

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3568

Appeal MA16-656

The Corporation of the City of Barrie

February 27, 2018

**Summary:** The City of Barrie (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to a purchase and sale agreement between the city and a named company regarding particular properties. After the request was narrowed, the city issued a fee estimate of \$231.00, requesting the payment of a deposit of 50% of the fee before it continued to process the request. The appellant appealed the city's decision. The sole issue on appeal is the reasonableness of the city's fee estimate. In this order, the adjudicator upholds the city's fee estimate in part.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 45(1) and sections 6 and 7 of Regulation 823 made under the *Act*.

### OVERVIEW:

[1] The City of Barrie (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records including agreements and the closing file related to the city's purchase of certain identified properties in 1998.

[2] The city issued an interim access decision advising that it is prepared to grant partial access to responsive records on payment of a fee, estimating the fees for the processing of the request at \$1,939.40. Pursuant to section 7(1) of Regulation 823 made under the *Act*, the city requested a 50% deposit of \$969.70 before it continued to process the request. The city noted that the large amount of the fee estimate is due to

the broad and general nature of the request and advised that if the scope of the request was narrowed, it might result in a reduced fee.

[3] The requester responded to the city by narrowing his request to a copy of the executed Purchase and Sale Agreement between the city and a named company for the purchase of identified properties.

[4] The city issued a revised decision granting partial access to the record advising that the revised fee estimate for the record responsive to the narrowed request was \$231.00. It provided a breakdown of the fee. The city requested a 50% deposit of \$115.50 prior to continuing to process the request.

[5] The requester (now the appellant) appealed the city's decision with respect to the fee.

[6] During mediation, the appellant was advised that if he could establish that any of the conditions set out in 45(4) of the *Act* apply, he could request a fee waiver. After some consideration, the appellant confirmed that he would not request a fee waiver.

[7] As a mediated resolution regarding the fee charged by the city could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. During my inquiry, I sought and received representations from both parties on the sole issue on appeal: whether the city's fee estimate is reasonable. The city's representations were shared with the appellant. I decided that it was not necessary to share the appellant's representations with the city.

[8] In this order, I uphold the city's fee estimate in part.

## **DISCUSSION:**

### **Should the city's fee estimate of \$231.00 be upheld?**

[9] 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.

[10] More specific provisions regarding fees are found in sections 6, 7, and 9 of Regulation 823. Those sections read:

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.

7.(1) If a head gives a person an estimate of an amount payable under the *Act* and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

### ***Fee estimate***

[11] An institution must advise the requester of the applicable fee where the fee is \$25 or less. Where the fee exceeds \$25, an institution must provide the requester with a fee estimate [Section 45(3)]. Where the fee is \$100 or more, the fee estimate must 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.<sup>1</sup>

[12] 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.<sup>2</sup> The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.<sup>3</sup>

[13] 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>4</sup> This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

### ***Representations***

[14] At issue in this appeal is the city's fee estimate of \$231.00. In its fee estimate, the city provided a breakdown of the amounts charged for search and preparation for disclosure (severances), and photocopying of the responsive record. The fee estimate sent to the appellant was set out as follows:

<b>Action</b>	<b>Search Time/Volume Estimate</b>	<b>Fee</b>
Records Search/Consultation and Preparation Time <sup>5</sup>	7.5 hours @\$30.00 per hour*	\$225.00
Photocopying Fees	30 pages @\$0.20 per page	\$6.00
<b>TOTAL:</b>		<b>\$231.00</b>

\*Based on \$7.50 per 15 minutes for search and preparation time as per Regulation 823, Section 6.

[15] The city submits that its fee estimate should be upheld. It state that the fee estimate is based on actual work completed by the city in response to a similar access request, as well as a review of a representative sample of the records and consultation with individuals generally familiar with the records concerning the property.

[16] To describe the search it conducted, the city provided some background. The city explains that a corporation, separate from the city, was created to purchase and operate the property identified by the appellant. It states that the decision to purchase

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

<sup>2</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>3</sup> Order MO-1520-I.

<sup>4</sup> Orders P-81 and MO-1614.

<sup>5</sup> In its representations, the city submits that although this letter indicates that preparation costs formed part of the estimate, this was included in error. The city enclosed with its representations a tracking document that clearly indicates that no preparations costs were actually included in the fee to be charged.

occurred in 1998/1999. It further states that a decision to wind up that corporation and incorporate its assets into the city was made in 2006<sup>6</sup>. Therefore, the city submits that the Purchase and Sale Agreement sought by the requester was not originally held as part of the city's Corporate Records and Information Management Program and therefore, was not managed in the same manner as other city records.

[17] The city claims that many of the original records from the corporation are currently stored in the Inactive Records Centre as they were originally prepared by representatives of the corporation. Although many of those records were converted to the city's coding system, the city submits that staff who converted the records were not originally involved in the transaction and some of the legal agreement records may not have been separated from general background information. Additionally, the city noted that a large number of land parcels were transferred at the same time as the property identified by the appellant. It stated that, due to the age of the records and the lack of access to individuals involved in the transaction at the time, there is some question as to whether the sale of the identified properties was addressed through a separate agreement or formed part of a general agreement setting out the transfer of a larger group of related properties.

[18] The city submits that upon receipt of the narrowed request, the records previously identified as responsive were reviewed and all records not held by the corporation and the Legal Services Department were removed from the estimate as well as the preparation time. The listing of records to be searched was reduced to 18 physical files and the electronic records. The city also claims that at this time, the Legal Services Department was again consulted regarding the search time that might be involved, along with the Office Co-ordinator and the corporation's internal legal counsel currently overseeing litigation affecting the corporation.

[19] The city submits that "spot reviews of physical corporation records" were conducted by the Records and Information staff and multiple agreements were discovered with complex legal descriptions of specific parcels of land. The electronic records were also searched and multiple versions of draft agreements were located. A legal description of the property was requested to allow staff to determine if any agreement related to the identified properties exists.

[20] The city submits that at the same time, staff requested a search of the agreement index for the requested record in case it had been added to the index since the decision was made to incorporate the operational assets of the corporation into city records. Furthermore, it states that city staff contacted the external law firm that handled the transaction at the time, for a copy of the requested record. The city submits that the external legal counsel advised that due to the age of the file, the records were no longer held on site and a search would be required at their off-site records location.

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<sup>6</sup> Although, the city later notes that the wind up of the corporation has not yet been completed due to litigation affecting it.

[21] The city explains that as a result of the initial efforts required to search for the responsive record, it was determined that a fee estimate should be prepared for the expected amount of search and preparation time that would still be required. It submits that the search time set out in the fee estimate was based on an estimated 15 minutes of search time per corporation file with 14 files to be searched, including the search for electronic records, and an estimated 60 minutes of search time per file for the 4 files held among the Legal Services Department. It explains that the files held by the Legal Services Department are substantially larger than the corporation files.

[22] The city explains that, to date, those estimates were based on the following actual amounts of time spent searching for the responsive records:

- Legal Services – 45 minutes
- Legislative and Court Services – 10 minutes
- Corporation files – 30 minutes

[23] The city clarifies that the above search times do not constitute a full search of the records within each file. It also clarified that the search time in the fee estimate did not include any time that might be charged to the city by the external legal counsel for searching its records.

[24] The appellant's representations do not specifically speak to whether the fee estimate set out by the city is reasonable. His representations provide some background regarding the property to which the records he seeks relate. He submits that the city took steps to develop the lands without, he alleges, proper and full environmental and archaeological clearances. He takes the position that the public has a right to know whether the city conducted itself appropriately under the *Municipal Act* and the city by-laws on the purchase of the land.

### ***Analysis and finding***

[25] In the circumstances of this appeal, I find that I have not been provided with sufficient evidence to determine whether the fee estimate quoted by the city is reasonable. As a result, I will uphold it only in part.

[26] The city has identified 18 physical files and electronic records as potentially containing records that are responsive to the request. It has clarified that 14 of those files originated with the corporation that was formed, and 4 files are held by the city's Legal Services Department. It indicates that, based on its review of a sample of those files, corporation files would take 15 minutes per file to review, and legal services files would take 60 minutes per file to review. It applies these time estimates to the statutorily set search fee of \$30.00 per hour. The city does not appear to include the time spent to search for electronic records in its fee estimate.

[27] While I accept that the city's fee estimate is based on time spent for actual work

done on a representative sample and it has accurately applied the statutorily set fee to that time, in my view, the city's representations lack sufficiently detailed evidence to support the time suggested that it would take to review the responsive files. Aside from indicating that the legal services files are larger than the corporation files, it has provided no indication of the size of these files or of the types of records that they contain. Without additional information (for example, an estimate of the number of pages that each file might contain or a explanation of whether each page of each file needs to be reviewed separately or whether pages are grouped together as reports or agreements), I am unable to determine whether 15 minutes or 60 minutes is a reasonable amount of search time per file, no matter whether it is a corporation file or a legal services file. As a result, I will only uphold the fee in part, as specified below.

[28] With respect to the photocopying fee, I find it reasonable that any records that might be identified as responsive to the request (an agreement regarding the purchase and sale of properties) might contain an estimated 30 pages. As the city has correctly applied the statutorily set fee of \$0.20 per page for photocopying, I accept that its estimated fee of \$6.00 for photocopies is reasonable.<sup>7</sup>

[29] In summary, while I uphold the city's fee estimate for photocopying the agreement that it identifies as responsive to the request, as indicated above, I find that I have insufficient evidence to conclude whether its fee estimate for searching for responsive records is reasonable. In my view, 7.5 hours to search 18 files for a specific agreement appears to be a rather lengthy amount of time.<sup>8</sup> As a result, I will reduce the estimated search time by 50%, allowing the city to charge \$112.50 to spend an estimated 3.25 hours searching for the record that is responsive to the request.<sup>9</sup> Accordingly, the amount of the total fee estimate is reduced to \$118.50 and the 50% deposit owed by the appellant decreases to \$59.25.

[30] As indicated above, the purpose of a fee estimate decision is to give the requester sufficient information to make an informed decision as to whether or not to pay the fee and pursue access. The appellant is entitled to rely on this information in deciding to proceed with his request and pay the deposit. I acknowledge that a fee estimate is in fact an estimate. However, in my view, adjustments to the estimated fees should be limited in nature. While I accept that a final fee for access to the responsive records might be different from that quoted in the estimate, allowing for variances to copying charges based on the actual number of responsive records located, I do not accept that it permits the city to charge entirely new fees not specified in its fee estimate.<sup>10</sup> Previous orders have found that to conclude otherwise would, "defeat the purpose of providing the appellant with a reasonable fee estimate made"<sup>11</sup> and would,

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<sup>7</sup> As these photocopy charges are based on an estimate, in its final fee the city is entitled to charge the statutorily set fee of \$0.20 for the actual number of pages of the responsive agreement.

<sup>8</sup> I note that that search is for a rather lengthy (estimated 30 pages) document that should be relatively readily identifiable amongst other records. I also note that once the record is located, the search is complete and the remaining files need not be searched.

<sup>9</sup> This amounts to a search time of just over 10 minutes per file.

<sup>10</sup> See, for example, Order 81 and MO-1699.

<sup>11</sup> Order MO-1699.

"compromise and undermine the underlying principles of the Act."<sup>12</sup>

[31] In the circumstances of this appeal, the city has not included in its estimate fees that it might charge for preparing the records for disclosure, including any severances that it might make pursuant to the exemptions identified in its interim access decision. Despite its review of a representative sample of responsive records, it has not provided any indication of the degree of severance that might be required, such as an estimated percentage of responsive pages that might require severances. In keeping with the orders mentioned above, in my view, this would amount to entirely new fees not specified in its fee estimate thereby defeating the purpose of fee estimate, which the appellant is entitled to rely on when deciding whether or not to pay the fee and pursue access to the requested records. As a result, the city is not entitled to charge preparation fees in its final fee.

[32] Similarly, the city also advised in its representations that the fee estimate does not include the fees that might be charged to the city by external legal council for searching its records. I acknowledge that based on part 6 of section 6 of Regulation 823, the city is entitled to charge, "the 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." However, given that the city has not provided in its fee estimate any indication of the fees that might be charged by external legal council for searching its records, in the context of this appeal, I do not allow it to charge them back to the appellant in its final fee.

[33] Finally, I note that the city's fee estimate indicates that \$225.00 was the fee to be charged for search/consultation/preparation. In its representations, the city makes it clear that the reference to preparation fees in the estimate was in error and the \$225.00 fee does not include fees for preparing the records for disclosure. With respect to the reference to "consultation" in the estimate however, the city made no indication as to whether the estimated search fees included time for "consultation." As the city's explanation of how it arrived at \$225.00 did not address time for "consulting", I accept that this reference was also included in error. Nevertheless, the city is advised that neither search nor preparation fees can be charged for consulting with the requester or with other employees with respect to how to conduct the search, and it is advised not to charge such fees in its final fee.

**ORDER:**

I uphold the city's fee estimate in part and reduce it to \$118.50.

Original Signed By \_\_\_\_\_  
Catherine Corban  
Adjudicator

February 27, 2018 \_\_\_\_\_

<sup>12</sup> Order 81.