

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3014

Appeal MA11-526

City of Toronto

February 19, 2014

Summary: The city received a request for access to communications, including emails, that two named former officials of the city had with the TTC concerning a particular subject matter. In response, the city issued a fee estimate for restoring email tapes and searching for records. The requester appealed the fee estimate and the denial of his request for a fee waiver. In this decision, the city's fee estimate for restoring the email tapes is denied, and the city's fee estimate for searching for records is adjusted. The city's decision to deny a fee waiver is upheld.

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, section 6.

Orders Considered: Order MO-1083.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to communications, including emails, involving two named individuals, both of whom are former officials with the city. The request was for communications involving them and the Toronto Transit Commission (the TTC) regarding the suitability of the Ashbridges Bay lands for a streetcar maintenance and storage facility.

[2] The city issued a decision advising that records relating to the first named individual rested with the TTC, and are not in the custody or control of the city.

[3] With regard to records relating to the second named individual, the city stated that it did not have custody or control of any responsive hard copy records. It did indicate, however, that this individual's former business email account would contain potentially responsive records, and is accessible. It then stated:

However, as this is an inactive email account, staff will have to go through a process of recalling backup tapes once the post office restore is completed.

Information Technology Division staff further advises that it will take between approximately 90 to 270 hours (18 hours per tape) of staff person's time to complete this process to allow for the retrieval of the information that may be responsive to your request.

[4] The city then provided a fee estimate, which included an estimate for the time to restore the emails, and an estimate for the time to search them for responsive information.

[5] With respect to the estimated time to restore the emails, the city stated that if it is able to restore the information using quarterly tapes, there would be five quarterly tapes covering the relevant time period. At 18 hours per tape, the city stated that the cost for restoring emails would be \$2700 (90 hours @ 30.00/hr). The city then stated however, that if staff are required to restore the information using monthly tapes, there may be 15 tapes required to be restored, and that the cost for restoring emails could be as high as \$8100 (270 hours @ 30.00/hr). It then stated that staff will not be able to determine which method will be required until after the process has begun.

[6] Regarding the estimated fee for searching emails, the city stated:

Information Technology Division staff have further advised that as a result of a spot check of the email records, there would be approximately 500 emails for each restore conducted. These emails would then have to be searched for responsive information. Therefore, it is estimated that there will be approximately 2500 emails to be searched.

Email correspondence is not necessarily stored by subject heading, nor is the subject of an email always apparent on its surface. Therefore, a search will have to be conducted of the emails, once retrieved, for any responsive records.

[7] The city then stated that the estimated fee for searching emails was \$1500 (3000 emails x 1 minute per page (50 hrs) @ \$30/hr).

[8] The appellant appealed the fee.

[9] During mediation, the appellant submitted a request for a fee waiver, which the city denied. The appellant then provided additional financial information to the city, but the city maintained its position on fee waiver. The appellant confirmed that he was also appealing the decision not to waive the fee.

[10] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*.

[11] A Notice of Inquiry was initially sent to the city, inviting representations on the fee estimate and the denial of the fee waiver request, and the city provided representations in response. The Notice of Inquiry, along with a copy of the city's representations, was then sent to the appellant, who also provided representations in response. The city was then provided with a copy of the appellant's representations, and invited to submit reply representations, which it did. The city's reply representations were provided to the appellant, who then submitted surreply representations in response.

[12] This file was subsequently transferred to me to complete the inquiry process.

[13] In this order, I deny the city's fee estimate for restoring the email tapes, and adjust the city's fee estimate for searching for records. I uphold the city's decision to deny a fee waiver.

ISSUES:

- A. Should the fee estimate be upheld?
- B. Should the fee be waived?

DISCUSSION:

Issue A: Should the fee estimate be upheld?

[14] Previous orders have established that, 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.¹

[15] 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.²

[16] 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.

[17] 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.

[18] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Section 6 reads:

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.

¹ Order MO-1699.

² Orders P-81 and MO-1614.

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.

[19] In reviewing the city's fee estimate, I must consider whether its fee is reasonable, giving consideration to the content of the appellant's request, the circumstances of the appeal 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 the city. To discharge this burden, the city 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.

[20] I also note that the city has divided its fee estimate between the fee for restoring the emails and the fee for searching. I will review the fee estimates for each of these tasks in turn.

Restoring the tapes

[21] As noted above, the city has indicated that the named individual's former business email account is accessible, but that it is an inactive email account. In its decision letter it stated that, as a result, staff "will have to go through a process of recalling backup tapes once the post office restore is completed." It then stated:

Information Technology Division staff further advises that it will take ... 18 hours per tape of staff person's time to complete this process to allow for the retrieval of the information that may be responsive to your request.

Representations

[22] In its representations the city begins by stating that it did not base the fee estimate on actual work done to locate the responsive records, as no responsive records could be obtained until the e-mail account was restored.

[23] With respect to the fee estimate for restoring the emails of the former city official, the city confirms that this individual's email account had been deleted, but that it is possible to restore the email account from back-up tapes. It also confirmed its estimate that it would take 18 hours to restore each tape (at \$30/hour). It then states:

The City relied on the expert knowledge of Information & Technology staff, namely a Senior Technical Support Specialist with the Technology Infrastructure Services section. She has detailed and in-depth knowledge of the procedures and time required to restore a dormant e-mail account for a specified time period.

[24] The city does not provide any other details about why it would take 18 hours per tape of staff person's time to complete the process of recalling backup tapes once the post office restore is completed.

[25] In the appellant's representations, he acknowledges that the city "may have accurately estimated the costs related to this request." He then raises issues about the manner in which the request was processed and, with respect to the time to restore the tapes, he argues that the city is working with "a badly outdated data storage system" if it is so costly to restore the tapes. He then identifies some concerns he has with the city's data storage system.

[26] In its reply representations, the city briefly addresses the issues relating to its storage system (though it also argues that this is unrelated to the issues in this appeal). The city indicates that it began implementing a new archiving system in mid-2011, and states that this new system:

... is an add-on to [an identified] email system to automatically archive ... items such as emails, appointments, tasks and notes. Users can easily access, browse, search and retrieve these items without the assistance of the Information & Technology Service Desk. At the time of implementation, any emails residing in an active user's ... account were automatically archived into [the new system]. Emails from approximately April 2011 and later are archived in the new system. Email prior to this date is only available from backup tapes. As the email account for [the named individual] was closed before the implementation of this system, his emails exist only on backup tapes.

[27] The city then states:

The reasonableness of the fee estimates is based on the records in the form in which they exist, and not in a form that [the appellant] believes they should be.

Analysis and findings

[28] To begin, I agree with the city that the reasonableness of the fee estimate in this appeal is based on the records in the form they exist. I also accept that the responsive emails are only available on backup tapes.

[29] However, in this appeal, the city has not provided sufficient evidence to satisfy me that the fee estimate of \$540 per tape (based on 18 hours per tape) to restore each tape is reasonable.

[30] As set out above, section 45(1) of the *Act* identifies the fees that can be charged 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.

[31] Based on the evidence provided by the city, the fees to restore the backup tapes in this appeal would not fit within sections 45(1)(a), (b) or (d). They likely fit within section 45(1)(c), and possibly 45(1)(e).

[32] Furthermore, as set out above, more specific provisions regarding fees are found in section 6 of Regulation 823, which reads.

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.

[33] I have carefully considered the city's representations in support of its position that it would take 18 hours of staff time to restore each tape, and its indication that it is charging \$30 per hour for this.

[34] Of the paragraphs in section 6 of Regulation 823, paragraphs 1, 2 and 6 do not appear to be relevant in this appeal.

[35] Furthermore, without additional information from the city, it does not appear that the staff involved in restoring the tapes are "manually searching for a record" under paragraph 3, nor do they appear to be "preparing a record for disclosure" under paragraph 5. These are the two types of tasks that section 6 of Regulation 823 states the city can charge \$30 per hour for.

[36] Based on the city's evidence that the staff involved in restoring the tapes are "Information & Technology Service Desk" staff (as set out in its reply representations), an assumption could be made that staff involved in restoring the tapes may be "developing a computer program or other method of producing a record from machine readable record," as per paragraph 5 of the Regulation. However, I note that I have no additional evidence regarding the actual tasks staff are performing during the 18 hours it takes to restore each tape. I also note that the city can charge \$60 per hour for this task, and the city has not done so.

[37] Although time spent by a person running reports from a system can fall within the meaning of "preparing the record for disclosure" under section 45(1)(b), previous orders have established that an institution cannot charge for the time spent by a computer to compile the data, print information or for the use of material and/or equipment involved in the process of generating the record.³

[38] As set out above, the burden of establishing the reasonableness of the fee estimate rests with the city. To discharge this burden, the city 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.

[39] Although I accept that restoring each tape which contains the information at issue in this appeal may take some time, and perhaps even 18 hours, in the absence of any detailed information about the nature of the tasks required to restore each tape, and what is involved in the 18 hours of staff time, I do not uphold the fee estimate of 18 hours per tape.

[40] I considered whether I have been provided with any evidence to support a lower fee for restoring each tape; however, without further evidence about what is required in restoring the tapes, I am not prepared to find that a lower fee for restoring the tapes would be appropriate in the circumstances of this appeal.

[41] As a result, I find that the fee estimate of 18 hours per tape for restoring each tape is not reasonable, and I do not uphold the city's fee estimate for restoring the tapes.

Search time

[42] Regarding the estimated search time, the city's initial decision letter stated:

Information Technology Division staff have ... advised that as a result of a spot check of the email records, there would be approximately 500 emails for each restore conducted. These emails would then have to be searched for responsive information. Therefore, it is estimated that there will be approximately 2500 emails to be searched.

[43] However, later in its decision letter, it stated that the estimated fee for searching emails was \$1500 (3000 emails x 1 minute per page (50 hrs) @ \$30/hr).

[44] In its representations, the city states:

³ See, for example, Order M-1083.

Once the e-mail account was restored, the e-mails would have to be reviewed to determine how many were responsive to the request. E-mail correspondence is not stored by subject heading, nor is the subject of an e-mail always apparent on its surface. Access & Privacy staff has experience in reviewing records to determine if they are responsive to the request and can accurately assess the time required to perform this task.

[45] The city then states:

Information Technology staff estimated approximately 3000 e-mails for the time period requested. The fee estimate for searching the emails to determine responsiveness would be \$1500 based on review time of one minute per page (50 hours) @ \$30 per hour.

[46] The appellant does not address the estimated search time in his representations.

[47] To begin, there appears to be a discrepancy in the information provided by the city. In its decision letter, it states that, as a result of a spot check of the email records, there would be approximately 500 emails for each restore conducted, and that it estimated there will be approximately 2500 emails to be searched. However, later in its decision letter it bases its search estimate on searching 3000 emails. The city's representations state that Information Technology staff estimate approximately 3000 e-mails for the time period requested.

[48] In this appeal, I have conflicting evidence regarding the estimated number of emails to be searched. However, I do have evidence from the city that the estimate of 2500 emails is based on a spot check done by Information Technology staff. In these circumstances, I find the estimate of 2500 emails to be the appropriate number to base the fee estimate on.

[49] Regarding the city's estimate that it will take one minute to view each email, based on the evidence provided by the city regarding the manner in which the correspondence is stored, I find this to be a reasonable estimate. Paragraph 3 of section 6 of Regulation 823 establishes that an institution may charge \$30 per hour for manually searching for a record. As a result, I find the appropriate fee estimate to be 2500 emails @ 1 minute per email (at \$30/hour) = \$1250.

Summary

[50] In summary, I do not uphold the fee estimate for restoring the tapes. With respect to the search time, I find that it will reasonably take an estimated 41.67 hours to complete the manual search under section 45(1)(a). As a result, I allow the city to claim the search fees of \$1250 under section 45(1)(a) of the *Act*.

Issue B. Should the fee be waived?

General principles

[51] 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.

[52] 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.⁴

⁴ Order PO-2726.

[53] 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.⁵

[54] The institution or this office may decide that only a portion of the fee should be waived.⁶

Part 1: basis for fee waiver

[55] In this appeal, the appellant has requested that the fee be waived based on financial hardship. He has also provided brief representations suggesting that the dissemination of the record will benefit public health and safety.

[56] I will review each of these grounds.

Section 45(4)(b): financial hardship

[57] For section 45(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.⁷

[58] In this appeal, the appellant's representations are based on the city's initial fee estimate for restoring the tapes and for manually searching for the records. I have found that the fee estimate for restoring the tapes is not sustained, and I have adjusted the fee for manually searching for the records to \$1250. As a result, I will review the appellants' financial hardship argument based on the adjusted fee estimate of \$1250.

[59] In support of his position that payment of the fee will cause him financial hardship, the appellant provided the city with information regarding his financial situation. The city responded to the appellant's request by stating that, in the absence of additional information about whether payment would cause financial hardship, it was not granting the fee waiver.

Representations

[60] The city provides representations on the issue of financial hardship. It states:

... the [appellant] notes in his [initial] fee waiver request ... that he is seeking a fee waiver on the grounds that his household income falls below

⁵ Orders M-914, P-474, P-1393 and PO-1953-F.

⁶ Order MO-1243.

⁷ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

the "tax low-income cut-off (LICO)" used by the city's parks and recreation's "welcome policy" for 2010 which was \$28,182 for a two-person household". ...

The City sent a letter to [the appellant] ... noting that detailed information relating to [the appellant's] assets and expenses must be provided to enable the City to determine if the payment will cause undue financial hardship. In order to establish financial hardship, [the appellant] should have provided details on actual income, expenses, assets or liabilities.⁸

[In response], the City received, via e-mail, a listing of [the appellant's] assets and expenses. Based on the information provided by [the appellant] regarding his financial circumstances, the City is not satisfied that the payment of the estimated fee would cause him financial hardship within the meaning of section 45(4)(b). While [the appellant's] annual income falls below the "tax low-income cut-off", given that [the appellant] shows in excess of [a significant amount] worth of assets, the City is not convinced that paying the fees would cause financial hardship.

[61] In response, the appellant argues that payment of the fee would cause him financial hardship. He reiterates that his income was well below the "tax low-income cut-off" for 2011, and states that, with respect to the value of his assets, these assets are only half his, as they are shared with his spouse. The appellant also reviews his and his wife's benefits, vacation and pension situation, various other costs that he is incurring for other purposes, and his prospects for future income (which, he acknowledges, may improve). He states that money is tight, and argues that the requirement to pay a significant amount for email accounts "to do work in the public interest" is troubling.

[62] In response the city states:

With respect to the issue of financial hardship, it is the City's position that [the appellant] has failed to provide sufficient evidence demonstrating financial hardship. The four financial markers that are required to ascertain a real picture of [the appellant's] financial situation is income, expenses, assets and liabilities. The City must balance each of these markers. In this case, given the value of [the appellant's] assets and net worth, the City submits that there is insufficient evidence to support a finding of financial hardship.

⁸ The city refers to Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

... The fee in this appeal may pose a financial challenge for [the appellant], but the City is not convinced that paying this fee alone would cause [the appellant] to undergo "severe financial suffering or privation."⁹

[63] In response, the appellant takes issue with the city's "dictionary definition" of financial hardship, and then states that, notwithstanding these definitions, the city has itself identified the low-income cut-off in its "welcome policy." He reviews the income levels set by this policy, and then states that he and his spouse "certainly fall below the city's two-income threshold."

Findings

[64] On my review of the appellant's evidence respecting his financial situation, including the information provided by him about his income, expenses, assets and liabilities, for the reasons that follow, I find that payment of the fee of \$1250 would not constitute financial hardship for the appellant as contemplated by section 45(4)(b) of the *Act*.

[65] While I accept that the appellant's finances could be strained by payment of this fee, I conclude based on the evidence before me that he has access to adequate financial resources to cover the cost of the request without suffering financial hardship. Furthermore, based on my review of the appellant's financial situation as provided by him, I am satisfied that this is not a case where my decision on the waiver of fees will determine the appellant's ability to obtain access to the records. The appellant himself has identified a number of expenses which he is incurring for other matters. In these circumstances, based on the amount of the fee estimate and the financial information provided by the appellant, I find that there is not sufficient evidence to support a finding that payment of the estimated fee to the city would impose a financial hardship on the appellant.

[66] Given my finding that financial hardship under section 45(4)(b) has not been established by the appellant, it is not necessary for me to consider whether it would be fair and equitable to waive the fee on this basis.

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

[67] Previous orders of this office have found the following factors to be relevant in determining whether dissemination of a record will benefit public health or safety:

- whether the subject matter of the record is a matter of public rather than private interest

⁹ The city relies on the Concise Oxford Definition of "hardship".

- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record.¹⁰

Representations

[68] The city's initial representations state that the appellant has not demonstrated that there is a public health or safety concern which may be addressed by the dissemination of the information sought. The appellant's representations on this issue are brief, stating that, in his view, there is a likelihood that the city has unnecessarily spent a significant amount of money as a result of purchasing the land that is referenced in his request. He then states that, if this is the case, that means there is less money available for health and safety programs in the city. He concludes by stating that "health and safety are at stake when openness and public accountability are compromised."

Findings

[69] Based on my review of the appellant's representations, I am not satisfied that the basis for a fee waiver in section 45(4)(c) applies.

[70] Previous orders have established that one of the relevant factors in determining whether dissemination of a record will benefit public health or safety is "whether the subject matter of the record relates *directly* to a public health or safety issue" [emphasis added]. Although the appellant argues that the money that may have been wasted means that there is less money available for the city's health and safety programs, the records requested in this appeal do not relate *directly* to a public health and safety issue. Furthermore, the appellant has not provided evidence to support the view that dissemination of the requested information contained in the emails would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue.

[71] As a result, I find that section 45(4)(c) does not apply in this appeal.

¹⁰ Orders P-2, P-474, PO-1953-F and PO-1962.

[72] In summary, I find that none of the considerations in section 45(4) apply in this appeal. I therefore uphold the city's decision to deny the fee waiver.

ORDER:

1. I do not uphold the city's fee estimate for restoring the tapes.
2. I reduce the city's estimated search time to 41.67 hours, for a total of \$1250.00.
3. I uphold the decision not to grant a fee waiver.

Original Signed By:
Frank DeVries
Adjudicator

February 19, 2014