

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2753

Appeals MA11-220 and MA11-222

Hamilton Entertainment and Convention Facilities Inc.

June 20, 2012

Summary: The Hamilton Entertainment and Convention Facilities Inc. received two requests for access to certain financial information about the operations of its venues, as well as information about employee expenses. It issued fee estimates for searching and preparing the records for disclosure. The requester appealed the fee estimates and the denial of his requests for fee waivers. In this decision, I uphold the fee estimate in relation to one request, partially uphold the fee estimate in relation to the other request, and uphold the decision to deny a fee waiver.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1), 45(4), Regulation 823, *City of Hamilton Act, 1985*, Chapter PR23, as amended by the *City of Hamilton Act, 1998* and *City of Hamilton Act, 1991*.

Orders and Investigation Reports Considered: Orders MO-1699, P-81, MO-1614, P-890, PO-2574, PO-2726, P-591.

OVERVIEW:

[1] These appeals concern fee estimates given by Hamilton Entertainment and Convention Facilities Inc. (HECFI)¹ for searching and preparing records for disclosure, and requests for a fee waiver.

¹ Incorporated to "maintain, operate, manage, market and promote Hamilton Place, the Hamilton Convention Centre and the Victor K. Copps Trade Centre-Arena, as social, cultural, educational and recreational facilities for the benefit of the City of Hamilton and in the public interest;...". Source:

[2] HECFI received two requests from the same individual under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain information for the years 2009 and 2010.

First Request (MA11-220)

[3] The first request sought access to the following:

1. Gross sales
2. Cost of talent
3. Number of paid attendees
4. Number of [complimentary tickets]
5. Fees paid to Ticketmaster
6. Monthly petty cash accounting

[4] Parts 1, 3, 5 and 6 are not issues in this appeal.

[5] HECFI issued an interim decision with respect to parts 2 and 4 of the request and relied on a preliminary review of the records considered to be responsive to provide a fee estimate of \$360.00. HECFI explained that this figure represents 12 hours of search time at a rate of \$30.00 per hour, apportioned as \$240.00 to process part 2 (the cost of talent) and \$120.00 to process part 4 (complimentary tickets). HECFI requested a deposit of \$180.00 from the requester prior to processing the request.

[6] The requester appealed HECFI's decision.

Second Request (MA11-222)

[7] The second access request was for the following information:

HECFI employees expense report. The report that details the expenses incurred by HECFI employees in their performance of their duties; i.e. credit cards, cash reimbursements, etc.

[8] In response, HECFI disclosed a sample monthly procurement card report to the requester for review. HECFI subsequently issued an interim decision stating the following:

An initial review of the records indicates that it will cost an estimated \$900.00 to produce monthly procurement card reports and to search and copy expense reports for managers and above and to copy petty cash reimbursement forms, all for the years 2009 and 2010. These cost

estimates are based on our initial estimate that it will take thirty hours to search for this data at a rate of \$30 per hour. The cost of copies would be in addition to the foregoing. Should you request additional support material, the cost to search and copy the newly requested material will increase the above noted estimate.

[9] HECFI requested \$450.00 from the requester prior to processing the request.

[10] The requester also appealed this decision to this office and the two appeals, MA11-220 and MA11-222, were mediated together.

[11] During mediation, the parties confirmed that parts 1, 3, 5 and 6 of the first request were addressed by HECFI separately and were therefore no longer at issue in this appeal.

[12] HECFI issued supplementary decisions providing further elaboration regarding the fee calculations. It also indicated that, with respect to the second request, some information may be withheld, pursuant to section 14(1) of the *Act*.

[13] With respect to the first request, the explanations did not fully satisfy the requester (now the appellant) and he submitted a fee waiver request to HECFI, claiming financial hardship under section 45(4)(b) of the *Act*. HECFI denied the fee waiver.

[14] With respect to the second request, the appellant revised the scope of his request to the following: "I am willing to accept the individual copies by employee for [this request]; procurement cards if the summary report is too onerous to produce." HECFI responded by indicating that in fact the fee would increase as the appellant was now asking for more detailed information. The appellant wished to maintain his revised request, and HECFI informed the mediator that it will charge the same fee to process the revised request.

[15] The appellant also submitted a fee waiver request to HECFI with respect to the second request, claiming financial hardship under section 45(4)(b) of the *Act*, which was also denied.

[16] As a fully mediated resolution to the appeals was not possible, they were transferred to the adjudication stage, where an adjudicator conducts an inquiry. As the appeals relate to the same appellant and institution and raise similar issues, they were dealt with together in the inquiry and are addressed jointly in this decision.

[17] HECFI submitted representations in support of its fee estimate and decision not to waive fees. The appellant was invited to respond to the HECFI's representations,

and submitted representations of his own. Neither party objected to the sharing of their representations.

ISSUES:

- A. Should the fee estimates be upheld?
- B. Should the fees be waived?

DISCUSSION:

Preliminary Issue – Scope of the Inquiry

[18] The fees charged by HECFI to process both requests are challenged by the appellant in part because he believes “the information should already be part of the public record and available to members of the general public in electronic form or photocopies (at minimal photocopy fees).” The appellant bases this view on his interpretation of sections 22-27 of the *City of Hamilton Act, 1985*, which he suggests requires the requested records to be created and made available to the public.

[19] The appellant also provides evidence that he believes establishes that the information should exist in a particular format that enables HECFI to disclose it at no cost.

[20] Given these submissions by the appellant, the limits of this inquiry must be clarified. The issues in these appeals, as confirmed through the Mediator’s Report, relate solely to the head’s decision respecting the fee estimates and fee waiver requests. My decision on the reasonableness of the fee estimates is based on the records in the form in which they exist. Neither the reasonableness of HECFI’s search for records, nor whether HECFI has fulfilled its statutory duties under the *City of Hamilton Act, 1985*, are issues before me.

[21] The issue to be determined therefore is not whether additional records should or do exist, but rather whether HECFI has charged a reasonable fee for processing the requests in relation to records already identified as existing and responsive to the requests, and in accordance with the fee provisions in section 45 of the *Act* (and Regulation 823). The second issue is whether HECFI ought to have granted a fee waiver to the appellant in the circumstances of these appeals. As to the *City of Hamilton Act, 1985*, I have no jurisdiction to ensure compliance with that statute.

[22] Having said that, the existence of a statutory duty to maintain or publicly disclose records in a particular form, apart from the provisions of this *Act*, *might* be a relevant factor on the reasonableness of a fee estimate or a decision on a fee waiver request. In this case, however, for the reasons given below, I find that the provisions of the *City of Hamilton Act, 1985*, do not assist the appellant in these appeals.

Preliminary Issue – Appellant’s “offer” to withdraw his objection to the fees

[23] During the course of this inquiry, the appellant provided representations in which he indicated he would withdraw his objection to the fees, subject to five conditions, which he describes.

[24] Without stating so explicitly, it appears that the appellant may wish to engage in further mediation of his appeals. As indicated above, these appeals were not resolved through mediation and are now before me for adjudication. The conditions the appellant describes are significant and even if they were a potential basis for a resolution of the fees dispute, would likely require further discussion. If the appellant wishes to engage in such discussions with HECFI on receipt of this decision he is free to do so but, in the circumstances, I see no useful purpose in delaying the disposition of the appeals and returning them to further mediation.

A. Should the fee estimates be upheld?

[25] The first issue before me in these appeals is whether HECFI’s fee estimates of \$360.00 for MA11-220 (the first request) and \$900.00 for MA11-222 (the second request) should be upheld.

[26] Where the fee is \$100.00 or more, the fee estimate may be based on either:

- 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. [Order MO-1699]

[27] 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. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated. [Orders P-81, MO-1614]

[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.
- 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.

[31] In reviewing HECFI's fee estimates, I must consider whether its charges are reasonable, giving consideration to the content of the appellant's requests, the circumstances of the appeals and the provisions set out in section 45(1) of the *Act* and Regulation 823. The burden of establishing the reasonableness of the fee estimate rests with HECFI. To discharge this burden, HECFI must provide me with detailed information as to how the fee estimate was calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

MA11-220

[32] With regard to the appellant's first request (MA11-220), HECFI issued an interim decision with respect to parts 2 and 4 of the request and relied on a preliminary review of the records considered to be responsive to provide a fee estimate of \$360.00. HECFI explained that this figure represents 12 hours of search time at a rate of \$30.00 per hour, apportioned as 8 hours (\$240.00) to process part 2 (the cost of talent) and four hours (\$120.00) to process part 4 (complimentary tickets). HECFI requested a deposit of \$180.00 from the requester prior to processing the request.

[33] During mediation, HECFI provided further elaboration on the fee calculation in a supplementary decision, as follows:

The accounting system does not track the talent costs incurred. HECFI's accounting policies (as identified in the accounting policy footnote found in the annual audited financial statements) result in HECFI recording only the net profit or loss on promotions or co promotions. As such, the cost of talent fees are not recorded as expenses and the compilation of data on talent fees requires the generation of a special purpose report that has never been done previously. It would involve identifying all possible events where talent fees are paid (not all concerts incur talent fees), retrieving the show files to compile the individual talent fees and summarizing the total talent fees paid for four separate venues. The resulting report would show the total HECFI share of talent fees paid in each of the years 2009 and 2010.... As the FOI request covers two years,

it is estimated that it would take four hours to compile this data for each of the requested years.

HECFI does not track total complimentary tickets issued in a year as there are a large number of reasons for issuing complimentary tickets, many of which are beyond the control of HECFI. For example, the promoter of a show has the ability to determine the number of tickets to be issued on a complimentary basis and HECFI simply follows the promoter's direction. As such, a total complimentary ticket report has very little utility. The Box Office staff have indicated that they would need to review the TicketMaster reports on each show booked at the four venues for the two years in question and compile a report showing the total number of tickets issued on a complimentary basis. They estimate that it would take two hours to compile this data for each of the two years requested.

[34] HECFI's submissions indicate that it based its fee estimate on the advice of its Corporate Controller. HECFI submits that the Corporate Controller has been working with the type of information at issue on a day-to-day basis for over 25 years and is therefore familiar with the type and contents of the requested records.

[35] The appellant's submissions focus on his belief that the information he seeks should exist in a particular format. He states that an employee of HECFI was nominated for a Hamilton Music Industry award for Talent Buyer of the Year, suggesting that he must purchase talent to perform at the facilities and his activities would therefore be tracked by some form of accounting system.

[36] He also submits that a recently issued RFP for the purposes of privatizing HECFI clearly sets out paid and unpaid admission to Hamilton Bulldogs hockey games.

[37] Accordingly, he submits, reports on talent costs and complimentary tickets exist and should be disclosed at no cost.

Analysis and findings

[38] The fee estimate is based on an initial estimate of the time required to perform the search and prepare the disclosure, at a rate of \$30.00 per hour. This is an allowable cost under sections 45(1)(a) and (b) of the *Act*. Further, the rate of \$30.00 per hour is allowable under sections 6(3) and 6(4) of Regulation 823.

[39] In Order MO-2218, the IPC, adopting Order MO-1699, indicated that:

In preparing a fee estimate, there are three optional approaches an institution can take. It may either base its fee on the actual work done to respond to the request; or it may seek the advice of an individual who is

familiar with the type and contents of the requested records; or it may base its decision on a representative sample of the records. [p.10]

[40] Reviewing the submissions of HECFI, including the materials it provided and sent to the requester during mediation, I find that the fee estimate for MA11-220 is reasonable. HECFI provides a detailed breakdown as to the work required to retrieve the information and the amount of time needed for each activity performed. For example, relating to part 4 of the first request, HECFI submitted that the Box Office staff would need to review the Ticketmaster reports on each show booked at the four venues for the two years in question and compile a report showing the total number of tickets issued on a complimentary basis and estimates that it would take two hours to compile this data for each of the two years requested.

[41] The appellant's representations do not cause me to doubt the fee estimate. With respect to the booking of talent, HECFI does not disagree that it books talent or that information about talent fees exists. Rather, it states that the information is not incorporated into its accounting system, and must be retrieved from the files for individual shows. I accept its submissions on the work required to collect this information.

[42] With respect to the complimentary tickets, the information provided by the appellant about the existence of information about paid and unpaid admissions for hockey games do not contradict HECFI's submission that information about complimentary tickets exists, but it would have to retrieve this information event by event. I accept HECFI's submissions about the process it would have to undertake to collect this information as well.

[43] Therefore, I uphold HECFI's fee estimate in full for the first request.

MA11-222

[44] With respect to the appellant's second request (MA11-222), HECFI's supplementary decision described the basis of its fee estimate stating, in part,

This FOI request is very general in nature and covers a great deal of individual financial records and related supporting data. To produce the requested data the following would be necessary:

- 1) On monthly procurement cards it would be necessary to access the City of Hamilton's procurement card files and download 24 months of procurement card data for 33 employees. Once this is done, each file would need to be attached to an e-mail to the FOI requestor.

- 2) An employee would need to access the manual file of expense reports for 21 individuals for a two year period, copy the expense reports and supporting documents and re-file the original documents.
- 3) An employee would need to access the manual file of petty cash reimbursements for several individual petty cash locations, copy the summary sheets for each reimbursement and re-file the original documents.

Our preliminary estimate is that it would take approximately 15 hours to do the above work for each year requested (2009 and 2010); therefore 30 hours would be required to gather and copy this data.

[45] As indicated above, the appellant has revised the scope of his request. HECFI states that the revised request would result in more detailed information but that it would charge the same fee.

[46] The appellant did not provide representations on the fee estimate for the second request.

Analysis and findings

[47] After reviewing the tasks listed by HECFI in justifying its search fee, I find that not all of them can be considered either a "manual search" to locate a record or the preparation of a record for disclosure. In particular, I find that HECFI cannot claim preparation time for copying the expense report and supporting documents, copying summary sheets for employee reimbursements and re-filing the original documents. This office has previously found that section 45(1)(b) does not allow for institutions to charge fees for photocopying or re-filing and re-storing records to their original state after they have been reviewed and copied [Orders P-890, PO-2574].

[48] Apart from these tasks, I am satisfied the work described by HECFI is covered by sections 45(1) and (b). HECFI has disclosed a sample monthly procurement card report to the appellant for his review. In order to respond to the request, HECFI will have to access such reports over a period of 24 months, for each of 33 employees. It will have to access the manual file of expense reports for 21 managers for the same 24 month period, as well as search through manual files of petty cash reimbursements for individual petty cash locations.

[49] Based on the description of the searches that would be required and how HECFI arrived at its fee estimate, I am satisfied that it will take HECFI a substantial amount of the 30 hours it estimated to search for and prepare the City of Hamilton's procurement card reports, the manual files of expense reports and the manual files of petty cash reimbursements.

[50] I must determine the amount of time that would be required to complete the tasks allowed under sections 45(1)(a) and (b), and the time required to complete the tasks for which it is not permitted to charge the appellant. After reviewing the fee estimate provided by HECFI and the sample procurement card, I find that it will reasonably take 21 of the 30 hours estimated to complete the manual search under section 45(1)(a) and to prepare the record for disclosure under section 45(1)(b). As such, I allow HECFI to claim 21 hours for fees under sections 45(1)(a) and (b), for a total of \$630.00.

[51] In its interim decision to the appellant, HECFI noted that the cost of copies in relation to the appellant's second request would be in addition to the fee estimate of \$900.00 to prepare monthly procurement card reports, to search and copy expense reports for managers and to copy petty cash reimbursement forms for the years 2009 and 2010. As per Regulation 823, HECFI is permitted to charge \$0.20 per page if it produces and provides photocopies of the records to the appellant. Should HECFI provide or send the responsive records to the appellant in electronic format, there should be no photocopying charges.

[52] Therefore, I partially uphold HECFI's fee estimate and allow it to claim a total of \$630.00.

[53] Before concluding this part, I wish to address the appellant's submissions about the effect of the *City of Hamilton Act, 1985*, on the reasonableness of the fee estimates. As I have stated, it is not within my authority to make determinations about whether HECFI has complied with obligations under another statute. However, I do not preclude the possibility that where another statute requires an institution to make specific information available to the public in a specific format, this may be relevant to my decision on the reasonableness of fees charged under the *Act*.

[54] In this case, my review of the provisions of the *City of Hamilton Act, 1985* indicates that they require HECFI to provide information to the City of Hamilton about its finances. They also require HECFI to keep proper accounting records, and to submit an annual budget to the City. It is not clear to me that there is any conflict between the requirements of the *City of Hamilton Act, 1985*, and the manner in which HECFI keeps the information requested by the appellant. I do not read those provisions as requiring the HECFI to record or maintain the information in a manner more conducive to the appellant's request. There is no dispute that HECFI has records containing the information sought by the appellant; however, that information will have to be compiled from various sources.

B. Should the fees be waived?

[55] 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.

[56] 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].

[57] 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.

[58] The appellant has requested a fee waiver in relation to both appeals based on financial hardship in section 45(4)(b) of the *Act*. The appellant explained his request to HECFI by indicating that:

As a performing artist, I have limited financial means to dedicate to the payment of the fees that HECFI has requested.

[59] This appears to be the entirety of the information provided by the appellant to HECFI in seeking a fee waiver. Further, the appellant provided no representations or evidence in this inquiry to support his request for a fee waiver, despite being invited to do so. For section 45(4)(b) to apply, a requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities [Order P-591].

[60] In the circumstances, I find the appellant has not provided a sufficient basis to justify a fee waiver. I therefore uphold HECFI's denial of the fee waiver.

ORDER:

1. I uphold HECFI's fee of \$360 in relation to MA11-220.
2. I reduce the time claimed by HECFI in relation to MA11-222 to 21 hours, for a total of \$630.00.
3. I uphold the decision not to grant a fee waiver.

Original Signed by: _____

Sherry Liang
Senior Adjudicator

_____ June 20, 2012