

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2710

Appeal MA08-278-2

City of Vaughan

March 29, 2012

Summary: The appellant requested compensation, benefit and related information for all employees of the City of Vaughan. The city issued a fee estimate of \$31,022.50 and denied the appellant's request for a fee waiver. The appellant did not provide submissions or evidence to support her fee waiver request and the matter was not considered in this order. The city's fee estimate was not upheld, but was reduced to \$31,000.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1), Regulation 823.

OVERVIEW:

[1] The appellant submitted a request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the amount of compensation paid to city employees who left the city's employ and a list of employees on stress leave. The request specifically stated:

I wish to have a list of positions and the amount of compensation paid to each employee that left the employment of the City of Vaughan during 2006 and 2007. Compensation broken into salary range paid during time of employment and compensation including all benefits, as a pay out when their employment was severed. I am requesting that employees that were paid more than a \$100,000 be listed separately.

As well, please provide a list of employees' positions where the employees are currently on stress leave or leave with pay or leave without pay and including employees in the process of negotiating severance for the City or being paid either by the City or through insurance plans who were previously in active employment with the City. Please provide a cumulative figure for all positions with compensation below \$100,000 and individual salary ranges for compensation above.

The FOI is for All money paid to All employees that are no longer in active employment and where they left the City for whatever reason or are on stress leave or any other type of unpaid leave. For the purposes of meeting expectations of privacy for employees paid below \$100,000, if you list the positions and provide a comprehensive figure for these positions it is satisfactory.

Please provide this information for the years, 2005, 2006 and 2007.

[2] In response, the city advised that the records do not exist because the Human Resources Department has not created the lists that contain the information the appellant is seeking.

[3] The appellant appealed that decision and appeal MA08-278 was opened. Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeal process. During the processing of the appeal the city acknowledged that certain related records may exist, and suggested that the appellant submit a new request for a specific set of records. The appellant chose to proceed with her original request.

[4] The issues in appeal MA08-278 were the scope of the request and whether the city had conducted a reasonable search.

[5] After obtaining representations from the parties, Adjudicator Jennifer James issued Interim Order MO-2460-I in which she addressed both issues. With respect to the scope of the request, the adjudicator determined that the "related records" referred to in the city's decision were not responsive to the appellant's request as worded. She also determined that the city's interpretation of the request was too narrow and ordered the city to conduct a further search for responsive records as follows:

I order the City to conduct a search for records responsive to the appellant's request for information which identifies the number, position and amount of compensation paid to former or non-active employees for 2005, 2006 and 2007.

[6] Subsequent to the issuance of Interim Order MO-2460-I, the city conducted a further search for responsive records and provided this office with an affidavit from its Records Management Supervisor. The affidavit stated that records in the form of lists showing paid leave and unpaid leave total compensation cost for each employee in 2005, 2006 and 2007 do not exist.

[7] The adjudicator concluded that the city had conducted a reasonable search and found that the information the appellant requested was not compiled in a record, whether it be a list or some other document, such as a memorandum, letter or email that already exists. Therefore, the adjudicator dismissed the appeal and appeal MA08-278 was closed.

[8] Despite the findings in Interim Order MO-2460-I, the city provided the appellant with a separate fee estimate decision dated November 3, 2009, which appears to interpret her request as including the "related records." In that decision, the city provided a fee estimate to search every employee personnel file for related personnel records, which would contain the information the appellant is seeking. The fee estimate was \$31,022.50. The city also provided the appellant with an interim access decision, indicating that some records will be exempt under section 14(1) (personal privacy) of the *Act*.

[9] The appellant appealed the city's decision and a new appeal MA08-278-2 was opened. The decision dated November 3, 2009 is the decision under appeal in this file. In Appendix 1 to its decision the city described the request and search fees as follows:

The Search

Records Management Staff searched for records responsive to this access request as indicated below:

1. Records related to the number, position and amount of compensation paid to former or non-active employees for 2005, 2006 2007 including employees in the process of negotiating severances from the City, or being paid by either the City or through insurance plans. Compensation would include salary and benefits.
2. Records related to the number, position and amount of compensation paid to employees in the years 2005, 2006, 2007 that were on stress leave or any other type of leave with pay.
3. Records related to the number and position for employees in 2005, 2006, 2007 that were on leave without pay.

Search Fees

<u>Type of Search</u>	<u>Time</u>	<u>Costs</u> <u>(\$)</u>
1. To run a report of all terminated people who quit, were dismissed or whose contract ended for the years 2005, 2006 and 2007.	15 minutes	7.50
2. To run a report to determine employee vacation days, days, personnel days and sick days.	30 minutes	15.00
3. To review employee personnel files for terminated people (1,000 files) to determine compensation paid. To review employee personnel files to determine paid and unpaid leave (2,000 files).	10 minutes per employee personnel file	10,000 (see break down below)

Search fees: 10 minutes per employee x 2,000 employee files = 20,000 minutes
20,000 minutes /60 minutes per hour = 333.33 hours
333.33 hours x \$30.00 per hour = \$10,000

Therefore, the total search time is estimated to be \$10,022.50.

Processing Fees

Based on a sample of responsive records, it is estimated that each employee personnel file will generate 15 pages of responsive documents. Therefore, the search will generate 30,000 pages it is expected that severances will be considered as moderate. Each document will require one minute to sever.

30,000 pages x 1 minute a page = 30,000 minutes

The processing fee is calculated at \$7.50 for each 15 minutes of staff time. Therefore, 30,000 minutes = 500 hours.

Total Processing Fee: 30,000 minutes at \$7.50 per each 15 minutes of search time = \$15,000.00

Photocopying Fees

30,000 pages of responsive records at \$0.20 a page = \$6,000.00

Total Estimated Fees

The total estimated cost to process this access request is estimated to be \$31,022.50.

Note: Please be advised the Human Resources Department has a staff complement of 13 positions. Based on the 35 hour work week, it would take one dedicated staff member about 24 weeks to process this access request.

[10] The appellant requested that the city waive the fee of \$31,022.50. The city denied the requested fee waiver on the basis that the appellant did not provide sufficient detail of her financial situation to warrant a fee waiver.

[11] The appellant also appealed the fee waiver decision.

[12] During mediation, the appellant and the city explored options to narrow the scope of the request, reduce the fee and resolve the appeal. The appeal, however, was not resolved in mediation. Accordingly, the file was referred to the adjudication stage of the appeal process.

[13] I sought and received representations from the city, which were then shared with the appellant in accordance with *Practice Direction 7* issued by this office. Although the appellant was invited to make representations on the issues in this appeal, she did not make any, but indicated that she would rely on submissions she made in her original appeal.

[14] I have reviewed the submissions that the appellant made in the previous appeal. Keeping in mind that the appellant's representations were made in the context of the issues in Appeal MA08-278, namely, scope of the request and reasonableness of the city's search for responsive records, I find that they do not address the issue of fee waiver. In general, the appellant's representations do not address the issue of fees either. However, the appellant makes some statements about the areas that she believes should be searched, which are peripherally connected to the city's fee estimate, and I will consider these statements in determining the fee issue.

[15] In this order, I have not upheld the fee of \$31,022.50 charged by the city. I found, however, that the city may charge the appellant a fee of \$31,000. Due to the absence of submissions and evidence from the appellant, I declined to adjudicate her request for a fee waiver.

PRELIMINARY MATTER: SHOULD THE FEE BE WAIVED?

[16] As I indicated above, the appellant did not make representations in this appeal. Nor do the submissions she made in Appeal MA08-278 address the issue of fee waiver. I have reviewed the current appeal file, and find that there is insufficient information contained in it to support the appellant's request for a fee waiver. Other than one statement to the mediator that the fee of \$31,022 "is ridiculous and will obviously cause a hardship," there is no further discussion of this issue.

[17] 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.

[18] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees

referred to in section 45(1) and outlined in section 8 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

[19] 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.¹

[20] In the absence of representations from the appellant on the issue of fee waiver, I find that she has failed to meet her onus in persuading me that a fee waiver is justified in the circumstances of this appeal. Accordingly, I will not consider this issue further in this decision.

[21] As a result, the sole issue to be determined is whether the fee estimate should be upheld.

DISCUSSION:

Should the fee estimate be upheld?

[22] An institution must advise the requester of the applicable fee where the fee is \$25 or less.

[23] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.²

[24] 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.³

[25] 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.⁴

¹ Orders M-914, P-474, P-1393, PO-1953-F.

² Section 45(3).

³ Order MO-1699.

⁴ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

[26] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁵

[27] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁶

[28] 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.

[29] 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.

[30] 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 records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.

⁵ Order MO-1520-I.

⁶ Orders P-81 and MO-1614.

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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. 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.
4. 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 – search time

[31] The city states that its fee estimate was based on a review of a representative sample of the records, as well as the advice of an employee who is familiar with the type and content of the records.

[32] In preparing to undertake the search for responsive records, the city indicates that it divided the request into three sections, each involving its own search and search fees. The city notes that the first two sections of the fee estimate involved the preparation of reports and the third section involved the search of individual employee files. The city states that the fee estimate relating to the first two sections was estimated by senior and administrative staff in its Human Resources Department, and the estimate for the third section was based on a review of a representative sample. The Records Management Supervisor was also involved in preparing the estimates.

[33] The city goes on to describe its record management practices in its Human Resources Department:

- Records are filed by employee name
- Records are grouped into three general areas – terminated, retired and active
- Retired files are filed alphabetically, not by year of retirement
- Retired individuals are entitled to benefits and are, therefore, receiving 'compensation'
- Individuals on long term disability do not draw pay, but are entitled to benefits.

[34] The city states that the only way to determine whether an individual received compensation, and the nature of that compensation, is to review his or her employee file. The city estimates that it would take 15 minutes to run a report for the approximately 1000 individuals who were terminated, who quit or were dismissed, or whose contract ended in 2005, 2006 and 2007.

[35] The city estimates that the search for employee vacation days, personnel days and sick days for approximately 2000 employees would take 30 minutes so that the second report could be prepared.

[36] With respect to the third search, which involves a search through employee personnel files for terminated people (1000 files) to determine compensation paid and to review employee personnel files to determine paid and unpaid leave (2000 files), the city claims that it would take 10 minutes per file.

The appellant's representations in Appeal MA08-278

[37] As I indicated above, the appellant did not specifically address the fees issue in her representations for the above appeal file because fees were not at issue. However, she does indicate her belief that a search for responsive records would be easy to conduct with a minimum of effort. She states:

The city claims they don't have a "list", when a specific formatted "list" is not at issue. The format is not a requirement, only the information. The city is free to provide in whatever format they wish.

The human resources department is responsible for all staff of the city and given the statutory payments are made to each person leaving the employment of the city, there are financial and other government records that will obviously exist. In addition, at budget time each year, each department must reconcile staff, and including staff change overs. This information, along with overages and underages must be reported. There are only six commissioners and one human resource department. The task is not onerous and the information exists.

The city is not that big and staff leaving goes without notice. There are only six departments to send the request out to...

Analysis and findings

[38] Based on the fee estimate chart provided by the city in its decision (set out above) and its explanations regarding the manner in which records are kept and the steps to be taken in order to respond to the request, I make the following findings:

- The city does not explain what actions formed the basis for the first two searches that were conducted in order to produce reports. The *Act* provides that \$7.50 per 15 minutes (or \$30/hour) spent by a person is the maximum the city can recover for the task of **manually** searching to locate a record. In Order M-1083, former adjudicator Holly Big Canoe made the following comments and findings regarding electronic searches:

The use of the phrase "run reports from Personnel system" and the suggestion that Information Technology staff may assist in processing the request lead me to conclude that the Board does maintain the responsive information in some kind of electronic format. Additionally, the referenced capability of the Board's Personnel system to "run reports" is commonly understood as an ability to select fields of data, such as date of birth and date of hire, from a larger

database of information to generate a record. This type of electronic search is not manual and does not, in my view, fall within section 6.3 of the Regulation. Accordingly, I find that the Board is not entitled to charge the appellant a search fee for the time spent on this activity under section 45(1)(a).

I agree with this analysis and finding. Without any detail about what “running a report” means in the context of this appeal, I find that the city has failed to establish that the electronic searches conducted by staff in order to produce the reports falls within section 6.3 of Regulation 823. Accordingly, I disallow the search fees of \$7.50 and \$15.00 respectively.

- The search for records responsive to the third aspect of the appellant’s request will require city staff to review personnel files for all former and current city staff. The city indicates that there are approximately 2000 personnel files and that they are all maintained in its Human Resources Department. The city estimates that each personnel file will produce 15 responsive pages. In my view, 10 minutes per personnel file is not an unreasonable amount of time. Moreover, as the city indicates, the calculation of this amount is based on city staff conducting a search through a representative sample of personnel files. Accordingly, I will allow the city to charge the appellant \$10,000 for the search of employee personnel files for the information she seeks.

[39] As a result of the above, I disallow the city’s estimate for search fees of \$10,022.50, but allow the city to charge the appellant \$10,000 to search for responsive records.

The city’s representations - Preparation costs

[40] The city reiterates that based on a representative sample, the processing fee was calculated at 15 pages per file (2000 files) generating 30,000 pages. The city anticipates that it will need to sever personal information from each page and has estimated this preparation cost to require one minute per page for a final cost of \$15,000 to prepare the record for disclosure.

[41] In addition, the city points out that the appellant was provided with opportunities to narrow the scope of her request in order to reduce the fees. The city notes that the appellant apparently provided the mediator with a list of certain employees about whom she wished information, but despite requesting this information, the appellant did not provide it to the city. Therefore, the city submits that it was unable to narrow the search and responded to the appellant’s request as discussed above.

[42] The appellant's representations do not address this aspect of the fee.

Analysis and findings

[43] Section 45(1)(b) includes time for severing a record.⁷ Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.⁸ The city indicates that it expects severances to the records to be moderate and has, accordingly, reduced the anticipated time for severance to one minute. In the circumstances, I find the city's calculation to be reasonable. Accordingly, the city may charge the appellant \$15,000 to sever the personal information from 30,000 pages.

Photocopying fees

[44] The city indicates that no record exists that contains the information that the appellant is seeking. Therefore, in order to address all aspects of her request, "numerous documents/forms in employee files will be required." Based on the estimated number of responsive pages at 30,000, the city has calculated the cost of providing photocopies to be \$0.20 per page.

[45] The city's calculation has been made in accordance with the provision for photocopying set out in section 6(1) of Regulation 823. Accordingly, I uphold this fee.

Summary

[46] In summary, I disallow the fee of \$31,022.50. However, I allow the city to charge the appellant \$31,000.00 for searching for and producing records responsive to her request, broken down as follows:

- \$10,000 for search of 2,000 personnel files
- \$15,000 for preparation of 30,000 pages of responsive records
- \$6,000 for photocopies of 30,000 pages.

[47] As with any fee estimate, once the appellant agrees to pay for the search and a final fee has been determined, any benefit must accrue to the appellant.

ORDER:

1. I do not uphold the city's fee estimate of \$31,022.50.

⁷ Order P-4.

⁸ Orders MO-1169, PO-1721, PO-1834, PO-1990.

2. I allow the city to charge the appellant \$31,000.00 for records responsive to her request.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ March 29, 2012