



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1992**

**Appeal MA-040361-2**

**City of Toronto**



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## NATURE OF THE APPEAL:

The City of Toronto received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to notices given to the public and public agencies for the passing of 12 specified bylaws listed in Appendix "A" of the request. Specifically, the requester sought access to the following information pertaining to the enactment of each of the By-laws enumerated in the appendix to the request:

Copies of the Notices given to the Public and Public Agencies before and after By-laws are passed, as prescribed by:

- a) THE ONTARIO PLANNING ACT, Sections 34(12) to (22) inclusive; and
- b) ONTARIO REGULATIONS made under the PLANNING ACT  
Re: Zoning By-laws, Holding By-laws and Interim Control By-laws; and Amendments to By-laws and Draft By-laws preceding the By-laws as listed in Appendix "A" attached hereto and the Method Used:
  - i) If by Newspaper – the Date and Name of the Newspaper and Copy of the Notice in the Newspaper as prescribed
  - ii) If by Mail or Fax or Personal Service, Names and Addresses to whom given and the Affidavit or Declaration of an employee of the Municipality that Notice was given as required by Section (18) in accordance with Section (22).

The City subsequently contacted the requester to clarify his request and the requester faxed the City an amended version of Appendix "A", in which he deleted By-law 438-86 from the list, leaving a total of eleven By-laws. The City did not respond within the 30 day time period as prescribed by the *Act*. As a result, the requester, now the appellant, launched an appeal and the Commissioner's office opened Appeal Number MA-040361-1 to address this matter. During the course of that appeal, the City issued a decision letter and the appeal file was closed.

In its decision letter dated December 9, 2004, the City granted the appellant partial access to records pertaining to By-law 214-84. The City denied access to portions of these records pursuant to the mandatory exemption in section 14(1) of the *Act* (invasion of privacy). In addition, the City advised the appellant that a fee of \$46.00 would apply to these records pursuant to section 45 of the *Act*.

In that same decision letter, the City conducted a preliminary search and issued an interim access decision granting the appellant partial access to the requested records pertaining to By-laws 68-87, 69-87 and 180-86. The City also estimated that, pursuant to section 45 of the *Act*, the fee for severing and photocopying these records would be \$1100.

With respect to records pertaining to the remaining eight By-laws, the City advised the appellant that staff from its Legal Department would have to embark on an extensive search and estimated that the fee for conducting such a search would be \$540. The City indicated that the search fee

of \$540 did not include the costs of severing these records. The appellant appealed the fee and fee estimate decision to this office.

During the course of mediation, the appellant wrote to the City requesting a waiver of the fee and fee estimates under section 45(4) of the *Act*. The City denied this request. As a result, the appellant advised the Commissioner's office that he wished to add the City's refusal of his request for a fee waiver as an issue in this appeal. The appellant also advised that he no longer wishes to pursue access to the responsive records pertaining to By-law 214-84. As a result, the portion of the City's decision relating to this By-law is no longer in issue.

The sole issues to be determined in this appeal relate to the appropriateness of the fee estimate given by the City and its decision to deny the appellant's fee waiver request.

I sought and received the representations of the City, which were then shared with the appellant. I did not receive any submissions from the appellant in response to the Notice of Inquiry provided to him.

## **RECORDS:**

The records remaining at issue relate to the ten By-laws listed in Appendix "A" of the appellant's request, with the exception of By-laws 214-84 and 438-86.

## **DISCUSSION:**

### **WERE THE FEES CALCULATED IN ACCORDANCE WITH THE REQUIREMENTS OF THE ACT?**

#### **General principles and statutory provisions**

Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.

Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records. [MO-1699]

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699]. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below. Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

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.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

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 floppy disks, \$10 for each disk.
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.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under Subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

### **The City's representations**

The City has provided me with detailed submissions regarding the manner in which the fee estimate was calculated. It indicates that the fee estimate was based on a search conducted of a representative sampling of some of the responsive records which uncovered various "notices and affidavits pertaining to the passing of By-laws 67-87, 69-87 and 180-96", along with the required notice for By-law 132-84.

The identified records total some 1000 pages, 900 of which contain personal information which must be severed. The City submits that previous orders of the Commissioner's office have upheld a fee for the preparation of a record for disclosure. It submits that this fee amounts to \$900, based on a charge of \$30 per hour for two minutes for each of 900 pages, in order to accomplish this severing exercise. In addition, the City submits that section 6(1) of Ontario Regulation 823 allows for a fee of \$20 per page for photocopying, for a total of \$200.

The City also sets out the details of the searches undertaken for responsive records and the method of calculating this fee. It states that a search for a representative sample of the records was undertaken by an Articling Student with its Legal Department who is familiar with the type of record requested and the "various resources available to track documentations such as the records requested by the appellant". The City goes on to indicate that the Student, in consultation with the City's Records staff and under the supervision of a City Solicitor from the Planning and Administrative Tribunal Law section of its Legal Department, undertook the following steps to locate the requested records:

- Searches of two databases maintained by the former City of Toronto Legal Department as well as an index card system were undertaken to assist in locating responsive records, files relating to a particular By-law were not filed under the designated number of the By-law as the number was only assigned at the time of enactment, which occurred subsequent to the creation of the records sought in the request;
- Minutes of City Council meetings were searched in order to link the By-law enacted at a particular meeting to the Legal Department files relating to its subject matter;

- Once the files were identified, they had to be retrieved physically from two storage facilities where, again, they are not stored according to the pertinent By-law number.

The City goes on to indicate that although it incurred roughly 24 hours of search time at this preliminary phase of its processing of the request, it has not charged the appellant the \$720 (24 hours X \$30 per hour) that section 6(3) of Ontario Regulation 823 allows. The City determined, however, that in order to locate the remaining records requested, it will require 18 hours of search time, based on its experience in collecting the responsive records in the representative sample described above. It has estimated this cost to be \$540 (18 hours X \$30 per hour).

### **Findings**

Based on the representations of the City, I am satisfied that the fees calculated are in accordance with the requirements of the fee provisions in the *Act* and the Regulation. The amounts indicated for search time, preparation time and photocopying charges are reasonable and I have no hesitation in upholding these amounts, particularly in the absence of submissions from the appellant to the contrary. Accordingly, I uphold the City's fee estimate of \$1100 for preparation and photocopying of the records that it has located relating to By-laws 68-87, 69-87 and 180-86, as well as \$540 as the cost to conduct searches for any responsive records pertaining to the remaining seven By-laws enumerated in Appendix "A" of the request. The fees quoted do not, of course, include a fee for any time spent preparing the records pertaining to those seven By-laws for disclosure or for any photocopying charges pertinent to them.

### **FEE WAIVER**

#### **General principles**

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) 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;
  - (c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed by the regulations.

8. 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 payment.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F].

### **The parties' representations**

In a letter requesting a fee waiver, the appellant advised the City the he did not "have the required funds to pay for the above mentioned fees, but the information is required to help me appeal". The appellant has been involved in ongoing litigation with the City for many years. The appellant did not respond to the Notice of Inquiry which I sent to him seeking his submissions on the granting of a fee waiver by the City.

In support of its position against the granting of a fee waiver to the appellant, the City submits that it considered the factors listed in section 8 of the Regulation in determining whether it would be "fair and equitable" to waive the fee in the particular circumstances of this appeal. It argues that the appellant bears the onus of demonstrating that "the criteria for the granting of a fee waiver are present in the circumstances". In addition, relying on the decision in Order P-1393, the City notes that the *Act* includes a "user pay principle" as evidenced by the mandatory nature of section 45, requiring that institutions charge the fees set out in that section.

The City goes on to note that the appellant has not provided any evidence to support his contention that he is financially unable to pay the fees required. It states that the appellant did not provide evidence pertaining to his income and expenses, assets, net worth or any explanation as to how the payment of the fee would cause him financial hardship.

The City also indicates that it did not charge a fee for the time spent locating the representative sample records described earlier in this order, and that it offered to make available the responsive records so the appellant could determine which he wanted copied, thereby reducing the potential photocopying charges.

Finally, the City submits that it would not be fair and equitable to waive the payment of the fee in the circumstances of this appeal. It notes that the appeal involves the preparation and

photocopying of a significant number of records which require a great deal of time to locate. The City relies on the decision in Order MO-1285, in which Adjudicator Laurel Cropley found:

. . . the size of the record and the amount of time expended by the City in searching for responsive records is a factor to consider in determining whether waiver of the fee would shift an unreasonable burden of the cost from the appellant to the City.

The City also submits that it assisted the appellant in narrowing the scope of his request, which was originally very broadly worded, and actively worked with him to clarify exactly what he was seeking. The City notes that the appellant only reduced the scope of his request in an insignificant way.

**Finding**

In my view, the appellant did not provide either this office or the City with the kind of detailed financial information required to assist in determining whether the payment of the fees would cause the appellant financial hardship. I find that without evidence of the appellant's financial situation, I am unable to make a determination that the payment will cause financial hardship within the meaning of section 45(4)(b).

I further find that the consideration listed in sections 45(4)(c) (benefit to public health or safety) has no application in the present circumstances. I also note that the City is not seeking a fee to cover the costs of its initial search for a representative sample of the records, which it estimated at \$720. Accordingly, the factor listed in section 45(4)(a) is relevant, as the costs sought by the City are less than the actual cost of searching for, preparing and copying the records sought.

In my view, taking into account all of the considerations in section 45(4) and section 8 of Regulation 823, I uphold the City's decision not to waive the fee in the circumstances of this appeal.

**ORDER:**

1. I uphold the fee estimate provided by the City.
2. I uphold the City's decision not to waive the fee under section 45(4) of the *Act*.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

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November 15, 2005