Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3797

Appeal MA18-544

The Corporation of the City of Cambridge

June 28, 2019

Summary: The City of Cambridge (the city) received a request for access to emails shared between city staff or councillors regarding the possible relocation of a shelter. In response, the city issued an interim access decision with a fee estimate and applied a three-month extension of time in which to issue a final access decision. The requester appealed the city's decision. In this decision, the adjudicator finds that the city's interim access decision was inadequate and does not uphold the city's application of the time extension. The adjudicator orders the city to issue a final access decision in response to the appellant's request, without charging a fee, and without recourse to a time extension.

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

Orders Considered: Orders 81, M-1123, MO-1614, MO-2020 and MO-2023.

OVERVIEW:

[1] The City of Cambridge (the city) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a journalist on behalf of a newspaper:

> I am requesting emails sent, received or shared between City of Cambridge staff and or councillors including the mayor with the Cambridge Shelter Corporation related to the possible relocation of the Bridges shelter from its current location on Simcoe Street. This includes but is not exclusive to any advice offered or requested about the process

> for looking for a new site, and financial or other support the city will provide to the corporation related to the relocation. I am looking for any electronic correspondence related to this issue between July 1 and July 25, 2018.

[2] The city issued an interim access decision with a fee estimate. In the decision, the city states the exemptions in sections 10(1) (third party information), 11 (economic and other interests), 12 (solicitor-client privilege) and 14 (personal privacy) of the *Act* may apply to the responsive records. It estimated a fee of $900.00 for responding to the request, which it specified did not include fees for preparing or photocopying the responsive records. The city advised that those fees could only be assessed after it completed the search. The city requested a 50% deposit and advised the requester that it anticipated it would require three months from the day it received the deposit to collect and review all the material.

[3] The requester contacted the city and offered to narrow the request in order to reduce the estimated fee. The city advised the requester that narrowing the request would not reduce the estimate. The requester, now the appellant, appealed the city's interim access decision and its fee estimate.

[4] At mediation, the city confirmed that it was applying a three-month extension of time to respond to the request, pursuant to section 20(1) of the *Act* and the appellant confirmed it was also appealing that decision.

[5] After reviewing the city's interim access decision and fee estimate, the mediator advised the appellant of its ability to request a fee waiver. The appellant subsequently submitted a fee waiver request to the city, which the city did not grant. That matter was then added as an issue to this appeal.

[6] No further mediation was possible and the matters proceeded to the adjudication stage of the appeal process. I commenced this inquiry by providing the city with a Notice of Inquiry that set out the issues under appeal and asked specific questions. The city submitted representations, which were shared with the appellant. The appellant provided representations in response, which were shared in full with the city. The city then provided a reply to the appellant's representations.

[7] In this order, I find that the city's interim access decision is inadequate and I do not uphold its three-month time extension. I order the city to issue a final access decision in response to the appellant's request, without charging a fee and without recourse to a time extension. As a result of these findings, it is not necessary for me to consider whether the fee estimate complies with the *Act* or if it should be waived.

ISSUES:

A. Is the city's interim access decision adequate?

B. Should the city's three-month time extension for responding to this request be upheld?

DISCUSSION:

Issue A: Is the city's interim access decision adequate?

[8] When an institution receives a request for information and the fee is $100 or more, it may choose to do all the work necessary to respond to the request at the outset. If so, it must issue a final access decision. Alternatively, the institution may choose *not* to do all of the work necessary to respond to the request, initially. In this case, it must issue an interim access decision, together with a fee estimate.[1] The institution may also require a requester to pay a deposit towards the fee.[2]

[9] As noted in the Notice of Inquiry provided to the city at the start of this inquiry (the Notice), an interim access decision must be accompanied by a fee estimate and must contain the following elements:

- a description of the records;
- an indication of what exemptions or other provisions the institution might rely on to refuse access;
- an estimate of the extent to which access is likely to be granted;
- name and position of the institution decision-maker;
- a statement that the decision may be appealed; and
- a statement that the requester may ask the institution to waive all or part of the fee.[3]

[10] The purpose of the fee estimate, interim access decision and deposit process is to provide the requester with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access to the records, while protecting the institution from expending undue time and resources on processing a request that may ultimately be abandoned.[4]

[11] The interim decision process also assists requesters to decide whether to narrow

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[1] Order MO-1699.
[2] Section 7 of Regulation 823.
[3] Orders 81, MO-1479, MO-1614 and PO-2634.
[4] Orders MO-1699 and PO-2634.

the scope of a request in order to reduce the fees.[5]

[12] As noted in Order 81 (which is referred to in the Notice), it is the responsibility of the head of the institution to take whatever steps are necessary to ensure that a fee estimate accompanying an interim access decision is based on a reasonable understanding of the costs involved in providing access to the responsive records. Both the Notice and previous orders of this office (referred to in the Notice) are clear that an interim access decision should be based on a review of a representative sample of the requested records and/or the advice of an individual who is familiar with the type and content of the records.[6]

[13] This office may review an institution's interim access decision to determine whether it contains the necessary elements referred to above. If an interim decision does not meet the minimum standards set out above, a number of remedies are available, for example, an adjudicator may order that the institution:

- issue a revised interim access decision;
- undertake additional work for the purpose of issuing a revised interim access decision; or
- issue a final access decision.[7]

[14] This office may also issue an order disallowing some or all of the fees in the estimate accompanying the interim access decision.[8]

The city's representations

[15] The city provided representations for this appeal on December 6, 2018. In those representations it states that it will outline its initial decision letter to the appellant because it "answers a majority of the questions asked in [the] Notice of Inquiry letter." The city then reproduces most of the interim access decision letter it sent to the appellant on August 1, 2018.

[16] The city says that the fees associated with the appellant's request can be broken down into two parts. It says that the first part includes the cost of responding in full to the request under the *Act*, including the "access and extraction" of all of the emails, and the second part relates to the copying and review of the emails.

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[5] Order MO-1520-I.
[6] Orders 81, MO-1479, MO-1614, and PO-2634.
[7] Orders MO-1614 and MO-2023.
[8] Orders MO-1614 and MO-2023.

[17] The city submits that the costs associated with the first part are "significant" and provided the following explanation about the steps it says are required:

> Collection of emails between the various sources outlined by the request involves searching through various email boxes with the use of a query. In order to retrieve the majority of the material requested via city staff and Council email boxes; staff will have to retrieve information from the weekly backup. These backups are produced to enable city staff to rebuild the city's computer systems in the event of a catastrophic system failure and to repopulate those systems with all the information they held prior to any system failure. The backups are designed to facilitate this particular process. Unfortunately they are not set up in such a way that would permit easy extraction of specific items of information. Extraction of specific information is not the intent of the backups nor is it the purpose of the backup system in place in the city.

[18] The city states that the process outlined above is expensive and time-consuming. It asserts that its staff will have to "produce several queries to retrieve data from the outlook database" and then "extract the data in order for it to be prepared for review." It provided the following breakdown of the process it anticipates it will need to undertake:

- First city staff will have to set up and retrieve data from the email boxes of all city staff and Council;
- Anything that has been deleted "later than a week of the current backup" is no longer on the email server or the network system and cannot be retrieved;
- the data from the email boxes of city staff and Council must be separated from the information requested;
- a half hour set up time is required for each requested search;
- at least two keyword searches would be required;
- it is expected that it will take considerable time (five days) to retrieve the required searches;
- While the searches are processing, city staff will have to monitor the process to ensure that it is operating as planned; and
- The city anticipates each search will have to be monitored for several hours.

[19] The city says that once the searches are complete, city staff will have to "extract a copy of the emails in a paper format." It asserts that "at this point in time there is no telling how much corresponding emails matching the request are in city staff and Council email boxes."

[20] The city estimated the following fees for this work:

- $15 for each 15 minutes spent by Technology staff to develop a computer program or other method of producing a record from machine readable record;
- $0.20 a copy for any printed material provided to the appellant; and
- $30.00 an hour for staff time to prepare and review information extracted and eligible within the appellant's request.

[21] The city submits that no matter how narrow the scope of the request, it will still be required to run queries and therefore narrowing the scope would not alleviate the amount of work required by staff.

[22] With regard to the second part of responding to the request (the copying and review of the emails) the city says that it does not know exactly how many copies it will be providing and therefore cannot estimate a fee for copying or severing the records.

[23] With regard to severing, the city says the following:

> It is anticipated that emails that have been requested could contain some form of personal, third party, constituent, and/or solicitor client privilege information. [The *Act*] requires that the city protect from unauthorized use and distribution this type of information in its custody and control. Consequently, it will be necessary for city staff to review each document prior to release to ensure that privacy rights are upheld.

[24] The city then reproduces sections 14 (personal privacy), 10(1) (third party information), 11 (economic and other interests) and 12 (solicitor-client privilege) of the *Act.* It says that "any information that is not eligible for release will be severed from whatever documents we release." It also asserts that the electronic versions of the emails cannot be severed and as such, must be printed.

[25] The city says that it is difficult to anticipate how many emails in the system are relevant to the appellant's request or how long it will take to review all the emails. It asserts that currently there may be as many as 20,000 to 30,000 emails per person in the system and says that there is no way to estimate how many of these emails are subject to the appellant's request. As such, the city says it is unable to provide a total estimate in relation to what it describes as the second part of processing the request.

[26] Additionally, the city states that there will be "duplication of content of emails" and that until the emails are printed there is no way to determine which are duplicates or how many times they have been duplicated. Furthermore, the city says, there is no practical way to separate the duplicates from the originals, so each page of the material produced will have to be reviewed.

[27] The city says it will take approximately two minutes (at $30 per 60 minutes) per

page to review and eliminate any personal, third party, constituent and/or solicitor-client privilege information. However, it reiterates that "it is difficult to estimate how long it will take to review all emails in total subject to the request, without knowing how many emails will be found during the e-discovery process" and that as a result, it can only give the appellant an estimate of "more than $900 for both parts."

[28] The city closes its representations with the following statement, which was not included in its original interim access decision to the appellant:

> Also, there isn't a fee waiving decision, the review of my cost decision lies within the appeal. Waiving a fee is a potential result of the appeal. I advised in my decision letter that the appellant could appeal the costs. This wording is very much in line with the IPC document below and past decisions with the IPC representatives. There is no further decision to be made on my part in terms of the fee.

The appellant's representations

[29] The appellant's representations regarding the city's interim access decision and accompanying fee estimate are brief. It states that the request was narrow and for a period of less than one month. Specifically, the appellant says it sought communications between July 1 and July 25, 2018.

[30] The appellant notes that it submitted the request on July 31, 2018 and received a response from the city on August 1, 2018. The appellant asserts that at that time an extensive extraction from the backup would not have been required since the emails would still be on the regular email server.

[31] The appellant also notes that it attempted to work with the city to narrow the search and reduce the cost, but that the city's "immediate and unequivocal response was that a narrow search would not lower the cost." The appellant points out that in the city's representations it talks about needing to search through various email boxes. The appellant submits that if the search had been narrowed as proposed, it would involve fewer email boxes and consequently less time and effort. It also notes that a narrowed request would have required less printing and less time for staff review, which the city said contributed to the time-related fee.

[32] The city was provided an opportunity to respond to the appellant's representations. Its reply focuses on why the responsive records (that it has not yet identified) may be exempt from disclosure under the *Act*. It says that sections 6 (Draft by-law or draft private bill/Closed meeting) and 15 (Information soon to be published) of the *Act* may also apply to those records, in addition to the exemptions noted in its initial representations. It also provided additional representations related to its assertion that the fees associated with the request should not be waived.

Findings and Analysis

[33] For the reasons that follow, I find that the city's interim decision is not adequate. In summary, the city has not taken sufficient steps to determine the location, quantity, or content of the records that may be responsive to the appellant's request. It has not provided the appellant with a satisfactory description of the responsive records or an estimate about the extent of access it may be granted. As a result, the appellant cannot make an informed decision about the payment of the estimated fees.

[34] In making this decision, I have considered the city's representations that there is no way to estimate how many of the estimated 20,000 to 30,000 emails per person in the system could be responsive to the appellant's request and that "at this point in time there is no telling how much corresponding emails matching the request are in city staff and Council email boxes." I find both statements unacceptable.

[35] I note that the Notice the city was provided clearly specified that if it did not complete the work to respond to the request, its interim access decision and fee estimate should be based on a review of a representative sample of the records or on the advice of an individual familiar with the type and content of the records.

[36] The city provided no evidence to suggest that it took any steps to gain a better understanding of the scope, quantity or content of the responsive records. I see no reason why the city could not have consulted with any of the individuals it believed may hold responsive records or asked some of those individuals to provide a sample of what they might have in their inboxes or estimate how many emails they might have deleted that would need to be retrieved from the server.

[37] Without reviewing any of the responsive records, the city has no way to provide the appellant with a reasonable or reliable indication of whether it might be granted access to the information in those records. The city says that multiple exemptions in the *Act* may apply*,* but it has not provided any estimation of how much information the appellant can reasonably expect to receive if it proceeds with the request.

[38] Furthermore, the city says that it believes a number of discretionary exemptions may apply to the responsive records. However, given that the city has not identified or reviewed any of the responsive records, it cannot have considered whether it may be able to exercise its discretion to grant the appellant access to some of the responsive information.

[39] At this point, the city is asking the appellant to pay a deposit towards a portion of fee (of which the total amount is currently unknown) so that the city will conduct a search for an indeterminate number of records that it does not know the content of and

cannot say how much of the information in those records might be disclosed. This is incompatible with the purpose of the interim access decision, fee estimate and deposit process described above and in previous orders of this office.[9]

[40] I also note that the city submits that duplication issues and its inability to sever information electronically will increase the fees by an amount that cannot be quantified or estimated at this point. The city appears to be asserting that it will not be able to address issues of duplication until after it has printed all of the records. However, it does not explain why this is the case, or how specifically (or to what extent) it anticipates this will affect its fee estimate.

[41] Furthermore, like the appellant, I do not accept the city's assertion that narrowing the request would not have reduced the fee. As the appellant noted, narrowing the request would have presumably resulted in fewer emails that would need to be processed through what the city refers to as "part two" of responding to the request (i.e. the cost of copying and severing a record).

[42] Finally, I note that (as set out in Order 81 and the Notice) an interim access decision must advise the requester of their right to request a fee waiver. The city did not do so in its August 1, 2018 interim access decision letter. Order 81 is clear that an institution's fee estimate and interim access decision should contain a reference to the fee waiver provisions of *Freedom of Information and Protection of Privacy Act* and solicit representations from the requester regarding the head's discretion to waive fees.[10] Order 81 stated that if a requester has already argued for a waiver in the original request, the head's decision regarding waiver should be given in this "interim" notice.

[43] It follows that the city should have advised the appellant of its ability to request a fee waiver in its August 1, 2018 interim access decision. The city says it advised the appellant that it could appeal the costs and that this statement was sufficient to include the fee waiver.[11] Based on the previous orders of this office, I find that a specific reference to the requester's ability to seek a fee waiver was necessary.

[44] For all of the reasons outlined above, I find that the city's interim access decision and fee estimate are not adequate. I will now go on to consider what the appropriate remedy is in these circumstances.

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[9] Orders MO-1699 and PO-2634.
[10] Order 81 is a decision under the *Freedom of Information and Protection of Privacy Act.* Section 57(3) of that Act (section 57(4), as amended), is the equivalent of section 45(4) in the *Municipal Freedom of Information and Protection of Privacy Act.*
[11] The city appears to use the terms "cost" and "fee" interchangeably. However, the actual "cost" of responding to a request can differ from the fees prescribed in the *Act* and the Regulation.

Appropriate remedy

[45] Adjudicators have imposed different types of remedies to address inadequate interim decisions, depending on the facts and circumstances of each appeal.[12]

[46] In Order M-1123, Assistant Commissioner Tom Mitchinson dealt with a situation where an institution responded to a request by providing some responsive records, and then issued a fee estimate to cover other possible responsive records it had not yet identified. Assistant Commissioner Mitchinson concluded that the interim access decision was inadequate and specified the following:

> By not complying with Order 81, none of the benefits of the process identified in that order are present in this case…The appellant does not have the benefit of an interim access decision. Finally, the Commissioner's office has not been provided with the type of information required in order to assess the reasonableness of the fee estimate.

[47] As a result, Assistant Commissioner Mitchinson disallowed the fee and ordered the institution to issue a final access decision to the appellant.

[48] Similarly, in Order MO-2020, Commissioner Brian Beamish said that where an institution had three opportunities to provide the requester with sufficient information about the nature of the responsive records so it could make an informed decision regarding the payment of fees (the original interim decision, a revised interim decision and its representations in response to the Notice of Inquiry issued in that appeal) and the institution had not done so, simply requiring a proper interim decision and fee estimate was not the appropriate remedy at that stage of the appeal.

[49] The Commissioner concluded that the remedy imposed in Order M-1123 was the appropriate remedy. He did not uphold the fee estimate and ordered the institution to provide the appellant with a final access decision, without charging a fee.

[50] In my view, the same remedy is appropriate in this case. The city's failure to provide an adequate interim access decision and fee estimate means that the appellant has no information to assist it in determining whether to proceed with the appeal, and I, as the adjudicator in this matter, have insufficient information to determine the reasonableness of the city's fee estimate.

[51] I note that, as was the case in Order MO-2020, the city had ample opportunity to gather the necessary information to make an adequate interim access decision. In circumstances where it appears the city took no further steps between its August 1, 2018 interim decision letter and the submission of its representations for this inquiry

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[12] Order MO-2020.

four months later, I do not accept its assertion that there is "no way to estimate how many of these emails are subject to the FOI request."

[52] In my view, where the city has not attempted to identify the responsive records, the appropriate remedy is not to order them to do so now. The city has had sufficient opportunity to comply with the *Act*. This matter has been through mediation and the Notice the city received set out what details must be included in an interim decision. In circumstances where it did not provide those details, it is not appropriate for it to do so now.

[53] As noted above, it is the responsibility of the head of an institution to take whatever steps are necessary to ensure the estimate is based on a reasonable understanding of the costs involved in providing access. As stated in Order 81, anything less would compromise and undermine the underlying principles of the *Act.* As such, I will order the city to provide the appellant with a final access decision, without charging a fee.

Issue B: Should the city's time extension for responding to this request be upheld?

[54] In its August 1, 2018 decision letter to the appellant, the city said that it "anticipates" a three-month time period to collect and review all material, from the time it receives the 50% deposit. During mediation, the city confirmed that it was applying a three-month time extension pursuant to section 20(1) of the *Act* and the appellant appealed that decision.

[55] The Notice I provided to the city provided the following information about time extensions pursuant to section 20(1):

> A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, where,
>
> > (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
> >
> > (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.
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> The issue in this appeal is whether a time extension is reasonable in the circumstances of the request, in the context of the provisions of section 20(1). Factors which might be considered in determining reasonableness include:

Section 20(1)(a):

- the number of records requested;
- the number of records the institution must search through to locate the requested record(s);
- whether meeting the time limit would unreasonably interfere with the operations of the institution;

Section 20(1)(b):

- whether consultations outside the institution were necessary to comply with the request and if so, whether such consultations could not reasonably be completed within the time limit.

[56] I asked the city to provide representations in relation to its decision that it would take three months to respond to the appellant's request, and I asked the city to submit any relevant documents or evidence in support of those representations.

[57] The city made the following statement in its representations:

> In order to provide this information to the appellant there [are] costs associated with the search and extraction of emails. The time and effort required by staff to collect the information will take them away from their everyday duties. These everyday duties are serving the public. The extension within my letter below is the maximum time I assume it will take to prepare and expedite the request. I was careful in not under estimating the time frame, but it could potentially take less time than indicated below, again that is just an estimate, because at this point we do not have an exact number of documents that might be revealed during e-discovery.

[58] Based on my review of the rest of the city's decision letter that is replicated in its representations, it appears the city is asserting that gathering the responsive records will take approximately 15 hours of staff time. The city says nothing further about its application of the time extension and it does not directly respond to the matters set out above and sent to it in the Notice.

[59] As a result, I find that the city has not provided an adequate basis for its decision to apply the three-month time extension and I do not uphold its decision.

ORDER:

1. I do not uphold the city's interim access decision or fee estimate.

2. I order the city to issue a final access decision in response to the appellant's request, without charging a fee and without recourse to a time extension, in accordance with section 19 of the *Act*, treating the date of this order as the date of the request, and to send me a copy of the decision when it is sent to the appellant.

Original Signed By: June 28, 2019

Meganne Cameron
Adjudicator