

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3985

Appeals MA19-00087 and MA19-00088

City of Ottawa

December 11, 2020

Summary: The appellant made two requests to the City of Ottawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* for observation reports created during the construction of the Rideau Light Rail Train Station. The appellant appealed the city's search fee estimates and sought a waiver of the fees in these estimates.

In this order, the adjudicator upholds the city's search fee estimates and the city's decisions not to waive them. She also finds that the scope of the requests is that as narrowed by the appellant at the request stage.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17, 45(1)(a), and 45(4)(c).

OVERVIEW:

[1] By way of background, this request is for information pertaining to Stage 1 construction of the light-rail system (LRT) in the City of Ottawa (the city) known as the "Confederation Line". In September 2019, the city completed Stage 1 of LRT at a cost of over \$2.1 billion. It consists of thirteen stations with some stations being located underground in a new downtown tunnel. There have been numerous challenges since construction began, including a sinkhole that developed near the underground Rideau Station in June of 2016 and concerns about the LRT having been delayed for over a year.

[2] Although the city disseminated information about the LRT, including the Rideau Sinkhole Root Cause Analysis Report, and provided general construction updates

online,¹ requests for more detailed information have been processed as formal access to information requests under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*).²

[3] The city received two access requests from the same requester under the *Act* for the following information:

1. From August 1, 2018 to present (October 1, 2018) or to when this request is begun to be processed, provide all Rideau Transit Group [non-conformance] reports (NCR) without attachments. Provide as well since January 1, 2014 to present (beyond NCR reports) more general inspection reports done periodically on LTR construction.

...I seek putting aside search and preparation fees for obtaining the requested NCR reports. Alternatively, for the whole request, I request a waiver of fees on the grounds that the records are of public interest.

2. From October 1, 2018 to present (November 15, 2018 or to when this request is begun to be processed), provide all Rideau Transit Group non-conformance reports (NCR) without attachments. Provide as well since September 1, 2018 to present (beyond NCR reports) observation reports done periodically on LTR construction, as well as (positive and failed tests) test reports/videos on pilot train runs. Include special security reports for the tunnel and downtown parliamentary LRT. Include backup generator plans for the train grid.

... I seek putting aside search and preparation fees and as well, request a waiver of fees on the grounds that the records are of public interest.

[4] For the first request, the city issued an interim decision, fee waiver denial and fee estimate on November 6, 2018. Specifically, it estimated 185 hours of search time for responsive records with an estimated cost of \$5,560. After some clarification with the requester, the city issued a second interim decision and fee estimate on January 9, 2019, reducing the search time to 28.5 hours and estimated cost down to \$855. The request was defined in the city's decision as follows:

From August 1, 2018 to present (October 1, 2018), provide all Rideau Transit Group non-conformance reports (NCR) without attachments.

Provide city observation reports, without attachments, done periodically on LRT construction by the Transportation Services Department on the

¹ <https://www.ligneconfederationline.ca/>

² From the city's representations.

following: 2015, 2016, 2017, 2018 observation reports connected to the Rideau Station.

[5] For the second request, the city issued an interim decision and fee estimate on November 30, 2018. Specifically, it estimated that 53 hours of search time for responsive records (not including the non-conformance reports) was required with an estimated cost of \$1,590.00. The city also denied the requester's fee waiver request.

[6] After some clarification with the requester about the second request, the city issued a second interim decision and fee estimate on January 9, 2019, reducing the search time to 4 hours and estimated cost down to \$120. The narrowed request was defined in the city's decision as follows:

From October 1, 2018 to present (November 21, 2018), provide all Rideau Transit Group non-conformance reports (NCR) without attachments. Provide as well since November 1, 2018 to present (Nov. 21, 2018) observation reports, without attachments, done periodically on LRT construction for the Rideau Station, as well as reports of failed pilot train runs.

[7] The requester, now the appellant, appealed both of the city's second fee estimate decisions and the city's fee waiver denials.

[8] During the mediation stage of the appeal, the appellant advised the mediator that he would like to proceed to adjudication on the issues of fee estimates and waivers.

[9] Specifically, regarding his first request, the appellant stated that he wanted to appeal the fee estimate from the city's original November 6, and 30, 2018 interim decisions, which were based on the original scope of the requests. The city was notified of this. It then took issue with the appellant appealing anything other than the revised fee decisions of January 9, 2019, which were based on the scope as narrowed at the request stage.

[10] The city maintained its position on the fee issues at mediation and objected, when notified by the mediator, to the appellant's request to appeal to adjudication the original fee estimate decisions based on the original scope of the requests.

[11] Accordingly, I will address, as a preliminary issue, whether the appellant is permitted to challenge the original fee estimates based on the original scope of each request, below.

[12] As mediation did not resolve the issues in this appeal, this file was transferred to adjudication where an adjudicator may conduct an inquiry.

[13] I decided to conduct an inquiry and sought the representations of the city and

the appellant. These representations were shared between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[14] In his representations, the appellant narrowed his requests to observation reports, as he had already received the NCRs at no charge from the city. Therefore, the NCRs in both requests are not at issue. Due to the appellant's narrowing of his requests, the failed pilot train run records³ in the second request are also no longer at issue.

[15] In this order, I uphold the city's search fee estimates and the city's decisions not to waive the fees associated with processing the two requests. I also find that the scope of the requests is for observation reports as set out in his narrowed requests made at the request stage of both requests.

ISSUES:

- A. Should the appellant be permitted to challenge the original fee estimates based on the original scope of the requests, given their subsequent clarification?
- B. Should the search fee estimates be upheld?
- C. Should the search fees be waived?

DISCUSSION:

Issue A: Should the appellant be permitted to challenge the original fee estimates based on the original scope of the requests, given their subsequent clarification?

[16] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

³ The city charged the appellant \$90 or 3 hours of search time for the failed pilot train run records.

. . .

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[17] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁴

[18] To be considered responsive to the request, records must "reasonably relate" to the request.⁵

Representations

[19] The city submits that the appellant agreed to narrow the scope of his requests and then appealed the resulting fee estimates dated January 9, 2019. Given this, the city argues that the appellant should not be permitted to challenge the original fee estimates for the two requests that the city issued more than two months earlier on November 6, and 30, 2018.

[20] The city states that the city's Access to Information and Privacy (ATIP) analyst communicated at length with the appellant throughout the processing of the requests, resulting in the requests being clarified and narrowed on a number of occasions. It states that its ATIP analyst, with the support of the Department of Business Support Services staff and the involvement of staff in the city's Light Rail Office, invested a significant amount of time to assist in the clarification and narrowing of the requests.

[21] For the first request, the city states that:

The [appellant] included in his original request the phrase "more general inspection reports done periodically on LRT construction by the Transportation Services Department" and ... the ATIP analyst clarified with the appellant that he was seeking "observation reports". Observation reports are essentially notes made by city staff or contractors that document construction-related observances. If the observation report reveals non-compliance with construction standards then a separate non-conformance-report (NCR) is created [that] describes the fault and the proposed action plan to mitigate the non-conformance. The scope of observations reports sought changed significantly through the process of

⁴ Orders P-134 and P-880.

⁵ Orders P-880 and PO-2661.

having the request narrowed from requesting records for the entire Confederation Line with attachments to records connected with the Rideau Station without attachments.

[22] The city summarized the appellant's interactions with the city regarding the first request, as follows:

November 5, 2018 - the city provides the breakdown for the search time totaling 185 hours for an estimated 120,000 pages of records for four years of observation reports for the entire Stage 1 Confederation Line.

November 6, 2018 – the appellant advised the city to:

...send a fee estimate letter although I would request such fees be forgiven in the public interest. I will likely then consider if fees still apply, narrowing this request for 2014 to 2018 city transportation LRT observations reports.

November 6, 2018 - the city sent the appellant the original fee estimate decision letter, which included a statement that the city was not granting his fee waiver request.

November 16, 2018 - the appellant requests fee estimates for an enumerated six categories of observation reports.

December 12, 2018 - the ATIP analyst provided the estimated total of 66 hours for four categories of documents without attachments while suggesting the search time would be reduced if the request were narrowed further by narrowing the request to a specific LRT station.

December 12, 2018 - the appellant agreed to narrow the scope of the request further to the first category of observation reports without attachments and asked the city to consider releasing a few observations reports.

[23] For the second request, the city states that:

The appellant's request was a follow-up to request [#1] as the records requested in [the second] request included the most recent non-conformance reports (NCRs) as well as "observation reports" ...created since he submitted his previous request...

Similar to the appellant's request for observation reports in request [#1] the appellant had narrowed his request significantly from observation reports for the entire Confederation Line with attachments to records connected with the Rideau Station without attachments...

The total 53 hours search time for the original request November 30, 2018, encompassed "special security reports for the tunnel and downtown Parliamentary LRT" and "backup generator plans for the train grid". The request for pilot train reports was also broader than the narrowed request as it was for not just summary tests and included videos.

[24] The city summarized its interactions with the appellant regarding the second request, as follows:

January 9, 2019 - the ATIP analyst informed the appellant that there were over 500 pages, 50 of which were observation reports without attachments with an estimated 1 hour of search time and the remainder were reports with respect to failed pilot train runs, which would take 3 hours of search time. The analyst did not include in his fee estimate any preparation time and did not charge any amount for the processing of the NCR portion of the request. Staff had reported a total of 515 estimated pages, 465 estimated pages of reports with respect to the failed pilot test and an estimated 50 pages of observation reports. The NCRs were disclosed in full to the appellant at no cost ...by way of [a] letter dated March 14, 2019.

[25] The city submits that the appellant ought to only be permitted to appeal the fee estimates for the records that he ultimately opted to obtain, although the city acknowledges that the earlier estimates are relevant to the fee estimate and fee waiver issues discussed below.

[26] The appellant states that the scope of the requests remains obtaining the full LRT observation reports. He states:

I attempted to come to more reasonable fee estimates by exploring different sub-records or time periods but got nowhere with no new fee structure proportionately...

I never abandoned my desire for or opted out from getting the maximum amount of LRT observation reports.

I request that these appeals be based on the original scope for all LRT observation reports sought even if the City of Ottawa is now alleging that amounts to a fishing expedition, which it is not so, given what these LRT construction reports are done for.

Analysis/Findings

[27] I need to determine whether the appellant should be permitted to challenge the original fee estimates based on the original scope of the requests.

[28] The city submits that the appellant narrowed the scope of his two requests, as follows:

1. From August 1, 2018 to present (October 1, 2018), provide all Rideau Transit Group non-conformance reports (NCR) without attachments. Provide city observation reports, without attachments, done periodically on LRT construction by the Transportation Services Department on the following: 2015, 2016, 2017, 2018 observation reports connected to the Rideau Station.
2. From October 1, 2018 to present (November 21, 2018), provide all Rideau Transit Group non-conformance reports (NCR) without attachments. Provide as well since November 1, 2018 to present (Nov. 21, 2018) observation reports, without attachments, done periodically on LRT construction for the Rideau Station, as well as reports of failed pilot train runs.

[29] Based on my review of the parties' representations, I agree with the city that the appellant narrowed the scope of his requests to these two narrowed requests.

[30] I find that the appellant's requests and subsequently narrowing of these two requests, provided sufficient detail to allow the city to identify the records responsive to the original and narrowed requests.

[31] I find that the city did not choose to define the scope of each request unilaterally and the appellant is limited on appeal to the requests as narrowed by him. I find that the appellant should not be permitted to challenge the original fee estimates based on the original scope of the requests.

[32] I find that, in accordance with section 17 of the *Act*, the appellant, narrowed his two requests. He also provided sufficient detail to enable experienced employees of the city, upon a reasonable effort, to identify the responsive records in both of the narrowed requests. The city, on identifying the responsive records and providing fee estimates, processed the requests as narrowed by the appellant and issued fee estimates for both requests.

[33] In conclusion, the city processed the two narrowed requests and issued fee estimates on them. The parties relied on the requests as narrowed by the appellant. The city's decisions on these requests were appealed by the appellant and forwarded onto mediation and then to adjudication for this inquiry. The appellant now cannot seek to revert to the original requests made prior to agreeing with the city to narrow the requests.

Issue B: Should the search fee estimates be upheld?

[34] An institution must advise the requester of the applicable fee where the fee is \$25 or less.

[35] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.⁶

[36] 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.⁷

[37] 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.⁸

[38] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁹

[39] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.¹⁰

[40] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[41] 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

⁶ Section 45(3).

⁷ Order MO-1699.

⁸ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁹ Order MO-1520-I.

¹⁰ Orders P-81 and MO-1614.

(e) any other costs incurred in responding to a request for access to a record.

[42] 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.

Representations

[43] As set out above, the two requests at issue at adjudication are for access to:

1. From August 1, 2018 to present (October 1, 2018), provide all Rideau Transit Group non-conformance reports (NCR) without attachments. Provide city observation reports, without attachments, done periodically on LRT construction

by the Transportation Services Department on the following: 2015, 2016, 2017, 2018 observation reports connected to the Rideau Station.

2. From October 1, 2018 to present (November 21, 2018), provide all Rideau Transit Group non-conformance reports (NCR) without attachments. Provide as well since November 1, 2018 to present (Nov. 21, 2018) observation reports, without attachments, done periodically on LRT construction for the Rideau Station...

[44] The city states that there are two components to the first request and three components for the second request. However, since the third component of the second request was for failed pilot train runs and these records are no longer at issue, only the first two components of the second request need be addressed in this order.

[45] The first component for both requests is for non-conformance reports excluding attachments for a period of two months. The city states that non-conformance reports from an earlier period were the subject of Order MO-3628 dated June 27, 2018. It states that:

The only issue in that appeal was the [third party information] exemption in section 10(1) and the public interest override in section 16. The adjudicator ordered that the non-conformance reports at issue be disclosed as the public interest override provision applied to the records, but notably the adjudicator held the more detailed attachments to those NCRs were required to be withheld from disclosure.

[46] The city, in processing these requests, retrieved the responsive non-conformance reports without attachments, notified the affected third party, and disclosed the reports to the appellant in full. At no time did the city provide a fee estimate or assess search time for processing the first component of the requests, although the city did charge the requester \$10 for the CD containing the records for the NCRs for the first request. The city waived any fee to process the NCRs in the second request, as the cost to do so was less than five dollars.

[47] The city states that the second component of both requests was for observation reports, which is the information that is at issue in this appeal.

[48] The city states that for the first request, it estimated that each observation report (without attachments) would average 7.5 pages, and that there are approximately 587 responsive observation reports. For the first request, the total estimate was 28.5 hours of search time amounting to \$855 with an estimated 4,400 pages of observation reports.

[49] For the second request, the city assumed (from the first request) that at an average of 7.5 pages, there would be approximately 7 responsive observation reports. The city states that, as such, it has estimated for the second request that there would

be 50 pages of observation reports without attachments with an estimated one hour of search time, for a total of \$30 in search fees.

[50] In arriving at the search fees in both requests, the city states that it relied on the advice of its Business Support Services department and its staff in the Light Rail Office who were familiar with observation reports in calculating the fee estimate. It states that staff would need to search for records in the following three categories of locations:

1. The "Observation Track" electronic record keeping system
2. multiple network drives
3. multiple hard copy documents including notebooks and folders

[51] For both requests, the city states that staff who worked with the records would need to locate the records to determine whether they were in fact responsive as being "connected to the Rideau Station". It states:

Staff would locate some responsive reports in the Observation Track system by filtering results for "Rideau Station" but would need to search multiple additional filters with a view to ensuring that a reasonable search is conducted. Rideau Station is not simply a concrete platform. It is an underground station with many connected components. For example, staff anticipated that observation reports with respect to many components including the ventilation system may not be searchable using the "Rideau Station" filter and the five "segments" of the Confederation Line individually cover multiple stations. After searching each filter, staff would then need to click on each document individually, wait for it to download, and then view the content to confirm whether it was responsive. Although Observation Track does not have a built in report generating function, the estimate does not include the time required to either save the downloaded report into a Microsoft Office/PDF document or print the content of the tabs.

With respect to the hard-copy search and network drive search, LRT Office staff included the time required to conduct a search for records in multiple network drives and physical files and notebooks. An estimated 7 individuals including 3 staff and 4 consultants would be required to undertake this work, ensuring that they check all locations where the documents may be located.

[52] The appellant did not respond directly to the city's fee estimate representations.

Analysis/Findings

[53] The city only issued fee estimates for the search fees for both requests. It did

not provide the appellant with fee estimates as to preparation time for severing information in the observation reports for both requests, as it did not anticipate any preparation time. It states:

The ATIP analyst assessed no preparation time as the determination was that city staff and city consultant-created observation reports would unlikely contain any commercially valuable information that is subject to [the third party information exemption in] section 10 of *MFIPPA*.

[54] For the first request, the city has estimated a search fee of \$855 for 28.5 hours of search time representing approximately 587 responsive observation reports without attachments containing approximately 4,400 pages.

[55] For the second request, the city has estimated a search fee of \$30 for one hour of search time representing approximately 7 observation reports without attachments containing approximately 50 pages.

[56] In arriving at these search fee estimates, the city sought the advice of individuals who were familiar with the type and contents of the requested records. As noted above, the city relied on the advice of its Business Support Services department and its staff in the Light Rail Office who were familiar with observation reports in calculating the fee estimate.

[57] The city is allowed by section 45(1)(a) of the *Act* and section 6.3 of Regulation 823, to charge the equivalent of \$30 per hour for search time (\$7.50 per 15 minutes).

[58] I accept the city's submission on the reasonableness of the fee estimate for the first request. In particular, I accept as reasonable its fee estimate of 28.5 hours (equivalent to a \$855 search fee) in order to identify all the estimated 587 observation reports comprising 4,400 pages from the city's Transportation Services Department over four years (2015, 2016, 2017, and 2018 up until October 1, 2018) in connection to construction of the Rideau Station.

[59] I also accept the city's submission on the reasonableness of the fee estimate for the second request. In particular, I accept as reasonable its fee estimate of 1 hour (equivalent to a \$30 search fee) to search for weekly, monthly or yearly observation reports dated October 1, 2018 to November 21, 2018.

[60] Based on my review of the city's detailed representations as to how it arrived at its search fee estimates in each request, and in the absence of any representations from the appellant challenging the reasonableness of the search fee estimates, I find that the city's search fee estimates are reasonable.

[61] Accordingly, I am upholding the city's estimated search times for both requests. I will now consider whether these search fees should be waived.

Issue C: Should the search fees be waived?

[62] 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.

[63] 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.

[64] 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.¹¹ 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.¹² The

¹¹ Order PO-2726.

¹² See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

factors set out in section 45(4) must be considered in deciding whether it would be fair and equitable to waive the fees.

[65] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.¹³

[66] The institution or this office may decide that only a portion of the fee should be waived.¹⁴

Representations

[67] The city states that the appellant asked that the fees be waived for both requests in the public interest but provided the city with no information to substantiate his assertion. The city, in denying the fee waiver requests, specifically stated that it is not sufficient to declare that there is a "public interest" in the records and the ATIP analyst enclosed with the appellant's decision letter the June 2018 IPC guidance document on *Fees, Fee Estimates and Fee Waivers*.¹⁵

[68] The city states that its primary focus with respect to the waiver was section 45(4)(c) of the *Act* as the "public health or safety" element most closely reflected the appellant's assertion that his requests were in the "public interest". The city states that the appellant was provided with the NCRs, in response to past requests and these two requests, and that any potential dissemination of observation reports would not benefit "public health or safety". The city's rationale was that any information about construction standards not being met would have been included in the NCRs that already had or were going to be imminently made available to the appellant.

[69] The city states that the distinction and relationship between the NCRs and observation reports was formally explained to the appellant when the city disclosed the NCRs to him, as follows:

- Rideau Transit Group (RTG) is building the O-Train Confederation Line for the City of Ottawa
- The city oversees the progress of work to ensure that the system is built in accordance with the specifications laid out in the project agreement (PA).

¹³ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁴ Order MO-1243.

¹⁵ https://www.ipc.on.ca/wp-content/uploads/2018/06/fees-fee_estimates-fee_waivers-e.pdf

- Observation reports are a written record of the city's observations of RTG's work undertaken during the day, either observed or monitored.
- These reports identify specific types of work performed as well as the means and methods used to achieve (i.e. trades, equipment, materials, etc.).
- The reports further note if work was performed in compliance with contract documents (e.g. PA, applicable standards, and approved shop/field drawings).
- When work is identified to be in non-compliance with a specific PA clause and/or noted standard, shop/field drawing etc., the non-compliance is identified and a supplemental non-conformance report (NCR) is issued.

[70] The city states that its ATIP analyst also recalls verbally explaining to the appellant that in some cases observation reports are a collection of attached photos with little or no written explanation. Based on the foregoing, the city submits that observation reports are essentially background information that, if they raise a non-compliance issue, result in the creation of a non-conformance report that the appellant would have already received.

[71] The city, therefore, concluded that observation reports connected to Rideau Station would not disclose any broad "public health or safety" specific issues under section 45(4)(c) of *MFIPPA*. It also states that the records do not contain information about any broader "public interest" issues not disclosed through the NCRs provided to the appellant through previous requests and his current requests.

[72] The city states that the ATIP analyst made reasonable efforts to work constructively with the appellant to narrow the requests and explained how observation reports are created. The city states that it also provided the appellant with three observation reports in each request for his consideration free of charge.

[73] The appellant states that the city seeks to discount any of its LRT observation reports being of public interest, including for health and safety, as in the case of NCRs that could be triggered by city observation reports.

[74] The appellant states that both the city and a third party contractor can initiate NCRs and that the LRT system needs monitoring and past construction scrutinized.

[75] The appellant states that the LRT and its safety and other problems have continually and daily been in Ottawa Citizen and CBC Radio media stories and that this includes matters like welding and LRT platform problems and extra costs. He submits that having LRT observation reports would serve a public interest and costs to obtain them add a barrier and lower the likelihood of necessary public accountability.

[76] In reply, the city asserts that the Head appropriately decided to adhere to the user-pay principle under the *Act* with respect to the observation reports while at the

same time not charging search time for the NCRs.

[77] The city states that the sample observation reports provided to the appellant reflect the nature of the records requested, which are essentially notes made by city staff and/or city consultants about the construction.

[78] The city states that the appellant appears to mischaracterize the city's position with respect to the nature of the documents that are responsive to his request. Although the city has not had the opportunity to review all of the thousands of pages of responsive records, it is of the view that they are not records of significance from a public interest perspective. In particular, the city does not believe they will disclose a public health or safety concern or contribute meaningfully to the development of understanding of an important public health or safety issue.

[79] The city relies on Order MO-2215, where I found that, while records may, in general, be of interest to the public, the appellant must provide sufficient evidence to lead to a conclusion that there is a specific interest, related to health and safety, held by the public in the particular information being sought.

[80] The city submits that it is not unusual to encounter delays in completing large projects. It states that on September 14, 2019, it welcomed the public aboard the first stage of the new LRT line. It further submits that despite having been provided with the NCRs, the appellant has only made conjectures with respect to "serious construction problems" and not explained any link to public health or safety concerns.

[81] In summary, the city submits that the most recent fee estimates ought to be upheld because they were generated based on a series of consultations with knowledgeable staff and they should not be waived or reduced as the city worked with the appellant to narrow the scope of the request, including providing him with:

- breakdowns for the multiple fee estimates,
- sample observation reports, and
- all the responsive NCRs.

[82] Finally, the city submits that a reduction in fees for processing these requests for general records would shift an unreasonable burden of the cost from the appellant to the city ATIP Office, which processes hundreds of access to information requests a year.

[83] In sur-reply, the appellant provided an Ottawa Citizen article dated December 3,

2019,¹⁶ in which he states that the city announced a sweeping review of Stage 1 of the LRT maintenance operational deficiencies carried out by RTG, including using outside experts. He states that, as part of that review, the city's role in monitoring LRT construction would be placed under the microscope. He submits that the public should also know how, through observation reports, the city did its monitoring.

[84] In further reply, the city states that the Ottawa Citizen article addresses the topic of "maintenance operational deficiencies" and was likely published further to a status update that city staff provided to the Transit Commission on November 20, 2019. It states that there have been updates since that date and the city has announced the withholding of maintenance payments due to LRT service delays caused by malfunctions. The city explains:

For example, there have been issues with delays caused by jammed doors on the LRT trains and bugs in the computer systems that have periodically caused the system to experience delays, resulting in inconvenience to passengers. The third party consortium that designed and built the LRT is currently responsible for maintaining the line until 2038.

The requests that are subject to this appeal are with respect to construction records that were created when the consortium was building the LRT line. [The city has generated] maintenance related records ...since September 14, 2019 when the line was open to the public. The relevance, if any, of the Ottawa Citizen article to [these appeals] is not clear as the records at issue in [these appeals] are with respect to the construction phase of the project rather than maintenance of the line.

[85] In response, the appellant states that the records can help the public understand the link between LRT maintenance woes and the quality of construction, as well as concerns about public safety. He asks that the search fees be waived as they were for the NCRs (some of which were prepared as a result of the observation reports).

Analysis/Findings

[86] 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.¹⁷ Section 45(4) lists certain factors that must be considered in deciding whether it would be fair and equitable to waive the fees, including actual cost in comparison to the fee, financial hardship, public health or safety and whether or not the requester is given access to the record.

¹⁶ <https://ottawacitizen.com/news/local-news/city-puts-rtg-under-closer-watch-as-company-debug-2-1-billion-lrt-system>

¹⁷ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

[87] The public health or safety factor raised by the appellant in section 45(4)(c) must be considered in deciding whether it would be fair and equitable to waive the fees.

[88] 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 or safety issue.¹⁸ From my review of the appellant's representations, I conclude he is claiming public safety issues, not public health issues.

[89] The following factors may be relevant in determining whether dissemination of a record will benefit public 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 safety issue;
- whether the dissemination of the record would yield a public benefit by
 - a. disclosing a public safety concern, or
 - b. contributing meaningfully to the development of understanding of an important public safety issue; and,
- the probability that the requester will disseminate the contents of the record.¹⁹

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

¹⁸ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

¹⁹ Orders P-2, P-474, PO-1953-F and PO-1962.

- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.²⁰

[91] The observation reports at issue in these appeals contain the city's observations of the work undertaken by the builder of the transit line, either observed or monitored, and from the time before the line was opened. These reports identify specific types of work performed, as well as the means and methods used to achieve this work. The reports further note if work was performed in compliance with contract documents.

[92] As the city notes, when the information in the observation reports is identified to be in non-compliance with the work that was to be done, a NCR is issued. The appellant has copies of these NCRs for the time periods set out in the two requests.

[93] The observation reports, therefore, can be put in two categories, those that raise a non-compliance issue, which result in the creation of NCRs, and those that do not raise a non-compliance issue.

[94] As such, the appellant, by receiving the NCRs, would have already received information about any compliance issues with the construction of the Rideau Station in the LRT from January 1, 2015 until November 21, 2018. The information that the appellant has not received is information that does not reveal compliance issues in the construction of the Rideau Station.

[95] The appellant's position is that the observation reports reveal LRT maintenance woes and quality-of-construction information about the Rideau Station, which can help the public understanding of concerns that include public safety.

[96] I find that the appellant has not demonstrated that disclosure of the observation reports would benefit public safety, especially with respect to the information that he has not received access to, the observation reports that do not address compliance issues. I am satisfied that the observation reports that address compliance issues resulted in the creation of NCRs, which were provided to the appellant.

[97] I find that dissemination of the records at issue would not yield a public benefit by either disclosing a public safety concern, or contributing meaningfully to the development of understanding of an important public safety issue.

[98] The appellant provided me with, and relies on, a December 3, 2019 Ottawa Citizen article. This article reveals that the city has launched a review of RTG's

²⁰ Orders M-166, M-408 and PO-1953-F.

operations to see if there are any deficiencies in the company's work maintaining the \$2.1-billion LRT system, including personnel working on it, the resourcing level, and the techniques used to maintain the system. In the article, the city comments that RTG has done well recently keeping trains in service, but wants to see evidence that the company can sustain those operations.

[99] I find that this article does not support the appellant's claim that the information in the operation reports that he has not received is a matter of public interest. The article is about maintaining and operating LRT system, which has been in operation since September 2019. The records at issue in these appeals, however, concern the construction of the LRT system from January 1, 2015 until November 21, 2018.

[100] Besides not being persuaded that the information in the observation reports would benefit public safety, I find that it would not be fair and equitable for the appellant to be granted a fee waiver.

[101] In making my determination in deciding that a fee waiver is not fair and equitable for both requests, I have considered that overall the factors listed above do not favour a waiver of the fee the city is to charge. In particular, the following factors do not support a fee waiver for both requests:

- the city worked constructively with the appellant to narrow the requests;
- the city provided the appellant with the responsive requested NCRs free of charge, as well as providing him with six observation reports free of charge;
- the requests involve a large number of records, namely, an estimated 587 observation reports (comprising an estimated 4,400 pages) for the first request and an estimated 7 observation reports (comprising an estimated 50 pages) for the second request; and,
- waiver of the fees would shift an unreasonable burden of the cost from the appellant to the institution.

[102] Therefore, I find that a fee waiver is not justified in the circumstances of both requests. I am upholding the city's decision not to grant the appellant fee waivers for both requests.

ORDER:

I uphold the city's decisions in both appeals and dismiss the appeals.

Original Signed by: _____
Diane Smith
Adjudicator

December 11, 2020 _____