

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3515

Appeal PA14-92-2

Metrolinx

July 29, 2015

Summary: The appellant requested information about the cost of the PRESTO fare card project from Metrolinx. Metrolinx responded with an interim access decision, fee estimate and time extension claim. The appellant filed an appeal of the fee estimate. During mediation, the appellant narrowed his request. Metrolinx amended the fee estimate to reflect the narrowed request. This order upholds the amended fee estimate as reasonable and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1) and (3); Regulation 460, section 6, items 2, 3 and 4.

Orders and Investigation Reports Considered: Orders P-81, M-1083, MO-1520-I, MO-1699 and MO-1854.

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Metrolinx for information about the PRESTO fare card. The PRESTO card is used for fare payment by a number of Ontario transit authorities.

[2] In particular, the appellant sought access to the following:

Consolidated Accounting statement of all expenses or payments related to presto project from inception to January 31, 2014. I am looking for any

form of document readily available that can tell me what is an internal expense or an external expense. I am not looking for the purpose or vendor code, I just want to know on a yearly basis from 2006 to date what has been spent on presto. Please also reflect any vendor credits. Please do not do extra work, whatever ready made report available from finance. The Presto accounting code should generate report at click of a button.

[3] The requester later amended his request to the following as a result of discussions with Metrolinx:

1. all yearly management financial reports for presto division from 2006-2012
2. all cost communication sent to [a named accounting firm], the Auditor General, Justice Coulter [Osborne]¹ which they relied on in order to get the calculate the [sic] total cost of Presto.

[4] Metrolinx issued a fee estimate, interim access decision and extension of time as follows:

The total estimated fee for access to the requested information is \$2350.00. A breakdown of the fee for this four part request is provided below:

1. All yearly management financial reports for PRESTO division from 2006 to 2012
 - Search Time: 1.5 Hours x \$30.00/hour = \$45.00
2. All cost communication sent to [the accounting firm], which was relied on in order to calculate the total cost of presto
 - Search Time: 18 Hours x \$30.00/hour = \$540.00
3. All cost communication sent to Auditor General, which was relied on in order to get the calculate the [sic] total cost of presto
 - Search Time: 11.25 Hours x \$30.00/hour = \$337.50
4. All cost communication sent to Justice Coulter [Osborne] which was relied on in order to get the calculate the [sic] total cost of presto
 - Search Time: 11.25 Hours x \$30.00/hour = \$337.50

¹ It is evident from Metrolinx' decision letter and representations that this is a reference to Justice Coulter Osborne.

Rather than photocopies, you indicated that your preference is to receive records on a CD ROM.

- CD ROM: \$10.00

In addition, it is estimated that an additional 36 hours is required to pull archived tapes of email correspondence for approximately 4 individuals.

- Preparation Time: 36 Hours x \$30.00/hour = \$1080.00

In email to [the Freedom of Information Coordinator for Metrolinx], dated February 25, 2014, you indicated that "cost communication" should consist of one email. However, the process of providing financial information to [the accounting firm], the Auditor General and Justice Coulter Osborne involved more than this.

Over the course of each review, financial information may have been communicated by several staff members through email, regular mail, or in person during various meetings, on an ad hoc basis.

Records may include emails, letters, slide decks, spreadsheets, etc. As such, retrieval of "cost communication" for each project necessitates a search through current and archived email boxes, electronic files and hard copy files for approximately 10 current and past Metrolinx staff members.

[5] The requester was advised of Metrolinx' preliminary view that sections 12(1), 17(1), 18(1) and 19 of the *Act* may apply to exempt some of the records from disclosure. In addition, Metrolinx informed the requester that it would require an additional 90 days to process the request after it received the required deposit of \$1175.00.

[6] The appellant filed an appeal of the fee estimate outlined in the Metrolinx' interim access decision.

[7] During mediation, the appellant confirmed that he did not wish to submit a fee waiver request and was not appealing the time extension claimed by Metrolinx.

[8] Also during mediation, the appellant narrowed his request to the following:

All cost communication sent to [the accounting firm], which was relied on in order to calculate the total cost of Presto

All cost communication sent to Justice Coulter [Osborne], which was relied on in order to calculate the total cost of Presto.

[9] In response, Metrolinx advised that the fee estimate would be reduced as follows:

The total fee estimate was \$2350.00. The appellant has chosen to remove the following portions of the request:

- All yearly management financial reports for PRESTO division from 2006 to 2012 - \$45.00
- All cost communication sent to Auditor General, which was relied on in order to get the calculate the [*sic*] total cost of presto - \$337.50
- As such, the revised cost would be \$1967.50.

[10] Metrolinx advised that revising the request would not reduce the preparation costs for pulling tapes, as the same ex-staff members are still affected by the remaining portions of the request.

[11] The mediator advised the appellant of the amount of the revised fee estimate. The appellant believed that the amount of the fee estimate remained excessive.

[12] No further mediation was possible. Accordingly, this file has moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. To begin the inquiry, I sent a Notice of Inquiry to Metrolinx, outlining the issues in this appeal and inviting it to provide representations. Metrolinx responded with representations.

[13] I then sent a Notice of Inquiry to the appellant, inviting him to provide representations, and I enclosed a copy of the representations provided by Metrolinx. In response, the appellant indicated that he does not “. . . have further submissions other than what was communicated to the mediator.” The appellant also provided previous communications he had with the mediator in another appeal, and with the Attorney General of Ontario.

ISSUE:

[14] The sole issue in this appeal is whether I should uphold the amended fee estimate provided by Metrolinx.

DISCUSSION:

Should the amended fee estimate be upheld?

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

[16] Where the fee is \$100 or more, the fee estimate may be based on either:

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.³

[17] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.⁴

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

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

[20] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

[21] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section states:

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;

² Section 57(3).

³ Order MO-1699.

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

⁵ Order MO-1520-I.

⁶ Orders P-81 and MO-1614.

- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[22] Section 57(3) of the *Act* deals with fee estimates. It states:

The head of an institution shall, before giving access to a record, give the person requesting access a *reasonable estimate* of any amount that will be required to be paid under this Act that is over \$25. [Emphasis added.]

[23] More specific provisions regarding fees are found in section 6 of Regulation 460. The relevant portions of that section state:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

- 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.

Representations of Metrolinx

[24] Metrolinx provided detailed representations to explain how it calculated the fee estimate.

[25] Prior to outlining the basis for the fee, Metrolinx submits:

PRESTO is a very large, complex operating division of Metrolinx in which the volume of email correspondence is significant. Implementing PRESTO is one of the most complex fare card projects currently underway globally. As such, PRESTO possesses an incredible amount of records.

Several reviews related to Metrolinx's PRESTO program have been conducted, including reviews by [the accounting firm], Former Ontario Superior Court Justice Coulter A. Osborne, and the Auditor General of Ontario.

The appellant's email communication with Metrolinx indicates that he believes "cost communication" would consist of very few emails. Metrolinx explained that the process for providing financial information to [the accounting firm], the Auditor General and Justice Coulter Osborne was a more involved back and forth process. Over the course of each review, several Metrolinx staff members would have communicated financial information through email, regular mail, or in person during various meetings, on an ad hoc basis. Typically in these types of engagements, the reviewer requests certain pieces of information which may be provided electronically or in hard copy. As the review progresses the reviewer may come back to request additional information several times. Records containing financial information may include emails, letters, slide decks, spreadsheets, etc. Retrieval of "cost communication" for each project necessitates a search through active and inactive email inboxes, electronic files and hard copy files.

[26] Metrolinx then explains how it calculated the fees for search time. It states:

The fee estimate was based on a representative sample of the records, as well as the advice of Metrolinx staff who are most knowledgeable on the subject matter and record holdings.

The Metrolinx FOI Coordinator worked with the affected business units (PRESTO and Finance) to identify a list of employees who would possess responsive records. PRESTO and Finance identified approximately 6 current staff members and 4 past staff members as possessing the bulk of the responsive records. Additional staff searches may be required. Please see Appendix A for a list of identified staff, broken down by each portion of the request.

The identified PRESTO and Finance staff who are current employees were consulted in order to determine the time that would be required to search for the records. Current staff were also tasked with undertaking a preliminary scan of their records in order to estimate the number of responsive records in their possession. In order to conduct a reasonable search, each current staff person who has been identified as having responsive records will be responsible to search for their own records. This ensures that the individuals most familiar with the records are conducting the search.

[27] For those past staff who are no longer with the organization, I have relied on advice from current PRESTO staff and, where appropriate, used a comparable staff role for the purposes of the estimate.

[28] With respect to the location of responsive records and the steps needed to locate them, Metrolinx submits as follows:

The requested records may be stored in electronic files, email inboxes/outboxes, and filing cabinets.

Steps that each staff member would carry out in order to search for responsive records would include:

- Identifying all possible locations of records for each part of the appellant's request (e.g. electronic files, shared drives, email inbox/outbox, hard copy files onsite, hard copy files off site).
- Locating and retrieving each hard copy file from filing cabinets.
- Reviewing each hard copy file to identify responsive records.
- Searching for responsive emails and electronic documents by entering in key search terms, based on the subject, in order to narrow down the number of emails.
- Scanning all emails generated by the key word search in order to locate the responsive emails. This would be essential as a key word search may bring up, for example, email correspondence that pertains to the requested topic, but that is not necessarily communication with the specific party that was requested by the appellant.

For current staff members, email correspondence would be accessible on their desktop computers.

For past staff members, restoration of email boxes from archived back-up tapes will be required before conducting the email search. The restoration work would be conducted by Metrolinx's IT department.

Appendix B presents an overview of the estimated search time and page count for each portion of the appellant's request. The estimate was based on the expert opinion of the record holders, as well as a preliminary scan of staff records.

[29] Appendix B to Metrolinx' representations provides details of search times and estimated page counts for the two components of the request: (1) all yearly management financial reports for PRESTO division from 2006 to 2012; and (2) all cost communication sent to each of the accounting firm, the Auditor General and Justice

Coulter [Osborne]. However, as already noted, the appellant has narrowed the request to exclude item (1) in its entirety, and in item (2), to exclude the "cost communication" sent to the Auditor General.

[30] The parts of the request that remain at issue under the narrowed request are therefore the "cost communication" sent to the accounting firm and to Justice Osborne. I will now summarize the contents of Appendix B with respect to these two items.

[31] With respect to the "cost communication" with the accounting firm, Metrolinx estimates that 350 pages of responsive records would be located by searching the email, electronic and hard copy records of eight staff members. For each staff member, 15 minutes would be required for entering keywords and one hour would be required to review all resulting emails to ensure responsiveness. An additional hour is estimated to be required in order to search electronic and hard copy records of each of these staff members. This amounts to 18 hours of search time.

[32] With respect to the "cost communication" with Justice Osborne, Metrolinx estimates that 100 pages of responsive records would be located by searching the email, electronic and hard copy records of five staff members. For each staff member, 15 minutes would be required for entering keywords and one hour would be required to review all resulting emails to ensure responsiveness. An additional hour is estimated to be required in order to search electronic and hard copy records of each of these staff members. This amounts to 11.25 hours of search time.

[33] The total estimated search time for the narrowed request adds up to 29.25 hours. The search fees for 29.25 hours at the rate of \$7.50 for every fifteen minutes (\$30.00 per hour) set out in section 6 of Regulation 460 would be \$877.50.

[34] Metrolinx also identifies additional estimated fees for preparation time relating to the back-up tape restoration that would be required in order to search the records of former staff members. The searches themselves are reflected in the times summarized above. These additional calculations relate only to the process of restoring records from tape. In this regard, Metrolinx submits:

It has been determined by Metrolinx that four (4) key past PRESTO staff members were likely involved in providing information to the parties identified in the request: [the accounting firm], Former Ontario Supreme Court Justice the Hon. Coulter A. Osborne, and the Auditor General of Ontario.

Based on the estimated core time period for these reviews, IT has estimated that there are approximately 36 tapes which will require restoration in order to access past email correspondence, requiring at

least 1 hour per tape, possibly more. Once the appropriate tapes to be restored have been identified, the following steps must be taken:

- Restore the tape, repeatedly checking back to see % completion or take corrective action if the restore stalls for any reason [checking back requires more effort than simply looking at an open screen] (30 + minutes)
- Extract the relevant file by beginning extraction, actively monitoring progress, and closing off the extraction (30 minutes)

These tasks are required in order to generate the responsive information. The restoration is similar to that required in past IPC Order MO-1854.

[35] At one hour per tape applied to an estimated 36 tapes, this part of the estimate produces a total of 36 hours of preparation time. The fees for preparation time of 36 hours at the rate of \$7.50 for every fifteen minutes (\$30.00 per hour) set out in section 6 of Regulation 460 would be \$1,080.00. Metrolinx has also indicated that the narrowing of the request does not reduce the preparation time required to restore the back-up tapes because the same ex-staff members' records must be searched in order to satisfy the remaining portions of the request.

[36] As identified in Metrolinx' fee estimate, the records being disclosed would be provided to the appellant on CD-ROM, and section 6 of Regulation 460 permits a fee of \$10.00 for the CD-ROM. In these circumstances, there would be no photocopy charges. In addition, Metrolinx has indicated that it will not charge preparation time for severing the records.

[37] In sum, Metrolinx' fee estimate to respond to the narrowed request would be the total of the following:

- for search time: \$877.50
- for preparation time: \$1,080.00
- for one CD-ROM: \$10.00.

[38] These amounts add up to \$1,967.50, which matches the amount claimed by Metrolinx in its amended fee estimate following the narrowing of the request during mediation.

The appellant's position

[39] As already noted, the appellant declined to provide representations in response to the Notice of Inquiry, and indicated that he would rely on information he had already

provided. In that respect, he attached previous communications with the Ministry of the Attorney General and the mediator.

In his notice of appeal, the appellant states:

Documents requested are less than 50 pages, they are acting in bad faith by charging more than \$40 per page.

Fix the disclosure costs at \$10 per page.

[40] In his communication declining to provide representations, the appellant notes that he reduced the scope of the request, which should have resulted in a "much lower fee."

[41] The appellant's communication with the Ministry of the Attorney General alleges improprieties in the process of the adoption of the PRESTO card by the TTC, and incorporates a number of press stories. This communication has no bearing on whether the fees charged by Metrolinx are in accordance with the *Act* and Regulation 460, and is therefore irrelevant to the question of whether I should uphold the amended fee estimate.

[42] The communications with the mediator that the appellant has provided to me address another appeal against a decision of the Ministry of the Attorney General, and in particular, the issue of reasonable search. Again, these communications do not speak to whether, in the present appeal of Metrolinx' fee estimate, the fees are in accordance with the *Act* and Regulation 460, and are therefore irrelevant to the question of whether I should uphold the amended fee estimate.

[43] I have also reviewed the portions of the mediator's notes in this appeal that are not subject to mediation privilege. I did not locate any notations that address the issue of whether the amended fee estimate is in accordance with the *Act* and Regulation 460.

Analysis and Findings

[44] Based on section 57(3), the question of whether or not I should uphold the fee estimate depends on whether the estimate is "reasonable." In assessing this question, I must assess whether the estimate is in accordance with the *Act* and Regulation 460, bearing in mind that this is an estimate of the time required to carry out searches and preparation that have not actually been done. In the event that the actual search and preparation time turn out to be lower than the estimate, I would expect Metrolinx to refund any excess fees to the appellant.⁷

⁷ See section 57(4)(a) of the *Act* and section 7(2) of Regulation 460.

[45] Because the fee is over \$100, it was open to Metrolinx to base its estimate on the review of a representative sample of the records or the advice of an individual who is familiar with the type and content of the records.⁸ It is clear that Metrolinx has relied on both a representative sample and the expertise of staff members who are familiar with the records.

[46] In his notice of appeal, the appellant suggests that an appropriate fee would be \$10 per page. There is no basis for this in the *Act* or in Regulation 460 and I reject this argument.

[47] In my view, Metrolinx' original estimate is detailed and well-articulated. It sets out the estimated times for each component of the request, and applies the fees permitted by section 6 of Regulation 460. It distinguishes between search and preparation time. It also addresses the appellant's view that not many records would be required to respond to the request. It explains what types of records would contain responsive information, and also indicates the exemptions that would likely apply. As a consequence, the original fee estimate clearly met the objectives of giving the appellant enough information to decide whether or not to pay the estimated fee⁹, and whether to narrow the scope of the request, as the appellant has done in this case.¹⁰

[48] As already noted, Metrolinx amended this original estimate in response to the appellant's decision to narrow the request during mediation.

[49] Metrolinx' representations amplify the detailed information it provided in the original estimate. With respect to search time, Metrolinx places the records in context, explaining the complexity of its PRESTO division and the nature of the records that would contain the requested information. It sets out detailed information about the process followed to prepare the fee estimate. It provides significant and credible detail about the processes that would be followed by its staff in order to locate responsive records. It estimates the number of pages that would be found with respect to the different components of the request. With respect to preparation time, it provides a detailed explanation of the process required to restore the back-up tapes.

[50] As regards search time, Metrolinx' representations explain that for each identified staff member, it would take an estimated two hours and fifteen minutes to search email, electronic records and hard copies, including keyword entry and detailed document review. In my view, this is a modest estimate, and I find that it is reasonable. The fees are calculated in accordance with the amount allowed under item 3 in section 6 of Regulation 460. I therefore uphold the estimate of \$877.50 for search time.

⁸ Order MO-1699.

⁹ Orders P-81, MO-1699.

¹⁰ Order MO-1520-I.

[51] In explaining the estimate for preparation time relating to restoration of the back-up tapes, Metrolinx has calculated the number of tapes that would require restoration and estimates that an hour would be required for each tape. Again, in my view, this is a modest estimate and I find that it is reasonable. Orders M-1083 and MO-1854 support the view that retrieving data from an electronic source may be charged as "preparation time."¹¹ The fees are calculated in accordance with the amount allowed under item 4 in section 6 of Regulation 460. Accordingly, I uphold the estimate of \$1,080.00 for preparation time.

[52] The fee of \$10.00 for the CD-ROM is in accordance with item 2 in section 6 of Regulation 460. Accordingly, I also uphold this aspect of the fee estimate.

[53] In sum, I uphold the amended fee estimate in the total amount of \$1,967.50. As indicated by Metrolinx, the appellant will be required to pay a deposit amounting to 50% of this estimate.¹² Under the amended estimate, the required deposit would be \$983.75.

ORDER:

I uphold Metrolinx' amended fee estimate of \$1,967.50 and dismiss the appeal.

Original signed by:
John Higgins
Adjudicator

July 29, 2015

¹¹ Orders M-1083 and MO-1854 were decided under the *Municipal Freedom of Information and Protection of Privacy Act* and Regulation 823 made under that statute. Item 4 in section 6 of Regulation 460, made under the *Act*, sets the amount of fees to be charged for preparation time, and is identical to item 4 in section 6 of Regulation 823.

¹² See section 7(1) of Regulation 460.