

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4460

Appeal MA21-00717

The Corporation of the City of Oshawa

November 8, 2023

Summary: After being ordered by the IPC to search for additional records, the city located and issued a new decision for records, in which it assessed a fee. The appellant appealed the search fee and asked for a fee waiver.

In this order, the adjudicator upholds the city's \$300 search fee and the city's decision not to waive this fee.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, section 17(1).

Orders Considered: Orders MO-3973-I, MO-4083-I, and MO-4171-F.

OVERVIEW:

[1] This order concerns the reasonableness of a search fee, and whether this fee should be waived.

[2] The Corporation of the City of Oshawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to specified information about a particular property.¹

[3] The city issued a decision in which it made references to the mandatory

¹ The appellant also requested that the records be provided on CD-ROM format.

exemption at section 14(1) (personal privacy) and the discretionary exemption at section 6(1)(b) (closed meeting) of the *Act*. The city indicated that it would release records upon the conclusion of third party notification. The city issued a subsequent decision granting partial access to the responsive records, withholding some information under the discretionary exemption at section 12 (solicitor-client privilege) and section 14(1) of the *Act*. The city produced an index of records containing a description of the responsive records and exemptions relied upon to withhold records in full or in part.

[4] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC).

[5] Appeal MA18-386-3 was opened and resulted in two interim orders, MO-3973-I and MO-4083-I. In both interim orders, the adjudicator ordered the city to conduct further searches for responsive records. As well, in Interim Order MO-3973-I, the adjudicator upheld the city's access decision.

[6] In response to the second interim order, MO-4083-I, the city issued a revised decision granting partial access to additional responsive records with severances pursuant to the discretionary exemptions at sections 6(1)(b), 11 (economic and other interests), 12, and 13 (threat to safety or health), as well as the mandatory exemptions at sections 10(1) (third party information) and 14(1) of the *Act*, charging a fee of \$300 representing 600 minutes of search time.

[7] In its revised access decision, the city explained that although it would charge a fee, it would waive 540 minutes of preparation time² and explained that this fee waiver (which amounted to \$270) was due to the duplication of records. This decision also indicated that some information was also redacted as non-responsive.

[8] The appellant submitted a request to the city for an additional fee waiver. The city denied the request, responding as follows:

In accordance with the Revised Notice of Decision for this file dated September 16, 2021, due to the duplication of records within this release the city waived all fees associated with preparing the records for release [referring to the 540 minutes, described above]. In accordance with section 45(4) of the Act, I reviewed your Request for Fee Waiver as provided to City Clerk Services on September 17, 2021, as well as your Request for Reconsideration of Fee Waiver dated October 15, 2021. After consideration of the details of your request and in conjunction with the partial waiving of fees already provided by the city, the remaining fees levied in response to your request will not be waived.

[9] The appellant appealed the city's revised decision and the denial of the additional

² The city charged a \$10 fee for putting the records on a CD-ROM. The appellant does not challenge this \$10 CD-ROM fee, which is an allowable amount under the *Act* and section 6.2 of Regulation 823.

fee waiver to the IPC.

[10] The IPC assigned a mediator to explore resolution. During mediation, the appellant stated that he is appealing the search fee amount of \$300 and the denial of the fee waiver. He believes that the fee was inflated due to an unnecessarily broad search conducted by the city. The city told the mediator that it maintains its decision. The appellant told the mediator that he wished to pursue this appeal at adjudication on the issues of fee and fee waiver.

[11] Since no further mediation was possible, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[12] An inquiry was conducted and representations were sought and exchanged between the parties by the former adjudicator assigned to this appeal in accordance with the IPC's *Practice Direction 7*. The appeal was then assigned to me to complete the inquiry. I reviewed the materials in the file and did not find it necessary to seek further representations from the parties.

[13] In this order, I uphold the city's \$300 search fee and its decision not to grant the appellant's fee waiver request.

ISSUES:

- A. Should the city's search fee of \$300 be upheld?
- B. Should the city's fee of \$300 be waived, in whole or in part?

DISCUSSION:

Issue A: Should the city's search fee of \$300 be upheld?

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

[15] 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.³ The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.⁴

[16] The institution can require the requester to pay the fee before giving them

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

access to the record.⁵ 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.⁶

[17] 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.⁷

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

- a detailed breakdown of the fee; and
- a detailed statement as to how the fee was calculated.⁸

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

Representations

[20] The city states that due to the scope of the further searches ordered in Interim Order MO-4083-I (the order the search was in response to), and the elapsed time between the initial request and the supplemental search, city staff were required to search through additional repositories for responsive records (e.g. digital back-ups and off-site physical records storage). For this work, the appellant was charged a search fee equivalent to 600 minutes of staff time.

[21] The city states that the search fees charged to the appellant were calculated based on actual work completed by city staff in accordance with section 6 of Regulation 823, which provides for a fee of \$7.50 for each 15 minutes (or \$30 per hour) spent for manually searching a record.

[22] The city states that the requested records were retained both electronically and in hard copy format. The hard copy records were retained both onsite at City Hall and in off-site records storage. While the electronic records were retained within the city's email system, as well as in various shared drive folders on the city's servers.

[23] The city submits that because the requested records were retained both electronically and in hard copy, various city staff in multiple branches were required to be involved in conducting the searches for responsive records.

⁵ Regulation 823, section 9.

⁶ Regulation 823, section 7(1).

⁷ Order MO-1699.

⁸ Orders P-81 and MO-1614.

[24] In terms of search methodology, the city states that its Manager of Policy in Planning Services and its Manager of Cybersecurity & Infrastructure Operations were identified to be the subject-matter experts on the records and technology related to the issue at hand, therefore it was appropriate that they conduct the searches in response to Interim Order MO-4083-I. It explains the time that was taken as follows:

First, City Clerk Services staff (now Legislative Services) spent approximately one hour assisting with the preliminary search effort by using the city's records management system [name] to identify hard copy files in off-site storage, and then recalling the files for review by Planning Services staff.

Second, the Manager of Policy in Planning Services spent a total of 9.5 hours searching through file drawers in City Hall and records retrieved from off-site storage for responsive hard copy records; as well as, in the Planning Services and Development Services shared drive folders on the City servers and email inboxes/folders for electronic records.

Finally, the Manager of Cybersecurity & Infrastructure Operations spent a total of four hours running a search query through the city's email server. This search was run in several ways to ensure the results were captured correctly, and also involved the extraction of results to make them available to City Clerk Services staff (now Legislative Services) for review and release.

As a result of the searches, the city located 1193 pages of records that were responsive to the appellant's request...

The searches detailed above were conducted by the identified city staff in response to Interim Order MO-4083-I. These search efforts were all found to be reasonable in Final Order MO-4171-F.

[25] The city states that the actual work completed by its staff in searching for responsive records was 14.5 hours (870 minutes), and that only 600 minutes (10 hours) of this time was charged to the appellant. (This is in addition to the "waiver" initially applied by the city, and as described above, of 540 minutes.)

[26] The appellant does not directly challenge the \$300 search fee, representing 10 hours of search time, in his representations.

Findings

[27] Section 45(1)(a) sets out that an institution is required to charge a fee, as follows:

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.

[28] More specific search fee provisions are found in section 6 of Regulation 823. Section 6 applies to general access requests, such as this one:

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:

...

- 3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.

...

[29] In this appeal, the city based its fee on the actual work done to respond to the request. It states that its actual search fee was \$435, not \$300. That is, the appellant was charged a search fee equivalent to 10 hours of staff time, not the actual 14.5 hours of search time. (This is in addition to the city's initial decision not to charge the appellant for 270 minutes of time, described above.)

[30] In response to its searches, the city located 1193 pages of records. The reasonableness of the city's search for records in response to Interim Order MO-4083-I was addressed in Final Order MO-4171-F (the final order), where the adjudicator upheld the city's search, as follows:

...taking into consideration the city's representations, affidavit evidence, and recent access decision (which resulted in locating and identifying over 1000 pages of responsive records, after the search following Interim Order MO-4083-I), I find that the city has provided sufficient evidence that it took reasonable steps to identify and locate the responsive records within its custody or control. More specifically, I now have sufficient evidence before me about which experienced employees searched for the remaining records at issue, the search parameters and terms used, and the locations that they searched.

For these reasons, I uphold the reasonableness of the city's search, and dismiss the appeal.

[31] The city only charged the appellant \$300 for 10 hours of search time instead \$435 for the actual 14.5 hours it spent searching for responsive records. Based on my review of the parties' representations, including the city's detailed representations on its

search efforts, I am upholding the city's search fee of \$300 as reasonable. In this order, I am upholding the city's search fee of \$300.

Issue B: Should the city's fee of \$300 be waived, in whole or in part?

[32] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 45(1) and outlined in sections 6 and 6.1 of Regulation 823 are mandatory unless the requester can show that they should be waived.⁹

[33] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 45(4) of the *Act* and section 8 of Regulation 823 set out matters the institution must 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.

[34] A requester must first ask the institution for a fee waiver and provide detailed information to support the request. If the institution either denies this request, or chooses to waive only a portion of the fee, the IPC may review the institution's decision,

⁹ Order PO-2726.

and can uphold or modify the institution's decision.¹⁰

[35] The city reiterates that in its initial decision it waived its \$270 preparation fee and submits that the acceptance of an additional waiver for the \$300 search fee would not meet the fee waiver requirements outlined in section 45(4). It says that the appellant has not adequately demonstrated the below criteria:

- 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.

[36] The appellant does not respond to these submissions in his representations. Instead, he challenges the city's search parameters in response to Interim Order MO-4083-I. The city responds by referring to the final order, where the adjudicator upheld the city's search as reasonable, including its search parameters. The city refers to the following passage, in particular:

I find that the search parameters set out above are consistent with the wording of the original request, and items 3 and 5¹¹ in the appellant's list of records that he believed to be "missing." As a result, I find that these search parameters are reasonable.

[37] The appellant's position is that the city located more records than he asked for and also located non-responsive records in its search. He has not reviewed the records located by the city, as he has not paid the fee yet. He does not address the fee waiver issue directly, instead his representations focus on the scope of the search conducted by the city, which is not the issue before me, and which is an issue that was addressed in the previous orders (MO-3973-I, MO-4083-I, and MO-4171-F).

[38] In terms of a fee waiver for the \$300 search fee, I have considered whether it would be fair and equitable to do so.

[39] A fee must be waived, in whole or in part, if it would be "fair and equitable" to do so in the circumstances.¹² Factors that must be considered in deciding whether it would be fair and equitable to waive the fee are set out above.

[40] The appellant has not addressed whether he would suffer financial hardship

¹⁰ Section 45(5), Orders M-914, MO-1243, P-474, P-1393 and PO-1953-F.

¹¹ Items 3 and 5 were records of:

3) the city's Planning & Development Services Department's "[street name]" property file.

5) correspondence with the two named previous city real estate managers.

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

under section 45(4)(b) or whether distribution of the records would benefit public health or safety under section 45(4)(c), both of which weigh in favour of the granting of a fee waiver.

[41] In this appeal, the actual cost to the city in searching for records is higher than the fee assessed by the city, namely \$300 versus the actual search fee of \$435. In these circumstances, this factor set out in section 45(4)(a) applies and weighs against waiving the fee.¹³

[42] Regarding section 45(4)(d) of the *Act*, section 8 of Regulation 823 under the *Act*, does not apply in favour of the search fee being waived as the city did not give the appellant access to the records, nor is the fee less than \$5.

[43] The institution must consider any other relevant factors when deciding whether it would be fair and equitable to waive the fee. 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 requester worked constructively with the institution to narrow the scope of the request,
- whether the request involves a large number of records,
- whether the requester has offered a compromise that would reduce costs,
- whether the institution provided any records to the requester free of charge, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.¹⁴

[44] Overall, considering all the factors listed in section 45(4) and these other relevant factors, I find that a fee waiver is not fair and equitable in the circumstances.

[45] Specifically, I have carefully reviewed the appellant's representations and have considered his representations that the city has located too many records, some of which, he says, are not responsive to his request. As such, this would weigh in favour of a fee waiver. However, the city has significantly reduced its fee, which is relevant to any additional records it searched for and located in its searches. The city has not charged the appellant the \$270 preparation fee and also has reduced the search fee from \$435 to \$300.

¹³ Order PO-3755. See also Order PO-2514.

¹⁴ Orders M-166, M-408 and PO-1953-F.

[46] I have also taken into account the following factors that weigh in against a further waiver of the fee:

- the city worked constructively with the appellant to clarify the request (see Interim Order MO-3973-I), and
- the \$300 search fee applies to a large number of records (1193 pages of records).

[47] It is my view that a fee waiver would shift an unreasonable burden of this cost from the appellant to the city.

[48] I find, on balance, that the considerations in favour of not granting a fee waiver outweigh those in favour of the granting of a fee waiver.

[49] Accordingly, I uphold the city's decision not to waive the city's \$300 search fee.

ORDER:

I uphold the city's \$300 search fee and its decision not to waive this fee.

Original signed by: _____
Diane Smith
Adjudicator

_____ November 8, 2023