

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3453

Appeal MA16-30

Hamilton Police Services Board

May 31, 2017

Summary: The appellant filed a request under the *Act* for records relating to employee vehicle claims. The police located responsive records and issued an interim fee estimate requesting partial payment of its \$123.80 fee, which included 4 hours search time. The appellant paid \$67.00 towards the requested fee but appealed the police's fee and denial of his fee waiver request. The police's search fee is reduced from \$120.00 to \$60.00. The police's denial of the appellant's fee waiver request is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 45(1)(a), *Regulation 823*, ss. 6.3.

Orders and Investigation Reports Considered: MO-3262 and PO-3035.

OVERVIEW:

[1] The appellant filed a request to Hamilton Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to employees' personal use of department vehicles and car allowance amounts for the years 2012 - 2015.

[2] The police issued a fee estimate in the amount of \$133.75 and requested payment of half of the estimated fee to continue processing the request.

[3] The appellant paid \$67.00 to the police but questioned the reasonableness of the police's fee.

[4] In response, the police wrote to the appellant to advise that they finished processing the request and invited the appellant to pick up the documents upon payment of the remaining balance.

[5] The appellant appealed the police's fee decision to this office and a mediator was assigned to the appeal.

[6] The mediator explored settlement with the parties but resolution was not possible. At the end of mediation, the appellant confirmed that he continued to question the reasonableness of the police's fee. In particular, the appellant raised questions about the portion of the fee relating to the police's search for responsive records. The appellant also takes the position that the police's search fee should be waived given that dissemination of the record will benefit public health or safety under section 45(4)(c).

[7] The appeal file was then transferred to adjudication where an adjudicator conducts an inquiry under the *Act*. During the inquiry, the police submitted representations and advised that its \$133.75 fee incorrectly included a registered mail cost and confirmed that its revised fee is \$123.80. The police also raised questions about whether the appellant made a proper fee waiver request. The appellant provided a brief response to the police's representations questioning the reasonableness of the police's search fee.¹

[8] In this order, I reduce the police's fee representing its search time from \$120.00 to \$60.00. I also uphold the police's decision to deny the appellant's fee waiver request.

ISSUES:

- A. Should the police's \$120.00 search fee be upheld?
- B. Should the police's \$60.00 fee be waived?

DISCUSSION:

A. Should the police's \$120.00 search fee be upheld?

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

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

¹ Throughout the request and mediation stage the appellant appeared to take different positions regarding what portion of the fee he sought to have waived and whether he was seeking the return of monies he already paid to the police. However, in his representations the appellant takes the position that "...all information must [be] freely available to [the] Public".

² Section 45(3).

- 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

[11] 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

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

[13] In all cases, the institutions must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁶ This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

[14] 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.

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

[16] With its final decision, the police provided the following breakdown of its search fee:

Total time to locate and assemble	240 minutes (4 hours)
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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.

Search time – charge per minute	\$7.50 per 15 minutes (.50 per minute)
Total charge for search	\$120.00

[17] The police submit that the responsive records did not exist in the format requested and state:

After consultation with [City of Hamilton finance staff and police finance staff], it was determined that these records did not exist in the format requested, and had to be extracted from a larger record. Staff were required to manually search through the financial records of the institution. They had to determine the relevant queries and then run the query. This took a total of four (4) hours to complete.

[18] In response to the police’s interim fee estimate, the appellant sent an email raising questions about the portion of their fee representing search time. In that email, the appellant submits that he thought that the time for the police to search for responsive records in this appeal, which totalled 19 pages, would have been lower than the 1 hour the police estimated it would take to locate 2840 pages in another request he filed under the *Act*.⁷

Decision and Analysis

[19] The police’s submissions do not provide specifics regarding where and how they store their expense records. Accordingly, it is not clear to me whether the police’s search included a search of their paper or electronic record holdings, or both. Other than their statement that it took staff 4 hours to “manually search” the records and “run the query” no explanation was offered to detail what specific actions staff undertook to locate the responsive information.

[20] In reviewing an institution’s search fee, previous decisions have considered how responsive records are kept and maintained. These decisions have also reviewed what actions are necessary to locate the requested records and what is the estimated or actual amount of time involved in each action.

[21] Recent decisions of this office have reduced the institution’s fee where the adjudicator found that the search time was inflated as a result of excessive time being logged to search for records that were not being maintained in an “easily searchable manner”. For example, in Order MO-3262, I stated:

Though the appellant’s evidence falls short of demonstrating that the board’s search for responsive records was unnecessary, the appellant’s submissions establish that there has been considerable interest in recent

⁷ The appellant advises that in the other file the police estimated their photocopying costs at \$568.00 and search time at \$30.00, representing 1 hour of search time.

years in the board's trustees' expense claims. I also note that the Toronto Catholic District School Board decided in 2007 to address the public's interest in its trustees' expense claims by posting all trustee expenses on its website.

Furthermore, in Order PO-3035, Commissioner Brian Beamish significantly reduced the search time McMaster University charged to locate expense receipts for a specified individual during 2005 to 2010. In that order, the Assistant Commissioner stated:

The request was for records from January 5, 2005 to December 31, 2010, which I consider of recent origin. In my view, it is reasonable to expect that university records from this time period should be kept in a consistent and easily searchable manner. If they are not, which I believe is the case in this appeal, I am of the view that the appellant should not bear the financial burden of the university's failure to implement proper record management practices. Consequently, I find that the search time is excessive and that the university has not provided adequate evidence to satisfy me that the search time was reasonable.

Given that the subject matter of this request informs the public about how its elected officials spent public monies, it is difficult to conceive of circumstances where it would be appropriate for a member of the public to pay for a laborious search process to access records of recent age that are the center of recent audits and public debate.

[22] Having regard to the submissions of the parties I am not satisfied that the police provided a detailed statement as to how they calculated their fee. The lack of information about what specific actions are required to locate the records raises questions about the reasonableness of the search time claimed by the police, particularly given the nature of the records. Though the police's submissions indicate that the information at issue had to be extracted from their database and converted into a readable format, no information is provided about the specific steps this would have entailed.

[23] In my view, records relating to vehicle expenses inform the public about the expenditure of public funds. Accordingly, such records ought to be stored in a consistent and easily searchable manner to facilitate access requests under the *Act* even if the information is requested in an unanticipated format or needs to be extracted from a larger record.

[24] For the reasons stated above, I find that the police's \$120.00 search fee is not reasonable or in accordance with the fee provisions of the *Act* and Regulation 823 and reduce it in half to \$60.00, representing 2 hours of search time. Accordingly, I calculate the police's allowable fee, as follows:

2 hours search time at \$7.50 per 15 minutes	\$60.00
19 pages photocopy charge at \$.20 per page	\$ 3.80
	<hr/>
	\$ 63.80

B. Should police’s \$60.00 search fee be waived?

[25] As a preliminary matter, in their representations the police submit that the appellant failed to make a proper fee waiver request. However, I note that the appellant’s email, dated January 13, 2015 in response to the police’s final access decision contains a request that the police consider waiving its fee. In response, the police emailed the appellant and advised him to “follow proper procedures” if he wanted to make a fee waiver request.

[26] Typically, 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. However, given that there appeared to be a breakdown of communication between the parties during the request stage I am satisfied that the appellant’s January 13, 2015 constitutes a fee waiver request. In addition, I am satisfied that the police’s advice to the appellant to “follow proper procedures” constitutes their denial of the fee waiver request.

[27] 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.

[28] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with 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.⁸

[29] 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.⁹ The institution or this office may decide that only a portion of the fee should be waived.¹⁰

[30] For a fee waiver to be granted under section 45(4), the test is whether any waiver would be "fair and equitable" in the circumstances.¹¹ Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are:

- section 45(4)(a): actual cost in comparison to the fee
- section 45(4)(b): financial hardship
- section 45(4)(c): public health or safety
- section 45(4)(d)/ section 8 of Regulation 823: whether the institution grants access

[31] Any other factors must also be considered when deciding whether or not a fee waiver is "fair and equitable".

[32] The appellant's submissions appear to submit that dissemination of the record will benefit public health or safety under section 45(4)(c). The parties did not refer to any of the other factors listed at sections 45(4)(a), (b) or (d) and I am satisfied that none apply in the circumstances of this appeal.

[33] Accordingly, I will go on to determine whether the appellant's request for a fee waiver is "fair and equitable" taking into consideration section 45(4)(c) and other factors relevant to the circumstances of the appeal.

⁸ Order PO-2726.

⁹ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁰ Order MO-1243.

¹¹ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

Representations of the parties

[34] In his appeal letter, the appellant states:

As an accountant, it is imperative to obtain actual accounting records to assess the annual budget that police services presents to their board for approval. It is necessary for me to compare actual costs incurred to budgeted amounts and to analyse and interpret actual expenditures.

Of my residential tax, 20% goes to Hamilton Police Services financial operations. Yet, why there is no transparency and Accountability? The Hamilton Police Services Board approves their budget based on the Chief's memo to the board ... but the amounts on those documents significantly differ from the summary of accounts. The amounts on the Summary of Accounts are recorded from and monitored in the accounting records and form the basis for financial reporting to the provincial ministry and to City Council It has been a constant struggle to obtain those accounting records.

[35] The Notice of Inquiry sent to the parties during the inquiry sought their representations on whether dissemination of the records will benefit public health or safety under section 45(4)(c). The Notice of Inquiry identified that the following factors may be 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 ¹²

[36] In response, the police provided representations which state:

In our opinion, there is no connection whatsoever between the Chief and Deputy Chief's car allowance information and public safety.

[37] The appellant submitted brief representations in response to the Notice of

¹² Orders P-2, P-474, PO-1953-F and PO-1962.

Inquiry and argues that the police is "100%" funded by tax payers and that "all information must [be] freely available to [the] Public".

[38] 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.¹³

[39] Though I have not viewed the records, I am satisfied that the subject matter of the records relate to a public rather than private interest. Disclosure of the records would provide information about the police's spending regarding their employees personal use of department vehicles. Given the appellant's advice that he needs the records to compare, analyse and interpret the actual costs amounts to the budgeted amounts, I am also satisfied that there is a likely probability that he would disseminate the records if he perceives any inconsistencies in the police's financial reporting. However, there is insufficient evidence before me to conclude that the subject matter of the records relates to a health or safety issue. In addition, the appellant did not provide evidence demonstrating that dissemination of the records would yield a public benefit by disclosing a public health or safety concern or contribute meaningfully to the development of understanding of an important public health or safety issue.

[40] Having regard to the submissions of the parties along with the circumstances of this appeal, I find that the factor at section 45(4)(c) can not apply in the circumstances of this appeal as there is no connection between the dissemination of the records and disclosure of a public health of safety concern.

[41] However, this does not end the matter, other factors also must be considered when deciding whether or not a fee waiver "fair and equitable". These factors may include:

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

¹³ Orders MO-1336, MO-2071, PO-2592 and PO-2726

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.¹⁴

[42] A relevant factor in the circumstances of this appeal is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the police. The *Act* establishes a user-pay principle where individuals seeking access to government records are required to bear some of the costs involved in processing requests.

[43] In my view, granting the appellant a fee waiver would shift an unreasonable burden of cost of processing the request to the police, which would ultimately fall on other taxpayers. In arriving at this conclusion, I also took into account that I reduced the police's search fee from \$120.00 to \$60.00. I also considered the breakdown of communication between the parties during the latter part of the request stage but find that this factor does not weigh in favour of nor against a fee waiver.

[44] Having regard to the above, I uphold the police's decision to deny the appellant's fee waiver request.

ORDER:

1. I reduce the search time claimed by the police to search for responsive records from \$120.00 to \$60.00.
2. I uphold the police's decision to deny the appellant's fee waiver request.

Original Signed By: _____
Jennifer James
Adjudicator

_____ May 31, 2017

¹⁴ Orders M-166, M-408 and PO-1953-F.