

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3079

Appeal MA13-349

City of Toronto

July 29, 2014

**Summary:** The city received a request for access to emails or correspondence between a former TTC Chair and named current and former Mayors. In response, the city issued a fee estimate for restoring email tapes, and denied a request for a fee waiver. It also issued a subsequent decision granting partial access to some records, and later revised its fee estimate. In this decision, the city's revised fee estimate for restoring the email tapes and the decision to deny the fee waiver are 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.

### OVERVIEW:

[1] This appeal arises out of a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

any emails or correspondence between [named TTC Chair] and/or [named Mayor] and/or [named former Mayor] and/or [named former TTC Chair], and TTC Transit Payment Card Project Director, [specified Ministry], [named Agency], or Legal Services from 2010 and 2011 regarding Presto.

[2] The city initially issued a decision in which it indicated that:

- A decision regarding the search of the Mayor's office would be made at a later stage.
- It could not access the records of the former TTC Chair.
- Access cannot be granted to the Legal Services' records as no records could be found.

[3] The city indicated further that it is estimated that a \$2160.00 fee will apply to the restoration of the 2010 email account of the former Mayor. Once the email account is restored, the city indicated that it would advise on the fees associated with the search, preparation, and photocopying of the records.

[4] In turn, the requester submitted a fee waiver request.

[5] The city then issued a supplementary decision in which it advised, that following a search of the Mayor's Office, additional records were located. The city granted partial access to the responsive records. The city denied access to the personal information of other individuals in these records pursuant to section 14(1) (personal privacy) of the *Act*. The city advised that additional documentation on the appellant's assets were needed to consider the fee waiver request.

[6] The requester, now the appellant, appealed the city's access decision, and provided some information to the city to support his request for a fee waiver.

[7] The city issued a decision denying the appellant's request for a fee waiver and the appellant also appealed this decision.

[8] During mediation, the appellant maintained his position that the fee should be waived, asserting that the estimated fee would cause him undue financial hardship, that the subject matter of his request relates directly to a public interest, and that the submitted documents constituted sufficient supporting evidence. The appellant indicated that he wished to pursue only the denial of his fee waiver request to adjudication.

[9] As mediation did not resolve the appeal, it was forwarded to the adjudication stage of the appeal process.

[10] The adjudicator previously assigned to this appeal sent a Notice of Inquiry to both the city and the appellant. The adjudicator requested the city to provide additional information regarding the fee estimate for restoration of the 2010 email account of the former Mayor. Both the appellant and the city were asked to address the issue of a fee waiver.

[11] The city and the appellant both sent representations. The city provided a revised fee estimate in its representations, reducing the fee to \$960.00 from \$2160.00. The adjudicator sent the city's representations to the appellant and invited him to respond to the representations and revised estimate. The appellant responded by stating that he wished to proceed with the appeal, and maintained his claim that the fee should be waived.

[12] This appeal was re-assigned to me. The issues before me are whether the revised fee estimate and decision not to grant a fee waiver should be upheld. For the reasons below, I uphold the city's estimate of fees, and its decision not to waive the fees.

**ISSUES:**

- A. Should the fee estimate of \$960 be upheld?
- B. Should the fee be waived?

**DISCUSSION:**

**A. Should the fee estimate be upheld?**

[13] 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.<sup>1</sup>

[14] 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.<sup>2</sup>

[15] 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.

[16] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

---

<sup>1</sup> Order MO-1699.

<sup>2</sup> Orders P-81 and MO-1614.

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.

[17] 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.
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.

[18] In reviewing the city's fee estimate, I must consider whether its charge 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

### ***Representations***

[19] The city states in its representations that in reconsidering its original estimate and calculation of the fee, it relied on the advice of Information and Technology staff, specifically, a Senior Technical Support Specialist with the Technology Infrastructure Services Section.

[20] The city describes as follows the tasks, time and personnel responsible for restoring one set of quarterly tapes:

1. Staff of the Email Team determines the amount of disk space required, to identify the server name of the post office to be restored and to initiate restore request to Information & Technology Operations. This process is estimated to take two hours.
2. Staff of Information & Technology Operations to determine the tapes to be recalled and to submit a recall request to the off-site storage facility. The turnaround time for tape delivery is the next business day. Actual staff time consists of two hours.
3. The estimated computer time required to restore one set of quarterly tapes is seven hours. Estimated staff time by Information & Technology Operations is two hours. Tasks involved are to locate the requested tapes from the daily tape delivery; to find available tape drives; to load the tapes and to monitor the process to switch tapes as backup tapes could span a few tapes; and to submit the request to restore from tape drive to appropriate disk location. If the restore fails, the restore request would have to be resubmitted.
4. After tape restoration, Email Team staff has to rebuild database to allow access to the restored mailbox offline and to grant appropriate access rights for the individuals designated to carry out the search. This process is estimated to take two hours.

[21] Based on the above, the city states that it requires 8 hours to restore each tape. As there are four tapes, the fee is \$960.00 - 32 hours for restoration of the 4 tapes at \$30 per hour.

[22] The appellant did not provide any specific representations as to the revised fee estimate, except to communicate that if the revised estimate amounts to more than \$100, he wished to proceed with the appeal.

### ***Analysis***

[23] In Order MO-2492, this office upheld the time required to extract emails from backup databases as search time for which an institution is entitled to charge a fee under section 45(1)(a) of the *Act*. This office has also stated that time spent by an individual in running reports from a computer system is covered by section 45(1)(b). In this appeal, the work detailed by the city could fall under either of these subsections.

[24] As stated above, the purpose of a fee estimate is to provide the requester with sufficient information to make an informed decision on whether or not to pay the fee and pursue access to the requested records. In the current appeal, the city's fee estimate was based on the advice of staff who are familiar with the type and content of the records. Its time was charged at the rate prescribed by the *Act* of \$7.50 for each 15 minutes spent by any person, or \$30.00 per hour.

[25] The city was asked to provide specific information about the calculation of the fee estimate for restoration of the email account of the former Mayor: who is responsible for the task of restoring the 2010 email account; what actions are required in order to restore the account; and a breakdown of the estimate to identify how much time an individual must spend actually performing the tasks that are necessary in restoring the email account. Based on the information provided by the city, and without any basis to cast doubt on its description of the tasks and time involved, I am satisfied that the fee estimate of \$960 is justified. I accept that the tasks the city describes are necessary in order to search for and prepare records responsive to the appellant's request. As a result, I uphold the city's fee estimate.

### **B. Should the fee be waived?**

#### ***General principles***

[26] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section states:

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.

[27] Section 8 of Regulation 823 sets out the following additional matters for a head to consider in deciding whether to waive a fee:

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.

[28] 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.<sup>3</sup> In reviewing a decision by an institution denying a fee waiver, this office may decide that only a portion of the fee should be waived.<sup>4</sup>

[29] 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 6 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. The appellant bears the onus of establishing the basis for the fee waiver under section 45(4) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances.<sup>5</sup>

[30] There are two parts to my review of the ministry's decision under section 45(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived.<sup>6</sup>

---

<sup>3</sup> Orders M-914, P-474, P-1393 and PO-1953-F.

<sup>4</sup> Order MO-1243.

<sup>5</sup> Order PO-2726.

<sup>6</sup> Order MO-1243.

***Whether the payment will cause a financial hardship for the person requesting the record***

[31] In this appeal, the appellant has requested that the fee be waived based on financial hardship in section 45(4)(b) of the *Act*.

[32] 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.<sup>7</sup> The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.<sup>8</sup>

*Representations*

[33] The appellant takes the position that even with the reduction in the estimate, the payment of the \$960 fee for restoration will cause him financial hardship. In support of his position, he provided the city with some information regarding his financial situation. This included Canada Revenue Agency Notice of Reassessments for the 2011 and 2012 tax year and credit card statements and reports. The appellant also sent bank statements to show that his self-employed consulting business was no longer operating or "functional" and that he is in financial need. The appellant submits that he has no liquid assets, survives on credit, has no car and is limited in providing documentary proof of his financial situation because a third party has denied him use of certain records. He states that he owes \$6000 in court costs regarding a matter in Divisional Court.

[34] The appellant also asserts that he has obtained fee waivers based on financial need in Divisional Court and from the TTC.

[35] The city asserts in its representations that the information provided by the appellant was insufficient to support granting a fee waiver. On the issue of financial hardship, the city relies on various documents and communications provided by the appellant in support of its decision. These include emails from the appellant asserting that any payment would require borrowing money from a credit card; that his expenses are more than his income; that he is surviving through family support payments from the government and credit cards, and his consulting business is no longer operating and he is looking for a job. The city asserts that in the absence of information regarding assets and details of his expenses, it is not convinced that paying the fees would cause financial hardship. The appellant's subsequent emails providing the city with a copy of his Consumer Credit Profile did not satisfy the city, as it asserts that the appellant has not provided any information relating to his actual expenses, i.e. rent, utilities, etc., or any assets he may own. The city argues that in order to establish financial hardship, details on actual expenses, assets or liabilities must be provided. Finally, the city states

---

<sup>7</sup> Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

<sup>8</sup> Order P-1402.



that a search in the Toronto Property System revealed that the appellant owns, or at the very least, co-owns property in the City of Toronto. The city states that this undisclosed asset further supports its denial of a fee waiver based on financial hardship.

[36] The city submits, thus, that the appellant had not provided evidence that paying the revised fee would cause him to undergo "severe financial suffering or privation."<sup>9</sup> The city submits that it appropriately denied the request for a fee waiver.

### *Analysis*

[37] On my review of the material before me, I have insufficient evidence that payment of the fee of \$960.00 would constitute financial hardship for the appellant as contemplated by section 45(4)(b) of the *Act*. I accept that on the basis of the evidence submitted, the appellant has a very limited income. However, the city provided evidence as to a substantial asset which the appellant did not explain despite being given the opportunity to do so.

[38] The appellant has referred to his inability to provide all the information requested because of the refusal of a third party to consent to release of relevant information. While I appreciate the difficulty this may cause the appellant, nonetheless I must make my decision on the evidence before me. I am unable, based on the incomplete picture of the appellant's financial situation, to conclude that payment of the fee would constitute a financial hardship.

[39] I have reviewed the material regarding a waiver of fees from the courts, and from the TTC. I do not find those circumstances helpful to my determinations. The document confirming the waiver of court fees suggests that the waiver is extremely limited in scope. Further, there is no basis or reason given for the waiver and I therefore have no assistance in understanding whether the court's reasons for granting the waiver have any bearing on the issue before me. The fee waiver granted by the TTC is also of limited relevance as it merely indicates that the TTC decided to grant a fee waiver, without giving specific reasons.

[40] I conclude that I do not have sufficient evidence to support a finding that payment of the fee would impose a financial hardship on the appellant.

### ***Whether dissemination will benefit public health and safety***

[41] In this appeal, the appellant also relies on section 45(4)(c).

---

<sup>9</sup> Order PO-2514.

[42] In prior orders of this office, the following factors have been found relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- 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
  - (a) disclosing a public health or safety concern, or
  - (b) 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.<sup>10</sup>

[43] The focus of section 45(4)(c) is “public health or safety”. It is not sufficient that there be only a “public interest” in the records or that the public has a “right to know”. There must be some connection between the public interest and a public health and safety issue.<sup>11</sup>

[44] This office has found that dissemination of records will benefit public health and safety under section 57(4)(c) where they related, for example, to:

- compliance with air and water discharge standards<sup>12</sup>
- a proposed landfill site<sup>13</sup>
- a certificate of approval to discharge air emissions into the natural environment at a specified location<sup>14</sup>
- environmental concerns associated with the issue of extending cottage leases in provincial parks<sup>15</sup>

---

<sup>10</sup> Orders P-2, P-474, PO-1953-F and PO-1962.

<sup>11</sup> Orders MO-1336, MO-2071, PO-2592 and PO-2726.

<sup>12</sup> Order PO-1909.

<sup>13</sup> Order M-408.

<sup>14</sup> Order PO-1688.

<sup>15</sup> Order PO-1953-I.

- safety of nuclear generating stations<sup>16</sup>
- quality of care and services at group or nursing homes<sup>17</sup>

### *Representations*

[45] The appellant asserts that “health and safety concerns” justify a fee waiver. These concerns include the risks associated with the city’s decision to use new transit payment cards rather than adopting an open payment system. The appellant lists as examples of these risks the susceptibility of personal information to hackers, environmental damage from disposal and the risk of theft from seniors due to transferability of the cards. Thus, the appellant alleges that dissemination of the records requested would benefit public health and safety by providing information as to why and how the government rendered this decision.

[46] In its representations, the city asserts that the appellant has not demonstrated a public health and safety concern which may be addressed by the dissemination of the information sought.

### *Analysis*

[47] On review of the representations and material before me, I conclude that dissemination of the information contained in the responsive records would not benefit public health or safety for the purposes of section 45(4)(c). The evidence before me does not suggest that any of the responsive records could relate to public health or safety in any way that supports a fee waiver. The connections made by the appellant between government communications about a transit payment project and public health or safety concerns are tenuous.

[48] As I have found that the appellant has not provided sufficient evidence to establish a basis for a fee waiver due to financial hardship or public health and safety, it is not necessary for me to consider whether it would be fair and equitable to waive the fee. However, for the sake of completeness, I will go on to do so.

### ***Whether it would be fair and equitable to waive the fee***

[49] For a fee waiver to be granted under section 45(4), it must be “fair and equitable” in the circumstances. Relevant factors in deciding whether or not a fee waiver is “fair and equitable” may include:

- the manner in which the institution responded to the request;

---

<sup>16</sup> Order PO-1953-I.

<sup>17</sup> Orders PO-1962 and PO-2278.

- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

### *Representations*

[50] The appellant asserts in his representations that it would be fair and equitable to waive the fees associated with his request. He cites various factors in support of this claim - that his offer to reduce the scope of his request by 40% in order to expedite the process was declined by the city; that no documents were provided free of charge, except personal information, as required by law; and that the city's reduction in email restoration fees should not be counted as a concession if the original fees should not have been charged in the first place. The appellant also asserts that the fee waiver would not shift an unreasonable burden of the cost from the requester to the institution given the disparity in income between the two. The appellant maintains that charging him anything over \$100 is inherently unfair, particularly as his financial situation would require him to charge the fees thereby incurring the 18% credit card interest.

[51] In addressing the issue of whether a fee waiver would be fair and equitable, the city states, among other things, that there is no further way to reduce the costs of the email restoration, so narrowing the request likely would not result in any cost reduction. Only after restoration of the email account would the city be able to determine if any records exist that respond to the request and then determine, based on the volume of records involved, whether copies of records could be provided free of charge. The city also states that it advised the appellant that, as he had made a similar request to the TTC, any records he obtained from the TTC would cover the correspondence between the TTC and the former Mayor.

[52] The city concludes by submitting that granting a fee waiver would not be fair or equitable, nor would it be in the best interests of the city, shifting an unreasonable

burden of these costs from the appellant to the city, its staff, and ultimately to the taxpayers of Toronto.

*Analysis*

[53] On my review of the circumstances surrounding the appellant's request, I am not satisfied that it would be fair and equitable to waive the fee.

[54] The appellant made his request in May of 2013 for records covering the years 2010 and 2011. He was aware that part of it required the city to search through emails in the email account of a Mayor who had left office. The city responded by preparing a fee estimate for restoration of the email account. I accept the city's submission that narrowing the request would not likely result in any cost reduction given that restoration of the email account would still be necessary. I am also satisfied that the city made an effort to minimize the costs to the appellant, by suggesting an alternative means of obtaining the same records.

[55] In these circumstances, I find that waiver of the fee would shift an unreasonable burden of the cost from the appellant to the city and ultimately the public.

**ORDER:**

I uphold the city's fee estimate of \$960.00 and its decision to deny a waiver of the fee.

Original signed by: \_\_\_\_\_  
Sherry Liang  
Senior Adjudicator

\_\_\_\_\_  
July 29, 2014