



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2215

Appeal MA06-302

City of Windsor



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NATURE OF THE APPEAL:

The City of Windsor (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for:

1. All records dated between November 1, 2002 and current date concerning any plans or proposals to operate, manage, own, sell, transfer, exchange, lease, or otherwise dispose of all or part of the Detroit-Windsor Tunnel including but not limited to any records with

[15 part list of entities]

2. All records dated between November 1, 2002 and the current date concerning the opposition to any plans or proposals to operate, manage, own, sell, transfer, exchange, lease, or otherwise dispose of all or part of the Detroit-Windsor Tunnel including but not limited to any records with

[15 part list of entities]

3. Any records dated between November 1, 2002 and the current date concerning any studies, plans or proposals to finance all or part of the Detroit-Windsor Tunnel operations or to securitize the revenues or in any way obtain revenue for an agreement, arrangement, divestiture or acquisition of assets of the Tunnel including those from third party funding sources.

4. All records dated between November 1, 2002 and the current date concerning the Duty Free Shop at the Windsor Tunnel including but not limited to rent reductions

5. All records dated between November 1, 2002 and the current date concerning improvements, changes and alterations to the Tunnel and Tunnel Plaza including but not limited to any records with

[15 part list of entities]

6. All records dated between November 1, 2002 and the current date concerning any plans or proposals respecting the Burger King, Top Hat Supper Club and Bus terminal sites including but not limited offers of purchase and sale, matters involving expropriation, assessment appeals, matters of land uses such as Drive-throughs

7. Records respecting the border file between November 1, 2002 and the current date concerning

[8 part list of items and entities]

[description of the meaning of "border file"]

In response, the City issued a fee estimate pursuant to section 45(1) of the *Act* in the total amount of \$101,089.00. This total included \$31,815.00 for search costs, \$57,729.00 for preparation costs and \$11,545.80 for photocopying costs. The requester was asked to provide a deposit of \$50,544.90, which represents 50% of the total estimate.

The City informed the requester that the fee may be waived under certain circumstances and that the City requires a time extension of ten months in order to complete the request, pursuant to section 20(1) of the *Act*. The City subsequently provided the requester with a breakdown of how it arrived at the costs contained in its fee estimate.

The requester (now the appellant) appealed all aspects of the City's decision.

During the intake stage of the appeal, the appellant submitted to the City a request for a waiver of the fee pursuant to section 45(4) of the *Act*. The City asked the appellant to provide evidence in support of the fee waiver request. During the mediation stage of the appeal, the appellant submitted a second, more detailed fee waiver request. After considering the second request, the City declined to waive the fees.

Also during mediation, the appellant raised section 17 of the *Act*, claiming that the City has not conducted a reasonable search for records, based on the fact that the City has estimated only 30 records are located in the Mayor's Office and that the number of responsive records estimated by the City (57,729 pages) is excessive. The appellant has also raised the issue of the appropriate scope of the request.

As it was not possible to resolve the appeal by mediation, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the City seeking its representations, initially. I received representations from the City in response. I then sent a Notice of Inquiry to the appellant, seeking his submissions and providing him with a copy of the City's representations. I received the appellant's submissions. Because the appellant raised issues that required a response from the City, I sought reply representations from it. Upon receipt of the City's reply submissions, I sought surreply representations from the appellant on:

1. The format in which the appellant wished the information to be relayed.
2. Whether the appellant wished to narrow the scope of his request. If so, in what manner?

I received the appellant's surreply representations. I then provided the appellant with an opportunity to contact the City directly to discuss narrowing the scope of this appeal. The appellant wrote to the City providing it with a modified version of his original request. I then sought and received representations from the City on whether the appellant's modified request would result in any reduction in the fee estimate. I received representations from the City in response.

DISCUSSION:

SCOPE OF THE REQUEST/SEARCH FOR RESPONSIVE RECORDS

The appellant has raised the issue of the appropriate scope of the request. The appellant has also claimed that additional records exist beyond those identified by the City. If I am satisfied that the search for records carried out was reasonable in the circumstances, I will uphold the City's decision. If I am not satisfied, I may order further searches.

I shall consider both the scope of the appellant's request and whether the City has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I].

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Representations

The appellant has claimed that the City has not conducted a reasonable search for records, based on the fact that the City has estimated only 30 records are located in the Mayor's Office and that the number of responsive records estimated by the City (57,729 pages) is excessive.

The City submits that:

Records in Mayor's Office

...[T]he (Mayor's) Chief of Staff reviewed the list of files to determine potential files containing the requested information. They physically went to the main office file cabinets to review and retrieve the files that might contain responsive records. The Chief of Staff also reviewed her own files and also conferred with the Mayor and the office Administrative Assistants to locate any electronic files

that may be responsive. There are no other locations in the Mayor's Office that might contain responsive records.

Number of Responsive Records

[T]he City points to the appellant's detailed list of records for which it seeks access. For example, the appellant's first three identified areas specify the Detroit-Windsor Tunnel. However, the categories and types of documents being sought are extensive and broad. The request seeks almost all documents that possibly could relate to the day-to-day operations of the Detroit-Windsor Tunnel from November 1, 2002 - a period of over 4 years. Additionally, [the appellant's] category number 7 seeks documents related to the "border file". The "border file" is not one file. Many City departments have had involvement with border issues and the number of related documents is potentially massive, even if [the appellant] has identified 8 subject areas. These and the other categories identified in the request cover an extensive and broad range of records...

It is clear that the City's initial response to [the appellant's] request was an interim decision and was based upon a partial review of responsive records and that not all responsive records had been located...

In response to the request, the City's Manager of Records contacted several departments that he felt would likely have responsive records. The number of departments contacted comprises most of the departments within the City and included:

- the Office of the Mayor
- Legal Services
- Public Works
- Council Services
- Planning
- Chief Administrative Officer's office
- Parks and Recreation
- Building
- Corporate Services

An example of the types of responses the Manager of Records received is appended to these representations... The response is for a search for a representative sample of responsive records if the search time is greater than 3 hours. In each instance the search is made or lead by someone from each department that has familiarity with the record keeping system of the department and where records are kept.

The appellant submits that:

[T]he City did NOT provide or identify any records from the Windsor-Tunnel Commission, one of the named ...parties from whom records were requested.

...WTC is a separate group in the City which ought to have its own files system. If it does not, that is not the fault of the Applicant.

It is absurd to suggest that there are only 30 records in the Mayor's Office that are responsive to this matter...

...Are there any other [file] cabinets [of the Mayor] in other locations?...

I have requested records surrounding the possibility of the sale, lease or securitization of the revenues of the Windsor/Detroit Tunnel. This is a major transaction that the City of Windsor has been discussing with the City of Detroit (each City owns half of the tunnel) and the Governments of Ontario and Canada...

Windsor had an agreement with the Detroit & Canada Tunnel Corporation to operate its side of the tunnel. It is not believable that an "operating agreement" and other relevant records respecting a possible "joint operating agreement" for an international Tunnel operation that the Mayor has estimated to be worth \$2-300 million would only be 30 records.

Please note as well that both the City and the Federal Government opposed a competitive Tunnel offer. Again, is it believable that there was not substantial correspondence between the two levels of Government? ...

It is also noteworthy that in Order MO-1839, ...where the request was wider than in this request, although the time period was shorter, the City had no trouble identifying and producing documents and did not raise the issues they are raising in this appeal. What has changed in the interim to now make it so hard for the City to produce documents? ...

In order for me to determine what my next step should be, I would appreciate if you could provide to me the number of records in each of the seven parts of my request. All that you have given me are total numbers.

I would also appreciate when dealing with each area, if you would also breakdown the records by year...

I then sought and received answers from the City on specific questions arising from the appellant's representations.

I asked the City about the difference between the appellant's earlier request, which resulted in an appeal that was resolved by Order MO-1839, for which he was asked to pay a fee of \$360.00, and the present appeal where the fee is much greater. In response, the City submits that:

The scope of the two requests referred to that the requester has submitted to the City of Windsor for the disclosure of responsive records are very different from each other. [The present request] is a much larger request than the [previous] request ...in that the subject matter in [the previous request] is quite specific and deals with records communicated from and to the Provincial and Federal Governments and also specifies a narrow time period of November 1, 2002 to March 18, 2003, whereas [the present request] has asked for all records from November 1, 2002 to the present and deals with a broader subject matter.

I also asked the City the following question:

In order to assist the appellant in narrowing the scope of his request, can you provide a list detailing the number of records in each of the seven parts of his request with a breakdown of the records by year?

In response, the City states:

...that this is a request for a large number of records... [T]he original seven-part request of June 28, 2006 in which the requester uses words such as "All records", "including but not limited to", "border file includes but is not limited to all matters involving the border". Use of these words in the request does not leave many records concerning border crossings as non-responsive.

...[T]he task of providing detailed number of records for each of the seven parts with a breakdown of the records by year would require each department to go through each record to first determine if the record is responsive and secondly to determine which part of the request the responsive record refers to. This would have to be catalogued record by record on the Index of Records first, which the appellant clearly does not want, in order to match the record with the part and then to record the year the record was created. In effect, the City would be performing the actual search of records defeating the purpose of the fee estimate decision of July 28, 2006 where estimates of the number of records were provided by experienced departmental representatives and used to determine the fees at issue...

I then provided the appellant with a copy of the City's reply representations and asked him if he wished to narrow the scope of his request, along with asking him about the format he wished to receive the records in. The appellant responded by stating that:

There is no reason why “experienced departmental representatives” who can give overall numbers relatively easily cannot give information by year by doing representative searches. To give overall numbers, they would have had to have estimated numbers by year already.

... There is no reason why the City cannot provide the breakdown of the records by year. It would be simple for me to obtain that information and the City would be required to provide that information within the statutory time period if I had filed separate requests for each one.

I asked for that information initially because of the volume of records that the City said it had. It made sense, to me at least, to determine whether I could narrow the scope by trying to understand where the records came from and the volume by year. As an example, I may be more interested in 100 records from the Windsor Tunnel Commission in a certain year than 5000 records from another Department in that same or a different year...

My preference is NOT to have me contact the City first but to have you issue a very brief interim Order requiring both parties to attempt to narrow the scope...

I then wrote to the appellant, as follows:

The IPC (Information and Privacy Commissioner/Ontario) has already, through the mediation process, attempted to mediate the issue of the scope of your request. As an adjudicator I cannot order the City to narrow the scope of your request. Furthermore, the City cannot unilaterally limit the scope of your request [Order MO-2144]. Nor is there an obligation on the City to provide you with an index of records in a fee estimate situation...

Based on the representations contained in your letter of April 8, 2007, I am providing you with an opportunity to contact the City to discuss whether an agreement can be reached that would narrow the scope of your request, thereby lowering the applicable fee estimate.

In response, the appellant stated:

Without prejudice to my [appeal] and to narrow the scope of my request, with respect to Questions 1, 2, 3 I would request all records dated between November 1, 2002 and the current date for the Windsor/Detroit transaction reported in the media or any other “financing options” as outlined above for the parties indicated in my application.

Question 4 would remain the same

Question 5 would relate, for the parties indicated, to the specific Tunnel Plaza Improvement project that is underway now

Question 6 would remain the same

Question 7 would remain the same

In addition, to keep costs low and to minimize inconvenience to the City, if the City would provide the records, I would review them at the City's offices and only ask for and pay for copies of documents I considered relevant

In response, the City stated:

...[The words] the appellant used in the original request to describe the records involving the take over of the Detroit Windsor Tunnel in Parts 1, 2 and 3 are:

own, sell, transfer, exchange, lease, or otherwise dispose of all or part of the Detroit-Windsor tunnel" and "proposals to finance all or part of the Detroit-Windsor Tunnel operations or to securitize the revenues or in any way obtain revenue for.....divestiture or acquisition of assets of the Tunnel including those from third party funding sources".

Wording used by the appellant to describe the records involving take over of the Detroit-Windsor Tunnel in Parts 1, 2, and 3 of the narrowed request are:

"transaction whereby the City of Windsor will do a US\$75M deal to take over the operation of the City of Detroit half of the Tunnel. A transaction such as this ...by a purchase or a securitization of revenues or other methods" and "financing options (all such transactions hereinafter referred to as financing options)".

The paragraphs in both the original and the narrowed requests captured in the above examples have the same meaning and as such do not constitute a narrowing of the request.

At the same time it is quite apparent that the appellant is attempting to increase the scope of his request by expanding the time frame which was originally outlined as between November 1, 2002 and June 28, 2006 to November 1, 2002 and the current day (May 24, 2007). This time frame is outside the scope of this appeal and would need to be addressed by a new request submitted to the Head of the institution, if the appellant wishes to do so.

Conclusion: Relative to Parts 1, 2, and 3, the appellant has not given sufficient evidence to the Institution in support of a narrowing of the scope of the request

and has actually increased the scope by increasing the time frame. Therefore, the City maintains its position on the fee estimate.

Parts 4, 6, and 7

Conclusion: The requester did not narrow these parts, therefore, the City maintains its position on the fee estimate.

Part 5

The Detroit-Windsor Tunnel Plaza Improvement Project, referred to by the appellant, is an ongoing project and can date back to 2002 and perhaps further. Therefore, any records relating to this project would need to be quantified by narrowing the scope to a specific year which would assist the institution in deciphering which part of the Tunnel Plaza Project the requester is referring to.

The appellant has also indicated for Part 5 in his "narrowed request", that the scope for Part 5 is "...Tunnel Plaza Improvement Project underway now". Again, as above, use of the word "now" indicates an increase in the scope of the time frame, since the original request was for records to June 28, 2006.

Conclusion: Relative to Part 5, the appellant has not given sufficient evidence to the Institution to support a narrowing of the scope of the request and has actually increased the scope by increasing the time frame to the date of his May 24, 2007 letter. Therefore, the City maintains its position on the fee estimate.

Analysis/Findings

Scope of the Request

I will first deal with the scope of the appellant's request. I agree with the City that the appellant has not narrowed the scope of his request. The appellant's request was and remains quite broad in its scope. Although he claimed in his representations that he was willing to work with the City to narrow the scope of his request and despite the fact that I provided the appellant with an opportunity to contact the City directly to discuss a narrowing of the scope of his request, he did not do so. Instead, he simply rephrased his original request. Not only did he not narrow the scope of his request during the adjudication stage of this appeal, he expanded it. By expanding the time frame of the request to include up to May 24, 2007, the appellant is thereby requesting additional, rather than fewer, documents from the City.

Search for Responsive Records

In its decision letter, the City states:

I am informing you that all City departments were contacted and responsive records pertaining to your request were located. Your request, as submitted, will

require a lengthy manual search through a large number of files by specific staff in each department. Many of these files are located off-site...

As we have not yet completed the search and reviewed all of the records in detail, no final decision has been made regarding access. I estimate partial access to the records will be granted, however the City may be relying on Sections 6, 7, 9, 10, 11, and 12, *Municipal Freedom of Information and Protection of Privacy Act*...

Addressing the reasonableness of the City's search, I note that as the fee in this appeal is over \$100, the City was entitled to provide the appellant with a fee estimate based on 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]. I find that the City did exactly that and is not, therefore, required, prior to the appropriate fee or deposit being paid, to conduct a search for all responsive records.

I disagree with the appellant's contention that the City has not conducted a reasonable search for records, based on the fact that the City has estimated only 30 records are located in the Mayor's Office. Taking into account the wording of the appellant's request, along with the City's representations, I find that at this time, the City has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records within its custody or control. The fact that it has estimated 57,729 pages of records indicates that it has conducted extensive searches of its record-holdings using representative samplings of the responsive records.

The *Act* does not require the City to prove with absolute certainty that further records do not exist. The City has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. Accordingly, I conclude that the City's estimate of the number of responsive records is reasonable in the circumstances.

I also find that the City is not required, when, as in this case, it is authorized by the *Act* to provide a fee estimate, to provide the appellant with a breakdown by year of the number of records in each of the seven parts of the appellant's request.

FEE ESTIMATE

I will now determine whether the fee estimate of \$101,089.00 should be upheld.

The *Act* requires that 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]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. 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 823, 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, 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.

In its initial decision letter the City advised the appellant that:

The fee estimate is broken down as follows for manually searching preparing, and photocopying the records:

Searching Time

Search time is calculated by taking into account the actions necessary to locate the requested records and how the records are stored and maintained as well as the actual amount of time needed in each step of locating the requested records.

Search time for your request: 1060 hours @ \$30.00/hour = \$31,815.00

Preparation Time

Preparation time is calculated for the actual records to be disclosed and includes the time spent on severing records, generally 2.00 minutes per page (Order P-4) since many of the documents may require multiple severing.

Preparation time for your request: 115,458 minutes/1924.3 hours @ \$30.00/hours
= \$57,729.00

Photocopying Costs

Photocopying costs are generally charged for each page that is photocopied and/or printed from a computer.

Photocopying cost for your request: 57,729 @ \$0.20 = \$11,545.80

The appellant then asked the City to provide him with a more detailed breakdown of the fee estimate. In response, the City wrote to the appellant as follows:

Your request is for a large number of documents covering a wide range of records held in the custody and control of the Corporation and as such each potentially responsive record must be reviewed by staff to ascertain if the content of your seven-part request is contained within any part of the record, which would qualify it as a responsive record to a part of the request. As discussed previously, this in-depth search and review can only take place once the City Clerk has received a fifty percent deposit as previously submitted to you in the July letter.

I provide the following chart that describes each area of the City and where the responsive records are located:

<u>Department</u>		<u>Pages</u>	<u>Hours</u>	<u>Preparation Time</u>
Building and Development		74	2	148
Chief Administrative Office		9550	11	19100
Council Services		10000	274.5	20000
Planning		5000	62	10000
Finance		0	0	0
Legal		2875	34	5750
Mayor		30	1.5	60
Public Works		15000	300	30000
City Auditor		10000	274.5	20000
Corporate Projects		5000	100	10000
Legal Documents Clerk		200	1	400

Total		57729	1060.5	115458
Costs Total		11545.8	31815	57729
Grand Total	101089.8			
Requester to pay 50%	50544.9			

In addition to this, you have asked how this office arrived at the \$30.00 per hour charge. I would direct you to Regulation 823 under the *Municipal Freedom of Information and Protection of Privacy Act*, section 6 which sets out the fees to be charged for the purposes of an access request made under the *Act*. Under this section a municipality shall charge the following fees:

- Photocopying: \$0.20 per page;
- Searching: \$7.50 for each 15 minutes;
- Preparing, including severing a part of a record: \$7.50 for each 15 minutes.

If you wish to contact me at any time regarding this request I would be pleased to assist you in further clarifying or narrowing the request to detail specific records which will then have an effect on the fee estimate as presented.

The appellant submits that:

It is self-evident from the "Records Retrieval Form" that the City's record keeping is a shambles if it takes 270 hours to find the limited documents I have requested. That should be the City's costs, not the Applicant's.

If one does the math of the "representative sample of responsive records," 51 documents found in 4.5 hours of searching should total 3060 in 270 hours yet the City alleges that there are 10,000 or more.

Are their other estimates as to number of records as inadequate?

Analysis/Findings

The appellant's request was dated June 28, 2006 and sought records dating back to November 1, 2002. His request was broadly worded and sought the following (emphasis added):

- 1) All records concerning any plans or proposals to operate, manage, own, sell, transfer, exchange, lease, or otherwise dispose of all or part of the Detroit-Windsor Tunnel including but not limited to any records with

- the Government of Canada,
- Province of Ontario
- the Government of the United States
- the State of Michigan
- City of Detroit,
- the Mayor of Detroit, any member of his Administration
- Council of Detroit
- any agency, Department or Ministry of each of the preceding
- Detroit Councilors
- any administrative or elected officials in Detroit
- the Bi-national Partnership,
- Detroit River International Crossing Project members and consultants
- OMERS and any of its subsidiaries or affiliates including but not limited to Borealis Capital, DRTP
- Macquarie Bank and any of its subsidiaries or affiliates including but not limited Macquarie Canadian Infrastructure Management Limited
- Detroit and Canada Tunnel Corporation

2) All records concerning the opposition to any plans or proposals to operate, manage, own, sell, transfer, exchange, lease, or otherwise dispose of all or part of the Detroit-Windsor Tunnel including but not limited to any records with

- the Government of Canada,
- Province of Ontario
- the Government of the United States

- the State of Michigan
- City of Detroit,
- the Mayor of Detroit, any member of his Administration
- Council of Detroit
- any agency, Department or Ministry of each of the preceding
- Detroit Councilors
- any administrative or elected officials in Detroit
- the Bi-national Partnership,
- Detroit River International Crossing Project members and consultants
- OMERS and any of its subsidiaries or affiliates including but not limited to Borealis Capital, DRTP
- Macquarie Bank and any of its subsidiaries or affiliates including but not limited Macquarie Canadian Infrastructure Management Limited
- Detroit and Canada Tunnel Corporation

3) All records concerning any studies, plans or proposals to finance all or part of the Detroit-Windsor Tunnel operations or to securitize the revenues or in any way obtain revenue for an agreement, arrangement, divestiture or acquisition of assets of the Tunnel including those from third party funding sources.

4) All records concerning the Duty Free Shop at the Windsor Tunnel including but not limited to rent reductions.

5) All records concerning improvements, changes and alterations to the Tunnel and Tunnel Plaza including but not limited to any records with

- the Government of Canada,
- Province of Ontario

- the Government of the United States
- the State of Michigan
- City of Detroit,
- the Mayor of Detroit, any member of his Administration
- Council of Detroit
- any agency, Department or Ministry of each of the preceding
- Detroit Councillors
- any administrative or elected officials in Detroit
- the Bi-national Partnership,
- Detroit River International Crossing Project members and consultants
- OMERS and any of its subsidiaries or affiliates including but not limited to Borealis Capital, DRTP
- Macquarie Bank and any of its subsidiaries or affiliates including but not limited Macquarie Canadian Infrastructure Management Limited
- Detroit and Canada Tunnel Corporation

6) All records concerning any plans or proposals respecting the Burger King, Top Hat Supper Club and Bus terminal sites including but not limited offers of purchase and sale, matters involving expropriation, assessment appeals, matters involving land uses such as Drive-throughs.

7) Records respecting the border file between November 1, 2002 and the current date concerning:

1. law firms involved including those in Canada and the United States (US)
2. "lobbyist," strategic and consulting firms involved including those in Canada and the US

3. polling and survey firms involved including those in Canada and the US
4. technical and engineering firms have been used including those in Canada and the US including but not limited to transportation planners, air, health and noise experts, land use planners, government/media relations expert, social impact analyst and an environmental assessment expert
5. all reports, proposals and studies prepared by each of the above firms
6. bills and accounts charged by each of the above firms by file including Finance Department accounting records showing payments whether charged directly or through law firms or other parties
7. what work did they do for the fees incurred
8. disbursements and expenses paid out to those firms and to the Mayor, Councillors and staff setting out the reasons for such payments.

The border file includes but is not limited to all matters involving the border such as the Detroit-Windsor Tunnel plaza improvements, possible Detroit-Windsor Tunnel purchase/lease/operation/management/financing/securitization, opposition to any Detroit-Windsor Tunnel purchase/lease/operation/management/financing/securitization, Walker Road changes, the Huron Church overpass, OMB (Ontario Municipal Board) hearing, Schwartz report, meetings with all Governments in Canada and the United States.

The City appended to its representations a sample of a completed "Records Retrieval Form" from the Council Services Department. I understand the appellant's concern that it took the City's Council Services Department 4.5 hours of search time to locate 51 documents, however I note that this department has estimated only 270 hours to locate 10,000 or more documents. The appellant is concerned that the City's Council Services Department might only be able to locate 3060 documents in 270 hours, if it took it 4.5 hours to locate 51 documents. The appellant appears to be implying that he is being asked to provide a deposit to cover an excessive fee for search time.

The Council Services Department based its estimate on a representative sample of the records. The "Records Retrieval Form" in the section entitled "Estimating the Search Time", asked the Department to:

Please describe what places were searched (e.g., what files in which offices or file rooms - for example, Licensing Services, Enforcement Branch, etc.)

In response the Council Services Department advised that it searched:

Livelihood - Corporate Documents (e.g. Order of Business, Council Minutes, Council Agenda Reports, CAO Reports, Communications, etc.); Files (Council Services) - See samples

Physically searched Council Services files in vault - See samples

The form also asked the department to:

Please describe the methods/processes used to conduct the search and types of files searched (e.g. searching e-mail, other electronic files, paper files, file lists, off-site file lists, microfiche, etc.)

In response the Council Services Department advised that it searched:

Electronic files, paper files, file lists

Based on the City's representations, along with the supporting documents, I find that the City has properly based its fee estimate on searches of representative samples of responsive records. I agree with the City that the categories and types of documents being sought by the appellant are extensive and broad. As stated by the City in its representations:

The request seeks almost all documents that possibly could relate to the day-to-day operations of the Detroit-Windsor Tunnel from November 1, 2002 - a period of over 4 years. Additionally, [the appellant's] category number 7 seeks documents related to the "border file". The "border file" is not one file. Many City departments have had involvement with border issues and the number of related documents is potentially massive...

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

I agree with the City's assessment of the appellant's request that:

Given the extensive and broad nature of the request and having due regard for the purpose and spirit of the legislation, it is not surprising that the number of potentially responsive records is great.

Given the enormous scope of the appellant's request, I find that the fee estimate of the City is reasonable. Therefore, I uphold the City's fee estimate of \$101,089.00.

FEE WAIVER

I will now determine whether the appellant is entitled to a waiver of part of, or all of, the fee.

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 institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellant has raised the application of sections 45(4)(b) and (c) in support of a fee waiver. These provisions state:

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:

- (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;

Part 1: basis for fee waiver

Section 45(4)(b): financial hardship

The appellant has sought a fee waiver on the basis of section 45(4)(b), namely, that payment of the fee of \$101,089.00 will cause him a financial hardship. Based on the large amount of the fee estimate and the appellant's representations concerning his limited financial situation, I find that payment of this fee will cause him financial hardship. Subject to my determination as to whether a fee waiver is fair and equitable in the circumstances of this appeal, I find that section 45(4)(a) applies to the appellant's request for a fee waiver.

Section 45(4)(c): public health or safety

The following factors may be relevant in determining whether dissemination of the records will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
 - (a) disclosing a public health or safety concern, or
 - (b) contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

This office has found that dissemination of the record will benefit public health or safety under section 45(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- safety of nuclear generating stations [Orders P-1190, PO-1805]
- quality of care and service at group homes [Order PO-1962]

Representations

In the appellant's request for a fee waiver to the City, he states that:

The matter I am dealing with in respect to the Detroit-Windsor Tunnel is of great importance from a public health or safety aspect. I am asking about plans concerning the Tunnel and in particular about its operation, management, financing and improvements, changes and alterations.

The Tunnel is in the midst of a project for improvements that may cost \$30 million or more by the time it is finished. In addition, the Tunnel ventilation building project, a separate transaction, will cost around \$20 million I believe, well over the \$13 million original budget. Both projects deal with public health and safety matters.

The news report states that there are public health and safety concerns to users of the Tunnel respecting the Tunnel ventilation building e.g. structural problems, aging ventilation system, repairing interior brick work, reinforcing the steel structure, removing PCBs, replacing the roof beams and corrosion of the steel structure throughout the building, which is adjacent to the downtown bus terminal, and concerns about the structural stability of the entire building.

The Mayor has said "virtually no work has ever been done on this building and it appears as if they are encountering new problems every day and every time they turn around." Councillor Valentinis has said "there are certainly major red flags being raised."

Clearly this project concerns public health and safety.

As you know, there has been considerable concern also about exhaust and pollution from diesel trucks and cars on Huron Church Road in Windsor. In fact, there is a desire expressed by the Mayor and Council to tunnel a good section of the road to the new crossing. However, I am certain that few Windsor residents are aware that the Detroit-Windsor Tunnel owned by the City through the Windsor Tunnel Commission exhausts unscrubbed air from the Tunnel such that it may be a major polluter in downtown Windsor.

My request deals with this matter, amongst others, and what is being done if anything.

In addition, the Tunnel has been called a "unique" security risk and US Customs has said that the Tunnel does not meet its requirements. As you know, it is such a risk because "There's this inherent security concern with the proximity of that tunnel to the downtowns of both Detroit and Windsor."

My request deals with this matter, amongst others, and what is being done if anything.

The improvements are also designed to remove vehicles from City streets since there are huge queues if there are backups going into the United States. I am aware of relatively inexpensive suggestions about how to fix the Tunnel problem at a cost substantially less than \$30 Million. The public needs to know and understand how the City proposes to tackle this issue as well.

Clearly this project concerns public health and safety.

It is obvious that I will disseminate the information received if it is meaningful since I write a daily Blog on politics in Windsor. The readership includes media, government, business people and the general public.

Clearly the taxpayers and residents of Windsor have an interest in being made aware of pollution issues and what is being done, or not being done to deal with pollution downtown. The City can hardly talk about fighting pollution and then be a major polluter. This is very important especially since the City passed recently an Environmental Master Plan and the Tunnel ventilation exhaust may impact the downtown negatively.

As “owners” of the Tunnel citizens should be made aware of what is being done to minimize risk and liability at the Tunnel because of the security risk and the failure to meet Customs requirements. If action is not taken, the Tunnel could be closed down if Bill C-3 is passed. This is a City-owned asset and citizens need to be made aware of the issue and what must be done as soon as possible.

In response, the City takes the position that the appellant has not proven a connection between the dissemination of the information contained in the records and a benefit to “public health or safety”.

Analysis/Findings

The appellant is concerned about the City’s Tunnel Improvement Project and Tunnel Building Ventilation Project. However, the wording of the appellant’s request is so broad that I am unable to establish a connection between this request and the disclosure of records concerning these two projects. Although the appellant would probably disseminate the records, he has not demonstrated that the subject matter of the records relates directly to a public health or safety issue and that the dissemination of the records would yield a public benefit by disclosing a public health or safety concern. He has not sought specific records concerning either of these two projects, nor has he provided sufficient details as to how his seven part request for records spanning a four year period is related to these projects. Therefore, I cannot find that section 45(4)(c) is applicable in the circumstances as a basis for a fee waiver.

Part 2: fair and equitable

I will now consider whether it is fair and equitable for the appellant to be granted a fee waiver pursuant to section 45(4)(a).

For a fee waiver to be granted under section 45(4), it must be “fair and equitable” in the circumstances. Relevant factors in deciding whether or not a fee waiver is “fair and equitable” may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408, PO-1953-F]

In making a finding as to whether a waiver of the fee is fair and equitable, I have considered my findings under section 45(4)(a), the representations of the parties and the factors listed above. I find that the factors against the granting of a fee waiver in this case outweigh those in favour. In particular, I note the following with respect to the manner in which the City responded to the appellant’s request:

- The appellant’s request was dated June 28, 2006. The City responded on July 28, 2006. On August 4, 2006, the appellant asked the City to provide a breakdown of the fee estimate by providing the number of records for each part of the request further broken down by year. On August 8, 2006, the City responded promptly and provided a detailed breakdown of its fee estimate, although it did not provide it in the manner specified by the appellant. I have held above that the breakdown required by the appellant would have entailed that the City conduct the entire search, which it is not obligated to do when providing a fee estimate.
- On September 21, 2006, the appellant asked for a fee waiver. On September 22, 2006, the City responded by providing the appellant with a list of the requirements for obtaining a waiver. The appellant provided the City with his specific reasons for seeking a fee waiver by letter dated October 19, 2006 and the City responded in a timely manner on November 22, 2006.

- In its correspondence of July 28, August 8 and October 11, 2006, the City invited the appellant to contact the City's Freedom of Information Coordinator if he wished to narrow or further clarify his request. The appellant did not do so. Nor did the appellant narrow his request at either the mediation or the adjudication stages of his appeal.
- The request involves a large number of records. The appellant has not advanced a compromise cost reducing solution which would not entail the City undertaking the entire search.
- Waiver of the fee would shift an unreasonable burden of the cost from the appellant to the City.

Therefore, I find that a fee waiver is not fair and equitable in the circumstances, as the appellant has not worked constructively with the City to narrow the scope of the request and the City should not be required to absorb the large fee in this case.

TIME EXTENSION

I will now determine whether the time extension sought by the City to respond to the request is reasonable in the circumstances. The City requires 10 months to respond to the appellant's request, once the 50% deposit on the fee estimate is paid. The appellant submits that the City should produce the responsive records within 30 days of the deposit being paid.

Section 19 of the *Act* provides that:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20, 21 and 45, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

Time extensions are governed by section 20(1) of the *Act* which states:

A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, where,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

The issue in this appeal is whether a time extension is reasonable in the circumstances of the request, in the context of the provisions of section 20(1). Factors which might be considered in determining reasonableness include:

Section 20(1)(a)

- the number of records requested;
- the number of records the institution must search through to locate the requested record(s);
- whether meeting the time limit would unreasonably interfere with the operations of the institution;

Section 20(1)(b)

- whether consultations outside the institution were necessary to comply with the request and if so, whether such consultations could not reasonably be completed within the time limit.

The City relies on the extensive scope of the request and the staff time necessary to respond to the request in seeking the time extension. The City advised the appellant in its decision letter that:

Due to the large number of records involved in your request, under Section 20, *Municipal Freedom of Information and Protection of Privacy Act*, I will be exercising an extension of 10 months in order to complete your request. This will allow 11 staff persons (1 from each department) two hours per week, representing 6.0% of each staff person's time per week, to work on your request.

The appellant responds in his representations that:

If what I have stated is accepted, then it is ridiculous to assume that 10 months are required. I am prepared to work with the City even now to reduce the scope provided that the City will work in good faith with me.

Obviously the amount of time will drop considerably since the records request is limited.

However, given the shabby condition of the City's file system, the applicant should not be prejudiced by having to wait 10 months even if that is the period estimated. The City should be required at its expense to provide the manpower to provide the records within a reasonable time period, say 30 days.

Such an Order would force the City to maintain a proper filing system for other requests.

Analysis/Findings

I have already determined above that the appellant has not narrowed the scope of his request. I also do not have sufficient evidence to determine that the City maintains an improper filing system. The appellant's request is so broad and extensive that I do not find it unreasonable that 10 months is required to respond to the request.

I adopt the findings of Inquiry Officer Anita Fineberg in Order M-218, where she held that:

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.

In this appeal, there are a large number of records that the City must search through to locate the requested records. I find that meeting the statutory 30 day time limit would unreasonably interfere with the operations of the City. Furthermore, by the nature of the request, consultations with outside institutions may be necessary to comply with the request.

Therefore, I am upholding the City's request for a 10 month time extension. In other words, if the appellant pays the 50% deposit on the fee estimate, then the City has ten months to locate the responsive records and issue the appellant a decision respecting access to them.

ORDER:

I uphold the City's decision.

Original signed by: _____

Diane Smith
Adjudicator

July 31, 2007
