

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-2835-R

Appeal MA10-356

Order MO-2823

City of Vaughan

January 25, 2013

Summary: This is a reconsideration of Order MO-2823 in which the adjudicator did not uphold the city's refusal to confirm or deny the existence of records responsive to the appellant's request on the basis that doing so may constitute an unjustified invasion of personal privacy pursuant to section 14(5) of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator ordered the city to disclose those parts of records responsive to the appellant's request. In this reconsideration order, the adjudicator concludes that he omitted to address the issue of fees in his original decision and amends a provision of that order to allow the city to issue a fee decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 45.

OVERVIEW:

[1] The appellant made an access request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information contained in invoices from various law firms rendered to the city, for the period ending September 2010, in relation to wrongful dismissal litigation commenced by a named individual (the affected party) against the city.

[2] The city issued an access decision in which it stated that it could not confirm or deny the existence of any records responsive to the request, as doing so may constitute an unjustified invasion of privacy pursuant to section 14(5) of the *Act*.

[3] The appellant appealed the city's decision.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry. After an inquiry was conducted into the appeal, I issued Order MO-2823. In that order, I did not uphold the decision of the city to refuse to confirm or deny the existence of records relating to the appellant's request pursuant to section 14(5) of the *Act*. I ordered the city to disclose the records responsive to the appellant's request in accordance with the affected party's consent.

[5] Pursuant to my decision, I made the following order provisions:

1. I do not uphold the decision of the city to refuse to confirm or deny the existence of records responsive to the appellant's request. If I do not receive an application for judicial review from the city on or before **January 24, 2013** in relation to my decision that section 14(5) does not apply, I will send a copy of this order to the appellant on or before **January 29, 2013**.
2. In the event the city does not seek judicial review of this order, I order it to disclose the records responsive to the appellant's request, in accordance with the consent provided by the affected party. To be clear, I order the city to disclose the responsive records in accordance with the highlighted versions of these records provided to the city with its copy of this order, by **February 6, 2013**. To be clear, the city is not to disclose to the appellant the portions of these records that have been highlighted in yellow.
3. I order the city to provide me with copies of the severed versions of the records referred to in provision 2 that it discloses to the appellant.
4. I remain seized of this matter in order to verify compliance with order provisions 1, 2 and 3.

[6] The city, subsequently, wrote to me in a letter dated January 8, 2013 seeking clarification regarding its ability to issue a fee decision.

[7] The city states that as its application of section 14(5) has been denied, and it has been ordered to provide access, it has the right to charge and collect fees from the requester pursuant to section 45(1) in the amounts prescribed by the regulations. The

city further notes that "in the absence of explicit direction to waive the fee it would appear that any fee must be paid."

[8] The city notes that the issue of fees is not addressed in Order MO-2823, and it seeks clarification and poses the following questions:

1. Does the Order prohibit the City from charging the fee? If so, under what authority?
2. Does the appellant have the opportunity to request a review of the fee and/or a fee waiver? If so, how would they be advised of this?
3. If the appellant chooses not to pay the fee, appeals the fee or pays the fee after the mandated disclosure date of February 6, 2013, is the City in violation of the Order?

[9] In light of the city's request for clarification, I have decided to initiate a reconsideration of my Order MO-2823.

[10] In this order, for the reasons that follow, I find that in issuing Order MO-2823 I omitted consideration of the city's right to issue a fee decision. Accordingly, I amend provision 2 of my order to enable the city to issue a fee decision.

ISSUES:

- A. Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order MO-2823?
- B. Is the city entitled to issue a fee decision and, if so, what are the implications of such a decision on the appellant's rights of access to the records ordered disclosed pursuant to Order MO-2823?

DISCUSSION:

- A. Are there grounds under Section 18.01 of the *Code of Procedure* to reconsider Order MO-2823?**

The Reconsideration Process

[11] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

Grounds for the Reconsideration Request

[12] As set out in paragraph (c) of section 18.01, this office may reconsider an order where it is established that there has been an "omission" in the decision.

[13] The city has not formally sought a reconsideration of Order MO-2823. Rather, it has asked for clarification regarding its ability to charge a fee in order to process the appellant's request. However, as set out above, in section 18.03, this office has the right to initiate a reconsideration process.

[14] The city submits that pursuant to provision 2 of Order MO-2823 it is ordered to disclose the records at issue to the appellant without the right to charge a fee for processing the request.

[15] The city makes reference to section 45(1) of the *Act*, which governs the charging of fees. Section 45(1) states, in part:

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.

[16] Having examined the intent of section 45(1) and the implications of provision 2 of my order, I concur with the city that I omitted to address the city's right to charge a fee to process the appellant's request. In my view, this constitutes an "omission" as contemplated by paragraph (c) of section 18.01. Accordingly, I will reconsider my decision in Order MO-2823 on this basis and I will now proceed to determine whether the city is entitled to issue a fee decision and, if so, the implications of such a decision on the appellant's rights of access to the records ordered disclosed in Order MO-2823.

B. Is the city entitled to issue a fee decision and, if so, what are the implications of such a decision on the appellant's rights of access to the records ordered disclosed pursuant to Order MO-2823?

[17] As stated above, section 45(1) governs the payment of fees by institutions for the processing of access requests, as prescribed by regulation.

[18] Having failed to address fees in Order MO-2823, I have left unclear the issue of whether or not the city can seek payment of a fee from the appellant in this case.

[19] It was not my intention to leave this issue unclear and it was not my intention to preclude the city from seeking payment of a fee pursuant to section 45(1).

[20] Accordingly, in my view, the proper remedy in this case is to amend provision 2 of my order to read as follows:

In the event the city does not seek judicial review of this order, I order it to disclose the records responsive to the appellant's request, in accordance with the consent provided by the affected party, subject to the city's right to issue a fee decision by **February 6, 2013**. I order the city to disclose the responsive records in accordance with the highlighted versions of these records provided to the city with its copy of this order. To be clear, the city is not to disclose to the appellant the portions of these records that have been highlighted in yellow.

[21] I will now briefly address questions 2 and 3 posed by the city in its January 8, 2013 letter. With regard to question 2, the city will be required to issue a fee decision in accordance with section 45(3) of the *Act* by February 6, 2013. The city's decision should set out that the appellant has the right to seek a review of the amount of the fee and/or a fee waiver, in accordance with section 45(5) of the *Act*. With respect to question 3, as a result of my amendment to order provision 2, the February 6, 2013

disclosure date is no longer applicable. The appellant will be entitled to disclosure of the records at issue upon the disposition of any fee-related issues.

ORDER:

1. I amend provision 2 of Order MO-2823 and replace it with the following:

In the event the city does not seek judicial review of this order, I order it to disclose the records responsive to the appellant's request, in accordance with the consent provided by the affected party, subject to the city's right to issue a fee decision by **February 6, 2013**. I order the city to disclose the responsive records in accordance with the highlighted versions of these records provided to the city with its copy of this order. To be clear, the city is not to disclose to the appellant the portions of these records that have been highlighted in yellow.

2. All other provisions of Order MO-2823 remain in full force and effect.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ January 25, 2013