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

ORDER MO-2459

Appeal MA08-344

City of Toronto

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NATURE OF THE APPEAL:

The requester made a written request to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> Copies of all correspondence including letters and e-mails between the City of Toronto staff, members of City of Toronto Council, or assistants to City Councillors and any individual corporate entity, or organization during the period from January 1, 2006 to January 25, 2008 related to signs or a sign in the City of Toronto.

In response, the City wrote to the requester stating that it does not have custody or control of City Councillors' records and is therefore unable to disclose those records. The City also stated that it could not respond to the remainder of the request, as its parameters were too broad. The City stated that responding to the request in that form would interfere with its operations.

The requester sent an e-mail to the City in response to this decision. The e-mail stated that she was complying with a direction from the City to provide the names and/or positions of specific City staff whose records were to be included, and in the e-mail she provided the City with a list of 21 City staff members whose sign-related records were being requested.

The City then wrote to the requester stating that the reformulated request was too broad and asking the requester to please focus her request on one of the 21 staff members mentioned in her list. The City also stated that, because dealing with the request in relation to all 21 individuals at the same time would interfere with the City's operations, subsequent access requests would be required for the remaining 20 staff members.

The requester then sent a second e-mail to the City, and in that e-mail, she complied with the City's instruction to focus on the records of one staff member. She named a staff member whose records were to be the subject of the request.

Despite the requester's compliance with the City's request to focus on one staff member, the City wrote to the requester and stated, again, that the request was too broad, and responding would interfere with the City's operations. The City offered no suggestions as to how the request should be further narrowed or focused.

After receiving that letter, the requester, now the appellant, filed an appeal asking that this office review the City's decision. The appeal was initially assigned to an Analyst, who issued a Notice of Inquiry to the City. The Notice of Inquiry indicated that the City was in a deemed refusal because it had not issued an access decision within the time stipulated in section 19 of the *Act*. By taking the approach that the City was in a deemed refusal, this office was, in effect, stating that the City's refusal to respond to the request on the basis of it being too broad was not a valid access decision under the *Act*.

Nevertheless, and somewhat surprisingly in the circumstances, the City responded to the Notice of Inquiry by sending another letter to the appellant, repeating its previous statement that it was unable to respond to the request as its current parameters were still too broad and, therefore, responding to the request would interfere with the City's operations.

The appeal was then transferred to me to continue the inquiry. I initially wrote to the appellant, referring to the requirements outlined in section 17(1)(b) of the *Act*, which stipulates that requesters are to "provide sufficient detail to permit an experienced employee of the institution, upon a reasonable effort, to identify the record." I invited the appellant to provide a more specific request, or explain why she believed that her request was sufficiently detailed, such that the City could identify the records being sought. The appellant responded by providing a 14-page list containing specific sign locations for which she seeks records.

I then provided a copy of the appellant's response and the list of addresses to the City, and invited the City to respond. If the City was satisfied that the appellant's response constituted a sufficiently detailed request, I asked that it treat the date of my letter as the date of the request and to respond to the request in accordance with the requirements of the *Act*. Alternatively, if the City was not satisfied that the appellant's response constituted a sufficiently detailed request, I invited the City to provide representations on that issue. The City did not issue an access decision, but instead provided brief representations.

DISCUSSION:

In its representations, the City states:

> The requester is seeking access to all correspondence pertaining to signs relating to 361 separate property addresses. Each address would be considered to be a "self-contained" request for which there is a $5.00 application fee. (Please see Order MO-2367). Each request could potentially involve a large volume of records and in order to locate responsive records for each address, time extensions would likely apply as it would not be possible to process all 361 requests concurrently within the legislated time frame of 30 days. The City's bulk user policy would also likely apply under which only 5 requests would be processed at any given time. Once the first 5 requests were completed, then the next 5 would be processed.
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> …
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> It is suggested that if the appellant wishes to proceed with the 361 separate requests, she should identify the property addressed for the first 5 requests that she wishes processed.
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> The City relies on Order MO-2367 in relation to its view that a request for information about 361 sign locations constitutes 361 separate access requests.

Unlike its earlier correspondence, the City's representations do not argue that the request with the attached 14-page list is not sufficiently specific to meet the requirements of the *Act*. Thus the City apparently accepts that the request is now sufficiently specific, and I agree.

As noted above, section 17(1)(b) of the *Act* describes the specificity required for requests under the *Act*. In my view, the appellant has complied with section 17(1)(b) by providing the detailed list of signs about which she seeks information.

As I have already outlined, my letter to the City asked that it issue an access decision if it was satisfied that the request is now sufficiently detailed. Despite no longer taking the position that the request is lacking in detail, however, the City did not issue an access decision. Instead, it claimed that the reference to 361 locations means that the appellant has made 361 separate access requests. I invited the appellant to comment on this approach, and she indicated that she wishes the request to be treated as one single request, not 361 separate ones.

The City has relied on Order MO-2367 in support of its position that records relating to each of the 361 properties should be treated as separate requests. In that case, a request had been made to the City for access to records from the City's Municipal Licensing and Standards Division relating to sign inspection records for various properties in Toronto. In relation to one of the requests pertaining to multiple addresses, the requester asked that each address be the subject of a separate access request, and paid a $5.00 request fee for each one. The appellant subsequently departed from this approach, and objected to the treatment of each property as the subject of a separate request.

As stated in the City's representations quoted in Order MO-2367, the City's rationale for viewing each address as the subject of a separate request was as follows.

> The City requires a $5.00 application for each FOI request for each individual municipal address. The reason for this requirement is provided in part on pages 2 and 3 of the City's June 7, 2007 letter to the Mediator:
>
> > The reason for this can be explained by the way the City manages its electronic and paper-based records. For example, [Municipal Licensing and Standards (MLS)] records are organized by property addresses both in its databases and (MLS Divisional system and IRIMS City-wide records management system) and physically on the filing shelves and cabinets. Therefore, without a precise municipal address and/or a specific file number, both systems and manual searching tasks would be difficult or impossible to do.
>
> On the other hand, organizing certain record holdings by property address makes it easier to locate all information relating to a specific property across a number of program areas in response to an FOI request. A request is charged only one application fee to cover such a request …
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> …

> [M]any requests are for all information relating to a specific property located in a number of program areas but as indicated above only one application fee is charged. The City believes that this is fair and equitable and in many cases, means that requesters including the appellant, are able to benefit from the City's policy of not charging any fees under $10.00 for any one request.
>
> For example, if a request for all information on 100 properties is treated as one request and there are a total of 1000 pages of responsive records of which 600 has to be severed, the total cost would be $800.00 ($200 for photocopying and $600 severing). However, if there are 100 separate requests (one for each property address), and each request file has 10 pages of responsive records and 6 pages have to be severed, the total cost for each request would be $8.00 ($2.00 for photocopying and $6.00 severing**).** Since the City does not charge for fees under $10.00, there would be no fees assessed. The total cost for 100 requests would thus be the $5.00 application fee for each request = $500.00, a "savings" of $300.00. There would also be savings in terms of no search fees being charged if the total costs are less than $10.00.

In the particular circumstances that existed in Order MO-2367, Adjudicator Catherine Corban upheld the City's decision to treat each address for which sign inspection records were sought as a separate request.

Adjudicator Corban stated:

> The *Act* does not provide any guidance on how requesters should phrase their requests for information. It does not provide for circumstances in which multi-faceted requests might be treated as one request or several. The *Act* simply provides that the fee prescribed by the regulations ($5.00) should be charged for each request. Nevertheless, it is neither appropriate for a requester to attempt to avoid incurring search fees by parsing the request in a manner that would ensure the fee for each part is too small to justify requiring payment; nor is it appropriate for an institution to penalize a requester who lists multiple requests in one letter by treating it as one request in order to inflate the search fees.
>
> In my view, the appropriate determination in this case of whether a request for information should be treated as a single request or several should be based on how an institution's records are maintained and what the most straightforward, logical way to search for and to retrieve the responsive records might be. From the City's representations, I understand that MLS records are organized by property addresses both electronically, in that department's database and in the City-wide records management system, as well as physically, in the filing cabinets and archival boxes. The City submits that this method of managing the records makes it easy to locate all information relating to a specific property across a number of program areas in response to an FOI request.

> Based on the City's explanation of how the types of records at issue in this appeal are kept and why, I accept that requests that seek information about specific property addresses such as those that encompass Request Number 06-4690 *et al* result in searches that are essentially "self-contained" within those specific property addresses, whether an individual wants all the information relating to that property or just a specific type. In my view, it seems reasonable that requests relating to each property address would require a new search either by creating a query to locate electronic records in a database or by physically pulling a separate file related to that address from a filing cabinet or box. Not only does the characterization of each property address as a separate request best reflect the way in which the City would locate the responsive records but it also, taking into account the City's policy not to charge for fees under $10.00, minimizes the amount of fees that the requester will be required to pay. Therefore, in the circumstances of this appeal, I find it reasonable to conclude that each municipal property address is properly characterized as a separate request and requires its own $5.00 request fee.

In my view, however, the circumstances of this case are quite different from those that pertained in Order MO-2367.

In Order MO-2367, the appellant had himself raised the option of treating each property as a separate request with its own request number, and he was initially agreeable to paying a $5.00 request fee for each property. That is not the case in this appeal, given the appellant's initial submission of a single request and her statement that she wishes it to be treated as one request.

As well, the appeal addressed in Order MO-2367 was about fees and the way they were calculated. Although the characterization of the request as a single request or as multiple requests was addressed in the context of assessing the reasonableness of the fees charged in Order MO-2367, this was not considered in the context of whether the request was specific enough to constitute a request under the *Act*, which is the essential issue in this appeal.

In the case of this particular request, where there are more than five properties, the City indicates that this would have the added consequence of allowing the City to process only five requests at any one time under the City's "bulk user" policy. The "bulk user" policy was also not addressed in Order MO-2367, and given the way I have decided the issue in this case, it need not be addressed here. In my view however, it is significant that a number of provisions in the *Act*, and previous jurisprudence of this office, discussed below, provide assistance to institutions dealing with voluminous requests.

Most significantly, however, I conclude that it would be unjust and inequitable to permit the City to take this approach in this case, given the history of the matter and the way in which the City attempted to require the appellant to narrow her request, in which it made no reference whatsoever to organizing the request by specific properties or making each one the subject of a separate request.

On the contrary, the City's correspondence focussed on the number of City staff members whose records were sought, and when the appellant complied, the City continued to state that the request was still too broad. As noted above, it continued to take this approach even after receiving a Notice of Inquiry from this office, stating that it was in "deemed refusal", an implicit indication that its statements that the request was too broad did not constitute an access decision that complied with the requirements of the *Act*.

In this regard, the obligation imposed by section 17(2) of the *Act* is relevant. This section states:

> 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*. [Emphasis added.]

In my view, when the appellant complied with the City's direction to narrow the request to particular staff members or a single staff member, as the case may be, the City was obliged to make an access decision. It was not fair or equitable for it to respond by saying repeatedly, as it did, that the request was too broad. In the particular circumstances of this appeal, therefore, it was far too late for the City, upon receipt of the 14-page list of addresses provided by the appellant as the subject of her reformulated request, for the City to then claim that each was the subject of a separate request. By that time, the appellant had been attempting for months to address the City's concerns about specificity. In the circumstances, therefore, I find that it was not open to the City to require that the 361 addresses be treated as the subject of 361 requests, regardless of the findings in Order MO-2367.

Further support for this conclusion may be drawn from the Divisional Court's judgment in *Toronto Board of Education v. Burk*, [1996] O.J. No. 1996. In that case, the Board had insisted that the requester, who was seeking records containing his personal information, submit a separate request for records held at a law firm. After he had done so, the Board relied on solicitor-client privilege to refuse to disclose which records in a group that had been previously released to the requester were records held by the law firm. The Court stated (at para. 14 of the judgment) that "[t] he Board's conduct estops it from being entitled to draw the solicitor-client line where it seeks to draw it." One of the reasons for this finding was that the specific request for information held by the law firm was "provoked … by [the Board's] indication that it wanted the matter of records held at [the law firm] to be dealt with separately."

Here, the appellant was simply responding to my invitation to submit a more particular request, after the City had repeatedly rejected her revised requests that she had submitted in compliance with the City's instructions.

In addition, with respect to Order MO-2367 and its acceptance of a separate request for each of a number of different addresses or locations, I consider it significant that, in that case, the particular circumstances included the fact that the appellant had initially asked, in one of the requests, that each address he referred to be treated as the subject of a separate request.

To the extent that Order MO-2367 might be interpreted as endorsing the imposition of such a requirement on all requesters in similar circumstances, I decline to follow it for the reasons that follow, portions of which also serve to explain why the approach taken in my order provisions below will not, in my view, impose any undue hardship on the City.

To begin with, I do not consider it a proper interpretation of the *Act* to impose an ironclad requirement on requesters who ask for the same information about a number of different addresses or locations, that each location or address be considered the subject of a separate request, requiring the payment of a separate up-front request fee of $5.00 for each address. After all, the information requested for each address is the same or similar, and this would suggest a sufficient linkage in subject matter to justify treating this as a single access request.

Moreover, in my view, the manner in which records are stored should not dictate the form in which requests for that information are made. Rather, information storage systems developed by institutions ought to foster public access. They should not stand as a barrier to access or require payment of individual request fees where someone asks for the same information about a number of properties or cases. Referring to electronic records, in *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)* [2009] O.J. No. 90, the Ontario Court of Appeal recently quoted with approval the following passage from Order 03-16 (issued by British Columbia's Information and Privacy Commissioner):

> The public has a right to expect that new information technology will enhance, not undermine, information rights under the *Act* and that public bodies are actively and effectively striving to meet this objective.

Taking a larger view of what constitutes a request, and the question of interference with the City's operations, as referenced in its correspondence with the appellant, I note that both the *Act* and a number of decisions of this office provide other options for protecting the City's interests than the approach advocated by the City. In particular, the interim access decision and fee estimate scheme articulated in Order 81, which was affirmed in Order M-555 and revisited in Order PO-2634, offers the City an alternative method of dealing with a request for a large number of records, particularly in combination with the time extension provisions of the *Act* found in section 20.

In Order 81, former Commissioner Sidney B. Linden outlined the concept of an interim access decision for use in situations where "a record is unduly expensive to produce for inspection … in making a decision." He went on to state that this could arise as a consequence of "… the size of the record, the number of records or the physical location of the record within the institution."

Referring to sections of the provincial *Freedom of Information and Protection of Privacy Act*, he described the interim access and fee estimate process as follows:

> In my view, the *Act* allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the [provincial] *Act* [see section 45(3) of the *Act*].

This estimate should be accompanied by an "interim" notice pursuant to [provincial] section 26 [section 19 of the *Act*]. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the *Act*.

How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records. …

… Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed. However, in my view, if no indication is made at the time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees.

"Interim" … decisions are not binding on the head and, therefore, cannot be appealed to the Commissioner.

…

Regardless of whether the head has issued an "interim" … notice (based on a representative sample or consultations) or a regular … notice (based on inspection of the actual requested record), if the notice is accompanied by a fees estimate, the issuance of the fees estimate has the effect of suspending the 30 day time limit imposed by section 26. If the institution sends a fees estimate to the requester on day 14, for example, day 15 is deemed to be the day after the institution receives the required deposit from the requester or issues a decision to waive fees pursuant to a request for waiver. If the requester appeals the issue of fees, the running of the 30 day period is suspended. It begins to run again on the day after the appeal is resolved, either by Order of the Commissioner or mediated settlement between the parties.

As soon as the question of fees is resolved and the 30 day time limit is reactivated, the institution must retrieve and review all of the requested records

> for the purposes of determining whether access can be given. If the records are to be disclosed, [provincial] section 26(b) [section 19(b) of the *Act*] requires the head to "...give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced..." within the balance of the 30 day time limit.
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> …
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> The 30 day time limit referred to in my discussions is subject to the extension provisions of sections 27 and 28 of the *Act*, in the usual manner.

In Order 81, former Commissioner Linden stated that any decision to claim a time extension should not be included in the initial interim access decision, and would instead have to be made once the deposit had been received, but prior to the expiry of the 30-day period for responding to a request. I revisited this issue in Order PO-2634 and reached a different conclusion, finding that informing requesters of a proposed time extension in the interim access decision would be helpful since it provides more information about how long it would take to process a request, permitting them to make a more informed decision about whether to pay the requested deposit. I stated:

> … The length of time it will take to receive an access decision (and any records that are being released) could well be a factor in a requester's decision about paying a requested deposit and continuing to pursue access. For this reason, I have decided that institutions should be encouraged to identify that they will require a [provincial] section 27 time extension [section 20 of the *Act*], and the reasons for taking that position, as early as possible in the request process, and in the event of an interim access decision, this could be communicated in the interim decision letter. Since it is not certain when the deposit would be paid and the clock re-activated, it will not be possible to name a date by which the access decision would be given; rather, the estimate must be given by number of days, as the Ministry eventually did in this case.
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> On the other hand, since institutions have the entire 30-day response period to claim a time extension, and the clock is stopped by issuing the interim decision, I am not in a position to insist that the time extension be claimed in the interim access decision, but in my view this would be a good practice to adopt because it assists the requester in making an informed decision about whether to pay the deposit. Addressing the time extension issue in the interim access decision also appears to be the most practical approach for the institution, given that in formulating the fee estimate that accompanies the interim access decision, the institution would also have occasion to consider how much time it will likely require to process the request. In reaching this conclusion, I also note that time extensions may be appealed to this office regardless of when they are claimed by an institution.

> This approach will apply to future interim access decisions, and in that context, will provide more flexibility regarding the timing of a section 27 [section 20 of the *Act*] time extension claim than the approach taken in Orders 81 and M-555.

In this appeal, the appellant has made a request for records relating to signs located at 361 properties in the City. If circumstances warrant, the City may do some or all of the following: extend the 30 day time limit prescribed by the *Act* under section 20; charge fees as permitted by the *Act*; and provide a fee estimate to the appellant, together with an interim access decision as described in Orders 81 and PO-2634. All of these options are available to the City prior to providing access to any of the requested records.

In my view, these provisions of the *Act* and previous jurisprudence of this office are sufficient to protect the City from the difficulties of dealing with a large request such as this.

While the *Act* requires that a request be for specific records, as noted in section 17(1)(b), I find that the appellant has made such a request in this case. The City does not point to any other sections of the *Act* to support its preferred approach to access requests involving a number of properties. I also note that the City's preferred approach would require the appellant to pay an access fee of $1,805 prior to receiving any indication of whether access would be granted, or how long it might take, in total, for the request to be dealt with.

If the City's "bulk user" approach is in compliance with the *Act*, an issue which is not specifically before me in this appeal, then this large initial fee might not apply. But in my view, given the provisions of the *Act* designed to assist institutions in dealing with large requests, as well as Orders 81 and PO-2634, and in view of the history of this matter and the manner in which the City communicated with the appellant about narrowing her request, as outlined in this order, the appellant should have the option of having this dealt with as a single request. This will give her better information as to the overall cost of processing the request, and if she considers the proposed fee to be more than she wishes to pay, she would have the option of deciding to submit a new request of narrower scope. She would also have the option of appealing the fee estimate to this office. In my view, all of these outcomes are consistent with the public access purpose underlying the *Act*.

As well, although the appellant would have the right to appeal any time extension claimed by the City, there is nothing to prevent the City and the appellant from working together to develop a mutually agreed upon schedule for addressing her request, in stages, over the course of the time extension.

Accordingly, I will order the City to issue an access decision or interim access decision to the appellant, as outlined below.

ORDER:

1. I order the City to treat the appellant's request as one request. The City may charge a one-time $5.00 request fee.

2. I order the City to issue an access decision or interim access decision and fee estimate, treating the date of this order as the date of the request, in accordance with all applicable provisions of the *Act*. If an interim access decision is issued, it must comply with the relevant jurisprudence concerning such decisions as outlined in this order (Orders 81, PO-2634).

3. I further order the City to provide me with a copy of the decision issued pursuant to order provision 2, above.

Original signed by: September 25, 2009
John Higgins
Senior Adjudicator