

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-4123

Appeal MA20-00497

Toronto Hydro Corporation

November 5, 2021

**Summary:** The appellant submitted two access requests to Toronto Hydro Corporation and Toronto Hydro-Electric System Limited (together Toronto Hydro) seeking records relating to Toronto Hydro's costs and communications. Toronto Hydro claimed that the request at issue in this appeal was frivolous and vexatious and, in the alternative, refused to confirm or deny the existence of any responsive records pursuant to section 8(3) in conjunction with section 8(1)(l) (facilitate the commission of an unlawful act) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed Toronto Hydro's decision to this office and in Order MO-3935 the adjudicator found that the request was not frivolous or vexatious under section 4(1)(b) of the *Act* and did not uphold Toronto Hydro's decision to refuse to confirm or deny the existence of any records on the basis of section 8(3), in conjunction with section 8(1)(l). He ordered that Toronto Hydro produce a fresh access decision without relying on either provision. Toronto Hydro then issued a fee estimate decision, which the appellant appealed. In this order, the adjudicator partly upholds Toronto Hydro's fee estimate decision.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, 20 c. M.56, as amended, sections 45(1), 45(1)(a), 45(1)(b), 45(3); Regulation 823, section 6.

**Orders Considered:** Orders M-1083, MO-1854, MO-3935 and PO-3590.

### OVERVIEW:

[1] The appellant submitted an access to information request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to Toronto

Hydro Corporation (Toronto Hydro). The request was for access to the following information for the time period from January 22, 2016 to December 31, 2016:

Copies of all records (including but not limited to emails from work and/or personal email accounts, BlackBerry messages, letters, reports, notes to file, calendars and diary or agenda entries) reports mentioning me, [requester's name] (by name, partial name, or as "[named news outlet] reporter" or any other description), and/or my Freedom of Information requests dated January 22, 2016 ... originating from, sent to or cc'ing the following Hydro staff: [five named individuals]. My request covers any correspondence to, from or cc'ing outside agencies including any representatives of [named law firm] and [named securities expert].

[2] In response to the request, Toronto Hydro issued a decision letter, which reviewed the details of the request and stated:

... Toronto Hydro cannot confirm or deny the existence of any of the [requested] records for the period January 22, 2016 to December 31, 2016, pursuant to sections 4(1), 8(1)(l) (including in respect of obligations under applicable securities laws), 8(3), 20.1(1) and 22(2) of the *Act* [...]

[3] It added:

As per section 20.1(1) of *MFIPPA*, among the reasons your request is being refused is our belief that it is frivolous and/or vexatious. As you are aware, you have multiple access to information requests to Toronto Hydro in respect of which appeals are currently pending before the Information and Privacy Commissioner. We believe that this request is part of a continued attempt by you to request records that are the subject of, or which pertain to, the existing appeals. Additionally, your express indications to us that you intend to build a story in the media around your existing appeals lead us to believe that this request amounts to an abuse of the right of access, is made in bad faith and/or is made for a purpose other than to obtain access. ...

[4] Toronto Hydro also reserved the right to rely on additional or alternative objections and/or exemptions, including section 12 (solicitor-client privilege) of the *Act*.

[5] The appellant appealed the access decision.

[6] The appeals of this request and a related request were both dealt with in Order MO-3935. In that order, the adjudicator found that the request was not frivolous or vexatious under section 4(1)(b) of the *Act* and did not uphold Toronto Hydro's decision to refuse to confirm or deny the existence of any records on the basis of section 8(3), in conjunction with section 8(1)(l). He ordered that Toronto Hydro produce a fresh access decision without relying on either provision.

[7] In compliance with Order MO-3935, Toronto Hydro then issued a fee estimate decision.

[8] With respect to the request at issue in this appeal, Toronto Hydro estimated there were approximately 2,632 pages of records that may be responsive to the request and broke down the interim fee estimate in their decision letter as follows:

Locating and retrieving records:	65.8 hours @ \$30 per hour
	= \$1,974
Preparing records for disclosure and handling records: (includes severing process)	105.2 hours @ \$30 per hour
	= \$3,156
Photocopies and printouts:	2,632 pages at @ \$0.20 per page
	= \$526.40
Total Fee Estimate:	\$5,656.40

[9] Toronto Hydro requested a deposit of \$2,828.20 to continue processing this request.

[10] The appellant appealed Toronto Hydro's fee estimate to the Office of the Information and Privacy Commissioner (the IPC).

[11] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[12] I decided to conduct an inquiry into the appeal. During the inquiry, I sought and received representations from Toronto Hydro which were shared with the appellant who provided responding representations.

[13] In this order, I partly uphold Toronto Hydro's fee estimate decision.

## **DISCUSSION:**

[14] The sole issue in this appeal is whether Toronto Hydro's fee estimate is reasonable.

[15] Institutions are required to charge fees for requests for information under the *Act*. Section 45 governs fees charged by institutions to process requests.

[16] Under section 45(3), an institution must provide a fee estimate where the fee is more than \$25. The purpose of the fee estimate is to give the requester enough

information to make an informed decision on whether or not to pay the fee and pursue access.<sup>1</sup> The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.<sup>2</sup>

[17] The institution can require the requester to pay the fee before giving them access to the record.<sup>3</sup> If the estimate is \$100 or more, the institution may require the person to pay a deposit of 50 per cent of the estimate before it takes steps to process the request.<sup>4</sup>

[18] Where the fee is \$100 or more, the fee estimate can 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>5</sup>

[19] In all cases, the institution must include:

- a detailed breakdown of the fee; and
- a detailed statement as to how the fee was calculated.<sup>6</sup>

[20] The IPC can review an institution's fee and can decide whether it complies with the *Act* and regulations.

[21] Section 45(1) sets out the items for which an institution is required to charge a fee:

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;

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<sup>1</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>2</sup> Order MO-1520-I.

<sup>3</sup> Regulation 823, section 9.

<sup>4</sup> Regulation 823, section 7(1).

<sup>5</sup> Order MO-1699.

<sup>6</sup> Orders P-81 and MO-1614.

(d) shipping costs; and

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

[22] More specific fee provisions are found in section 6 of Regulation 823. Section 6 applies to general access requests and provides that,

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.

### **Toronto Hydro's representations**

[23] Toronto Hydro submits that the amount of the fee estimate in this case, which consists of the costs for locating, retrieving, preparing records for disclosure and handling and copying the requested records, is driven by the large volume of records requested. It argues that reducing these fees in these circumstances would shift an unreasonable burden of locating, retrieving, processing and copying costs from the appellant to Toronto Hydro. Toronto Hydro further submits that the appellant works for a media outlet and has made the request in the course of his employment, for business reasons and not for personal or non-business reasons. In addition, it submits that while the appellant could have sought to narrow or restrict his request, and thereby reduce the amount of the fee estimate, he elected not to do so. Instead, he chose to sustain his very broad request. It states that it would not be fair and equitable to require Toronto Hydro to reduce its fee estimate when the appellant elected not to reduce or restrict his request, owing to the number of documents at issue.

[24] Toronto Hydro explains that the fee was prepared in accordance with the user

pay principle established by the *Act*. It asked a law firm's e-discovery team to assist with preparing the estimate, "drawing on their expertise in document searching, collection, severance/redaction and production". Toronto Hydro explains that the e-discovery team are "very familiar with Toronto Hydro's servers and computer systems". The team assisted "with estimating the number of hours required to determine where the records are kept and maintained and to locate the requested records."

[25] Toronto Hydro submits that:

To estimate the number of potential documents that might be responsive to the request, Toronto Hydro (with [named law firm's] assistance) considered the various types of possible data (e.g. emails, calendar entries, word documents, hard copy documents, excel spreadsheets etc.) and the various potential locations of the data (e.g. email boxes, shared drives on network servers, laptops, hard drives as well as paper files) and [a] number of custodians/senders/recipients,...

Toronto Hydro also ran various computer searches. The searches were run by Toronto Hydro's IT group and not the individual custodians. The preliminary searches did not include a search of paper records or other files. [Footnote omitted]

Based on the preliminary computer searches and considering other potential sources of data, Toronto Hydro (with [named law firm's] assistance) estimated that there could be 2,632 documents included in the requested information.

[26] Toronto Hydro submits that to locate all the responsive records, there will need to be detailed searches conducted of various electronic and paper records for each of five Toronto Hydro employees named in the request. It states that the electronic data will be searched by using keywords searches across various locations on Toronto Hydro's server and the records resulting from those searches will need to be reviewed to determine if they are responsive to the request. Toronto Hydro submits that:

... Having regard to the period sought to be searched (49 weeks), number of employees/custodians (5) and the nature of the documents requested (paper, electronic, email, calendar entries, other documents), it was estimated that the total number of hours required to locate approximately 2,632 records is 65.8 hours, which at \$30 per hour, results in an estimated cost of \$1,974 to search for and locate the responsive records.

This estimate is in keeping with earlier IPC decisions. For example, in *South Bruce Peninsula (Town) (Re)*<sup>7</sup>, [Footnote omitted] the IPC considered whether it was reasonable for the Town to spend the allocated amount of time searching the records requested. A similar nature of records as in this case (i.e. a mix of emails and paper records) were considered, but the request was for a shorter duration of time (i.e. around 10 weeks). The IPC found that around 20-50 minutes per person conducting the search for a total of 13 hours was reasonable. Accordingly, extrapolating to around 49 weeks in this case, and 5 employees/custodians, an estimate of 65.8 hours is reasonable ...

[27] Toronto Hydro submits that the estimated cost of preparing the records for disclosure consists of estimating:

... both the costs to: (i) sever the records - owing to the existence of privileged communications contained in the records (in this regard, it is noted that the appellant's request seeks disclosure of records wherein Toronto Hydro's General Counsel and external legal advisors are sending, receiving, or copied on communications and, by extension, raise privilege issues); and (ii) for the running of reports from computer systems.

[28] Toronto Hydro submits that in light of the inevitable (and significant, in terms of anticipated number/volume) privilege issues that will arise in the responsive records, the cost for severing the records was calculated using the estimated page count (2,632) and multiplying same by two minutes per page, totalling approximately 87.7 hours for a total estimated fee for severing the records of \$2,631.20.

[29] Toronto Hydro adds:

Given the volume of records, the records will be processed in an eDiscovery database management tool. The tool used in this case is Axcelerate. It is estimated that it will take 17.5 hours to run reports from Axcelerate to prepare the records for disclosure. [Footnote omitted] 17.5 hours, multiplied by \$30 per hour totals \$525.

There are many steps involved in processing the data in the Axcelerate database and preparing the records for disclosure. In this matter, the following initial steps will be required to transfer the data:

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<sup>7</sup> Order MO-3858.

(a) Toronto Hydro will need to transfer the data to [the law firm] via an electronic file transfer site. [The law firm] will set up the electronic file transfer site and Toronto Hydro will upload the data to the site.

(b) Once the data is uploaded, [the law firm] will download the data and process the data to prepare it for ingestion into a document management software tool. [Footnote omitted]

The next step is to set up a document management database within the Axcelerate platform and the data is then ingested into the database. Reports are then run to identify any exceptions to the data that may have occurred during ingestion (i.e. documents that failed to process, issues with spam, issues with passwords, corrupt files etc.). Optical character recognition is also applied to the data. Once complete, the data is promoted to a review platform within the eDiscovery tool. [Footnote omitted]

Once the severance process is complete (as outlined and as calculated separately, above) the documents are prepared for production by creating a production workflow in the document review platform. Various reports are run to ensure the production is complete and accurate and that the documents are ready for production. The production is then generated. [Footnote omitted]

Once the production is complete, various additional checks are performed by running reports in the document review platform to ensure the production output is correct. If there are any errors, the production needs to be corrected and run again. If the production is accurate, it is then prepared for delivery by exporting the documents from the document review platform.

[30] Toronto Hydro submits that the total estimated time for preparing the records (including for severing records and running reports for production) for approximately 2,632 pages is 105.2 hours (87.7 hours to sever and 17.3 hours for running reports), which at \$30 per hour generates a total of \$3,156 in estimated preparation fees.

[31] Toronto Hydro adds that despite that it could have done so, it did not include any computer hosting or storage costs for the production of these records in its fee estimate. Nor did it include any shipping costs.

[32] Toronto Hydro submits that:

To give a measure of the costs that will be incurred by Toronto Hydro that were not passed along to the appellant, given the volume of records, there will be hosting and storage fees for the data in Axcelerate, the document management database that will be used to make any



production of these records. It is estimated that these fees will be \$15 GB per month and that there could upwards of 2 GB of data, consisting of \$30 in monthly fees. [Footnote omitted]

[33] Finally, Toronto Hydro submits that it included a cost of \$526.40 for photocopies and printouts, explaining that this number was derived by multiplying the estimated number of pages (2,632) by \$0.20 per page as prescribed by section 6.1(1) of Regulation 823.

[34] Toronto Hydro provided an affidavit of a member of the law firm's eDiscovery group in support of its fee estimate.

### **The appellant's responding representations**

[35] The appellant remains unconvinced after reading Toronto Hydro's representations and believes that the amount sought per page is excessive. He submits that while the total amount is manageable for a business like his newspaper, it might not be for members of the public seeking information that is by right belongs to them, unless the institution can prove otherwise. He adds that other access to information requests from his newspaper "might yield thousands of pages and the resulting bill, using Toronto Hydro's calculations, would be huge."

[36] He submits:

Secondly, Toronto Hydro is a publicly owned utility that, as I've learned in trying to get information about a thwarted plan for partial privatization, has enormous resources at its command. The fact that [named law firm], a top-tier Bay Street law firm that Hydro hired to fight me on my original request, has also been hired to fight my attempt to get a more reasonable processing fee, seems pertinent.

Finally, and I know this is speculative and you can't consider it in terms of the rules over what institutions can charge, but I'll say it anyway. My experience with Toronto Hydro to date and its proclivity for secrecy suggests to me the pages I am paying for will be heavily redacted, in many cases entirely so, and I will then be before you again with another appeal.

### **Analysis and finding**

[37] Some elements of the appellant's representations appear to be the types of submissions that are sometimes made in support of a fee waiver request under section 45(4) of the *Act*. The appellant has not formally requested a fee waiver. A requester must first ask an 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. In the absence of such a request, I will address the fee waiver issue and the

submissions that may relate to a fee waiver request no further in this appeal.

[38] With respect to the search time under section 45(1)(a), I find that Toronto Hydro has provided me with sufficient evidence to substantiate the estimated time to locate the responsive records in both its electronic and paper holdings, and I uphold the estimated fee for search time under section 45(1)(a) of \$1,974.00.

[39] With respect to the record preparation component of the fee which is governed by section 45(1)(b) of the *Act*, Toronto Hydro allocated 87.7 hours to sever the records and 17.3 hours for running reports from Axcelerate to prepare the records for disclosure. I accept that 87.7 hours for severing the records (based on two minutes per page) for a total amount of \$2,631.20 is a reasonable fee estimate for severing the records.

[40] I do not make the same finding with respect to the amount claimed for running reports. While Orders M-1083 and MO-1854 support the view that retrieving data from an electronic source may be charged as "preparation time", I find that the claimed estimated fee for the running of reports does not fit within the scope of section 45(1)(b). Previous IPC Orders, with which I agree, have found that activities such as data analysis, reviewing of data, assembling information and records, and proofing data are not allowable charges under the *Act*.<sup>8</sup> Accordingly, I find that Toronto Hydro is not entitled to charge the 17.3 hours for running reports from Axcelerate. As a result, I disallow that amount.

[41] Finally, as the appellant did not request that records be provided on CD-ROM as allowed under item 2 of section 6 of Regulation 823, I also uphold Toronto Hydro's estimate of photocopying fees of \$526.40 based on the estimated 2,632 pages of responsive records.

[42] In my view, except for the estimated fee for running reports, Toronto Hydro has provided a fee estimate that complies with the provisions of the *Act*. As set out above, Toronto Hydro has provided me with sufficient evidence to substantiate the estimated amount of time required to locate responsive records, and except for the estimated cost of running reports, to prepare them for disclosure. In that regard, it is the breadth of the appellant's request that resulted in the estimated fee. It is therefore the scope of the request and not the method of calculating the estimated fee that results in the amount to be charged for processing the request.

[43] It must also be pointed out that Toronto Hydro's interim fee estimate is simply the estimated cost for processing the request. Toronto Hydro has indicated that many of the responsive records will likely be severed because some information may be

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<sup>8</sup> Orders M-1083 and PO-3590.

subject to solicitor-client privilege and qualify for exemption under section 12 of the *Act*. Once the deposit fee is paid the request is then processed. At that stage, Toronto Hydro could generate an index of records for the appellant's review, thereby allowing him to determine which of the responsive records he requires. This may, or may not, reduce any fee. Between the interim fee estimate, as I have allowed in this order, and Toronto Hydro's indication of the possible application of the section 12 exemption, the appellant is now in a position to determine whether he should proceed with his access request.

**ORDER:**

1. I do not uphold Toronto Hydro's fee estimate as reasonable. I order Toronto Hydro to reduce the estimated fee for preparing the records for disclosure from \$3,156 to \$2,631.20, resulting in a reduction of the total fee estimate from \$5,656.40 to \$5,131.60.
2. In all other respects, I uphold Toronto Hydro's fee estimate.

Original Signed by: \_\_\_\_\_

Steven Faughnan  
Adjudicator

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November 5, 2021