readable records." He submits that fee estimates should be "generally complete in terms of the types of fees likely to be assessed, even if some of the estimated amounts are still subject to change." He acknowledges that an institution may need to "sharpen and finalize" its fee estimate once it has actually carried out the requisite work, but he protests that in this case the City should not be permitted to "return to the well" nearly two months after providing an interim decision and charge new fees that it had not originally contemplated. The appellant contends that allowing institutions to revisit the entire basis of fee estimates "after the fact" would open the door to abuse of process, with a view to discouraging access.

The appellant notes that the search fee relates not only to the newly identified records, but also to some identified in the City's first decision letter. He submits that the records the City initially identified appear to be similar in type to those it identified at the end of its search, and that the City was "in an excellent position to estimate search fees, if any," at the time of its original interim decision.

The appellant submits that he and his employer relied upon the City's original fee estimate in deciding how to proceed. Had they known that search fees might also apply, they might have amended the scope of the request. In fact, the appellant notes that they attempted to do so, but because they were dissatisfied with the City's tardiness in responding, they decided to proceed with the request as originally framed. At that point, the cumulative delays had diminished the records' value for the appellant, in his submission, because the Hamilton City Council had by then considered the subject matter of the records at a Council meeting. The appellant indicates that adjudicating the "unusual manner" in which the City had imposed fees has become more important for him than timely access to the records.

Findings

I have carefully reviewed the City's decision letters and the parties' representations, and I agree with the appellant that the City should not be permitted to charge a search fee in this case.

As noted above, one of the purposes of the fee estimate, interim access decision and deposit process is to provide requesters with sufficient information to make an informed decision as to

whether to proceed. Here, the City's first decision letter gave the appellant a fee estimate and interim access decision, and asked him to pay a deposit for copying the records and preparing them for disclosure. The appellant relied on this information in deciding to proceed with his request and pay the deposit. Only after receiving the appellant's deposit did the City advise him that it would be charging a search fee. The evidence before me, however, demonstrates that the City had contemplated charging the appellant a search fee prior to issuing its first decision. The City submits that upon receiving the appellant's request, it asked the Social and Public Health Services department to "track and record all search time related to identifying responsive records [and provide] an estimate of the search time."

The City should have informed the appellant of possible search fees and given him an estimate of the amount of such fees at the time it issued its first decision and asked for a deposit. The City's failure to do so prejudiced the appellant by putting him in the position of having to decide whether or not to proceed, without the benefit of the "full picture" regarding applicable fees.

The City's first decision letter indicated that upon rendering a final decision, the City would advise the appellant of "any revisions to the [fee] estimate." In my view, this proviso serves only to alert the appellant to possible adjustments to the copying and preparation estimates already given. It does not leave the door open for the City to charge entirely new fees not specified in its initial decision letter. To conclude otherwise would defeat the purpose of providing the appellant with a "reasonable" fee estimate and would "compromise and undermine the underlying principles of the *Act*" (Order 81).

In the circumstances, I find that the City should not be permitted to charge a search fee.

Despite my decision to disallow the City's search fee, I wish to note that I appreciate the City's efforts in other respects, such as giving the appellant a detailed fee estimate for preparing and copying the records and keeping him apprised as its search for records progressed. The City's efforts in this regard are not insignificant. In this case, however, they do not overcome the prejudice caused to the appellant by the City's late notice of the search fee.

WHAT IS THE APPROPRIATE REMEDY?

It is not clear to me whether the appellant continues to seek access to the records. His decision in this regard may be influenced by whether or not I permit the City to charge a search fee. At the same time, the appropriate remedy in this appeal depends on which course of action the appellant chooses.

If the appellant wishes to proceed with his request, the City may charge applicable fees for copying the records and preparing them for disclosure, but it must not charge a search fee.

If, however, the appellant wishes to withdraw his request, the City must refund his $200 deposit. This deposit relates only to copying and preparing the records for disclosure, and the City will no longer need to perform this work if the appellant withdraws his request.

Accordingly, I have crafted two alternative order provisions that are contingent upon whether the appellant decides to pursue access to the records.

ORDER:

1. If the City receives written notice from the appellant by **November 10, 2003** that he wishes to proceed with his request, I order the City to issue a final decision to the appellant under the *Act*, using the date of the appellant's written notice as the date of the request. The City's final decision must not include a fee for searching for responsive records.

2. If the City does not receive the written notice described in Provision 1 by **November 10, 2003**, I order the City to refund the appellant's $200 deposit by **November 24, 2003**.

Original signed by: October 27, 2003
Shirley Senoff
Adjudicator