

ORDER MO-2023

Appeal MA-040345-2

Toronto Community Housing Corporation

NATURE OF THE APPEAL:

The Toronto Community Housing Corporation (TCHC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a contract between the TCHC and the property manager for a specific property.

The TCHC did not issue an access decision for the request within the 30 days, nor did it request a time extension to process the request pursuant to section 20 of the *Act*. Accordingly, the TCHC placed itself in a “deemed refusal” situation pursuant to section 22(4) of the *Act*.

The requester, now the appellant, appealed the deemed refusal of his request and appeal MA-040345-1 was opened. Appeal MA-040345-1 was resolved by Order MO-1880, which ordered the TCHC to issue a decision letter to the appellant regarding access to the requested records, in accordance with the *Act* and without recourse to a time extension. The TCHC complied with Order MO-1880 and issued an interim access decision and fee estimate to the requester.

In their decision letter, the TCHC identified the responsive record as being approximately 700 pages long, including applicable “schedules” which define the contractual obligations of the two parties. The TCHC advised the requester that the estimated fee for the search and severance of the record was \$600.00 and that pursuant to section 7(1) of Regulation 823 made under the *Act* a deposit of \$300.00 was required for the TCHC to take further steps to prepare the record for disclosure. The TCHC also indicated it would be charging photocopy fees statutorily set at \$.20 per page.

The appellant appealed the fee estimate to this office. As a result, appeal MA-040345-2 was opened.

During the initial processing of the appeal, the appellant wrote to the TCHC requesting a waiver of the fee under section 45(4) of the *Act*. The TCHC did not respond to the appellant’s fee waiver request or provide him with a decision on the fee waiver issue.

During the mediation stage of the appeal process, the mediator called both the Freedom of Information Coordinator of the TCHC and legal counsel for the TCHC on several occasions. No one from the TCHC responded to the mediator’s phone calls. The mediator also wrote to TCHC on February 28, 2005 but received no response.

During mediation, the appellant confirmed that he is appealing the fee estimate, as well as the fact that TCHC, by its non-response, did not grant his fee waiver request.

As mediation was not possible, the file was transferred to adjudication.

I began my inquiry by sending this Notice of Inquiry to the TCHC. The TCHC did not respond to the Notice, nor did it respond to several phone calls made by an Adjudication Review Officer inquiring as to whether it would be submitting representations.

I then sent a copy of this Notice of Inquiry to the appellant, and received representations in return.

DISCUSSION:

INTERIM ACCESS DECISION AND FEE ESTIMATE

General principles

An institution is authorized to charge fees for processing requests pursuant to section 45(1) of the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in section 6 of Regulation 823 (as amended by O. Reg 22/96). This provision states:

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 floppy disks, \$10 for each disk.
- 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 a 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.

Where the fee exceeds \$25.00, the institution must provide the requester with a fee estimate. Where the fee is \$100.00 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the appeal. A fee estimate of \$100 or more must be based on either:

- The actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[Orders P-81, MO-1699]

This office may review an institution's fee and/or fee estimate to determine whether it complies with the fee provisions of the *Act* and Regulation 823.

Under the *Act*, an institution must, in all cases, issue a fee estimate together with an access decision within 30 days of receiving a request, unless a time extension is requested or notice to affected parties is required (sections 19, 20, and 21 of the *Act*). It cannot simply issue a fee estimate and refuse to provide any indication of whether access will be granted. This office has recognized, however, that it may be unduly expensive for an institution to respond to a request that involves a large amount of records that require a significant amount of search and/or preparation time. As a result, this office has developed an interim decision process that permits an institution to give a requester an idea of what information he or she is likely to obtain, and at what cost, without the institution having to do all the work necessary to respond fully to the request. Therefore, if denial of access in whole or in part is contemplated, the institution must either indicate which exemptions apply to what information and why (final decision), or the extent to which access is likely to be granted based on specific exemption that may apply (interim decision).

The purpose of the interim access decision and fee estimate is twofold: to permit an institution to meet its obligations to a requester under the *Act* while not putting it to the expense of searching, preparing and making a final access decision for a request for a large number of records and to give the requester sufficient information to make an informed decision on whether or not to pay the fee and to pursue access to the requested records [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699 and PO-2299].

However, if an institution wants to take advantage of this procedure, the interim decision must meet certain minimum standards established in a line of decisions starting with Order 81, which was issued by former Commissioner Sidney Linden. In that order, Commissioner Linden set out the procedures to be followed. These procedures contemplate that an interim access decision is based on a review of a representative sample of the requested records and/or the advice of an individual who is familiar with the type and content of the records and that the decision should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fee.

Order 81 and subsequent orders have established that a fee estimate that accompanies an interim decision must contain a number of specific requirements [see, for example, Orders M-555, M-1123, MO-1614, PO-2299]. Recently, in Order MO-1980, Adjudicator John Swaigen summarized these requirements as follows:

1. A reasonable estimate of proposed fees under section 45(3) should be accompanied by an interim notice under section 19, indicating whether the requester is likely to be given access to the requested records [including an indication of what exemptions might be relied upon by the institution to refuse access];
2. A requester must be given sufficient information to make an informed decision regarding payment of fees;
3. It is the responsibility of the head of the institution to take whatever steps are necessary to ensure the estimate is based on a reasonable understanding of the costs involved in providing access. Anything less would compromise and undermine the underlying principles of the *Act*;
4. To be satisfied that the fee estimate is reasonable without actually inspecting all the records, the head must do one of two things:
 - (a) Seek the advice of an employee of the institution who is familiar with the type and content of the requested records
 - (b) Based the estimate on a representative sample of the records.
5. The head's notice to the requester should include:
 - (a) A breakdown of the estimated fees;
 - (b) A clear statement of how the estimate was calculated; and
 - (c) Whether it is based on consultations or a representative sample;

6. If the institution does not indicate in its fee estimate that access to the records will not be granted, it is reasonable to conclude that the records will be released in their entirety upon payment of the required fees.

If an interim decision and fee estimate do not meet these minimum standards, one of the remedies an Adjudicator may consider is disallowing some or all of the fee estimate. Where the interim decision is found to be inadequate, this office may order the institution to: issue a revised interim access decision; undertake additional work for the purpose of issuing a revised interim access decision; issue a final access decision; or disallow some or all of the fee [Order MO-1614]. Therefore, one of the factors that I may consider in deciding whether to uphold the fee estimate is the adequacy of the TCHC's decision letter.

In my view, the interim decision issued by the TCHC does not meet the long-established requirements of this office. Although it states that the TCHC is prepared to grant access to the responsive record it also indicates that a fee is to be charged for severances that are to be made. The TCHC does not identify which exemptions are likely to be claimed for the severed portions. Therefore, the decision does not provide the appellant with any indication of how much of the information in the record is likely to be disclosed, and how much is likely to be withheld.

Although the decision letter exclaims that the TCHC can charge \$7.50 for each 15 minutes of search time and that 20 hours of staff work is estimated, it does not explain what portion of those 20 hours are to be spent searching for record and what portion is to apply to the severances previously alluded to. Accordingly, in my view, the interim decision does not contain an adequate breakdown of the search fee or explanation of how it was calculated.

Moreover, although reference is made to an employee who was consulted, it is not entirely clear whether the estimate was reached by reviewing a representative sample of the record or by seeking the advice and consultation of a knowledgeable employee of the institution who is familiar with the type and content of the requested record.

In short, in my view, the interim decision is inadequate as it does not provide the appellant with sufficient information to make an informed decision as to whether to pay the fee and pursue access, particularly given that he has not been provided with any information as to what portion of the records he is likely to receive in return for his payment.

Should the fee estimate be upheld?

In determining whether to uphold a fee estimate, my responsibility under section 45(5) is to ensure that the estimated amount is reasonable. The burden of establishing the reasonableness of the fee estimate rests with the institution, in this appeal the TCHC. To discharge this burden, the TCHC must provide me with detailed information as to how the fee estimate has been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

As noted above, the TCHC did not provide representations in response to the Notice of Inquiry. However, in its decision letter the TCHC states that it is charging a fee to locate and sever the records requested by the appellant. The TCHC's decision letter states:

I am pleased to advise you that access to the records is available.

However, due to the sheer volume of material that constitutes records you requested, I am asking for a fee to locate and sever the records. The Senior Legal Counsel has estimated that the contracts between [named property management company] and the TCHC, specifically pertaining to [named address], would require about 20 hours of staff time to research and sever the records. The complete contract is approximately 700 pages long, including applicable "schedules" which serve to define the contractual obligations of the two parties.

According to [Regulations 823 made under the *Act*], TCHC can charge \$7.50 for each 15 minutes of staff time spent searching. With an estimated 20 hours of staff work, the total for research would be \$600.00. Please also note Section 7(1) of the regulations permits TCHC to apply for a 50% deposit prior to the execution of the search. If you wish the records, I ask that you please send a cheque or money order for \$300.00 made out to Toronto Community Housing. As well [the *Act*] mandates that individuals making a request will be required to pay a photocopying charge at \$.20 per page.

The appellant submits:

In response to Issue B of the Notice of Inquiry, I think that the TCHC estimate of 20 hours of staff time to research and sever the records was made in bad faith.

The appellant goes on to explain that in his view a more reasonable estimate of the time that it would take to prepare the records would be 4 hours resulting in a cost of \$120.00 and that this fee, together with a cost of \$0.20 a page for photocopies totalling \$140.00 might be considered reasonable. The appellant also states that even if the total cost charged by the TCHC were the "reasonable" fee of \$260.00, that amount is beyond his means to pay.

Analysis and finding

The TCHC's fee estimate, as quoted above, indicates that the record itself is approximately 700 pages long and the time required to "research and sever the record" is estimated at 20 hours of staff time for a total of \$600.00.

I acknowledge that the TCHC is entitled to charge \$7.50 for each 15 minutes (or \$30 per hour) of search and/or preparation time (including severances), and, generally this office has accepted that it takes two minutes to sever a page that requires multiple severances [see Orders MO-1169, PO-

1721, PO-1834, PO-1990]. Taking this into account, given the fact that TCHC estimates that there are 700 pages of records, if it could be successfully argued that there were indeed severances to be made on every page of the contract, at two minutes a page, it would take a TCHC staff member approximately 23 hours to sever the records in preparation for disclosure. Following this reasoning, at \$30 per hour of searching for and/or severing a record, the TCHC would reasonably be entitled to charge \$690.00 for the preparation of the record alone, not factoring in any search time. In such a circumstance, it would be difficult to argue that the TCHC's fee estimate was unreasonable and it would likely be upheld.

However, the TCHC's decision is inadequate and makes it difficult for me to understand the fee and therefore find it to be reasonable. As I have stated above, the TCHC states in its decision letter "that access to the record [the appellant] requested is available", yet also states that severances must be made. The TCHC makes no reference to which exemptions may apply to the information that is to be severed or the estimated amount of severances that must be made. Additionally, the fee estimate does not adequately break down the fee or describe how it was calculated making it unclear as to what portion of the estimated 20 hours of search and preparation time apply to the search for the record and what portions of those hours apply to the severance and preparation of the record. Without a breakdown it is also difficult to determine whether the estimated search time for locating the one responsive record or the time spent severing the record is reasonable.

For these reasons, I find that the TCHC has not provided sufficient information as to how it calculated its fee estimate for the search and preparation of the requested records for me to determine whether or not the fee estimate is reasonable in the circumstances. Accordingly, I do not uphold the TCHC's search and preparation charges.

The appellant does not dispute the applicability of fees for photocopying. In fact, in his representations, he takes the position that it would be reasonable for the TCHC to charge for photocopying the 700 page record; at \$.20 per page, which would amount to \$140. Accordingly, I uphold the TCHC's decision to charge photocopying fees, at a rate of \$.20 per page.

FEE WAIVER

General principles

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.

Section 45(4) provides as follows:

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 in the regulations,

Section 8 of the Regulation in then prescribes, in part:

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.

... .

In the circumstances of this appeal, the TCHC has indicated that it will grant access to the record.

A requester must first ask the institution for a fee waiver before this office will consider whether such waiver should be granted. Under section 45(5), an appellant has the right to ask this office to review an institution's decision not to waive the fee. This office may then either uphold or overturn the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F].

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the appropriate standard to be applied by the Commissioner in reviewing decisions of the head under section 57(4) of the provincial *Freedom of Information and Protection of Privacy Act* (which is equivalent of section 45(4) of the *Act*), is one of correctness. In that same order, former Assistant Commissioner Glasberg also found that the phrase "in the head's opinion" means only that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee, and this wording does not affect the statutory authority of the Commissioner and her delegates to review the correctness of that decision.

It has been established in previous orders that the person requesting a fee waiver bears the onus of establishing financial hardship under section 45(4)(b) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances (Orders M-429, M598 and M-914).

Part 1: basis for fee waiver

The appellant submits that he is entitled to a fee waiver on the basis of financial hardship (section 45(4)(b)). The TCHC did not respond to the appellant's request for a fee waiver, a copy of which was provided by the appellant to this office. Accordingly, the TCHC is deemed to have refused the appellant's fee waiver request. As previously mentioned, the TCHC also did not respond to the Notice of Inquiry and therefore did not provide representations to support its deemed refusal of the fee waiver request.

As mentioned above, the requester bears the onus of establishing financial hardship under section 45(4)(b). Generally, to meet the "financial hardship" test to justify a fee waiver, the requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [see for example, Order P-1393].

The appellant has provided me with information to demonstrate that he is currently on social assistance under the *Ontario Works Act, 1997*, and has been on such assistance since February of 2005. Additionally, the appellant has provided me with information to show that he has been living in subsidised housing since November 1, 2004, and that, since that time, his monthly rent has been geared to his income. The appellant has also provided me with a recent statement detailing the amount that he receives monthly through the social assistance program as well as documentation showing his current monthly rent for the rental unit provided to him through the TCHC. In his representations, the appellant briefly explains that the amount received in social assistance payment is his only source of income and calculates the difference that remains for food and basic necessities once his rent has been paid. In his representations, as mentioned above, the appellant disputes the amount of time the TCHC suggests is required for searching the record. Additionally, although he acknowledges that he would consider it reasonable for the TCHC to request him to pay photocopying fees for the record, he explains that in his current financial situation, payment of even a reduced fee would cause him severe financial hardship.

Upon reviewing the representations and the documents submitted by the appellant, in my view, he has provided me with sufficiently detailed financial information to demonstrate that were he required to pay the estimated fee for the requested record, he would suffer financial hardship as contemplated by section 45(4)(b).

Despite the fact that I accept that payment of the fee would constitute a financial hardship for the appellant, section 45(4) of the *Act* also requires that I consider whether, in the circumstances, it would be fair and equitable for the fee to be waived.

Part 2: whether it would be fair and equitable to waive the fee

Previous orders have set out a number of relevant factors to consider when deciding whether or not a fee waiver is fair or equitable [see Orders P-474, P-890, P-1183, P-1259 and P-1557]. These 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;
- 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.

[Orders M-166, M-408, PO-1953-F]

With respect to the last factor listed above, it has been established that when reviewing an institution's decision to refuse a fee waiver, this office must be mindful of the Legislature's intention to include a user pay principle in the *Act*, as evidenced by the provision of section 45.

With regard to the manner in which the TCHC responded to the request, I note that there was some delay in the TCHC's response to the appellant. The appellant submitted his request September 17, 2004, and, having received no response from the TCHC by November 16, 2004, filed a "deemed refusal" appeal with this office. Despite attempts made by this office to contact the Freedom of Information Coordinator at the TCHC with respect to the "deemed refusal" the TCHC returned no calls. As a result, Order MO-1880 was issued on December 3, 2004, ordering the TCHC to issue an access decision in response to the appellant's request. In response to Order MO-1880, the TCHC issued an interim access decision on December 10, 2004.

In Order MO-1895 former Assistant Commissioner Tom Mitchinson found that in cases where there has been some delay in responding to the request the records lose their importance, use and effectiveness and accordingly, that in such circumstances, a delay is a factor to be considered when deciding whether or not a fee waiver is fair and equitable. I agree with Assistant Commissioner Mitchinson and find that in the circumstances of this appeal the delay in issuing

the decision in response to the appellant's request is significant and a factor that weighs in favour of waiver.

Additionally, following the issuance of the access decision, at the outset of this appeal, the appellant submitted a request for a fee waiver to the TCHC. The TCHC ignored this request and did not respond. Given that the TCHC, as the appellant's landlord in a rent-geared-to-income system, is fully aware of the intimate details of the appellant's financial situations including the exact amount of his total monthly income received by social assistance and the exact amount of his monthly rent, the TCHC's refusal to respond to the appellant's fee waiver request is all the more puzzling.

Finally, the TCHC did not engage in the mediation process to work with this office and the appellant in responding to the request. Nor did it respond to the Notice of Inquiry to assist this office in understanding the circumstances of this request and the TCHC's actions in response to the request.

I acknowledge that the TCHC suggests in its interim decision letter that the appellant contact the TCHC in order to set up a meeting at a mutually convenient time, so they can attempt to narrow the parameters of his request with a view to reducing the fee. I also acknowledge that there is no evidence as to whether or not the appellant attempted to contact the TCHC with respect to this matter. Despite this written statement, based on all the evidence before me, I do not find that the TCHC worked constructively with the appellant to narrow or clarify the request. In fact, except for the offer to meet contained in the decision letter, the TCHC's conduct throughout the request and appeal process indicates otherwise. As noted above, the TCHC did not respond to the appellant's request until it was ordered to do so by this office, nor did the TCHC respond to the appellant's fee waiver request. Subsequently, the TCHC declined to engage in this appeals process during both the mediation or inquiry stages. In my view, this lack of engagement by the TCHC provided the appellant with little or no opportunity to work constructively with the TCHC to narrow the scope of the request or to propose a compromise solution which might reduce costs. Accordingly, I find that the TCHC's actions, or lack of action, to be a significant factor that weighs strongly in favour of waiver.

I also acknowledge that there are a large number of pages that make up the record (700 pages as estimated by the TCHC), and should it be determined that severances would be made to the record, this would require some work by staff at the TCHC. In this regard I am cognisant of the "user-pay" principles inherent in the *Act* that are put into place to avoid requests for information placing an unreasonable burden of the cost from the appellant to the institution and have taken these principles into consideration when making my decision.

Based on the evidence before me and in the particular circumstances of this case, I find that payment of the fee would clearly constitute financial hardship for the appellant. Also in the particular circumstances of this case, given the conduct of the TCHC, I find that it would be "fair and equitable" to order the TCHC to grant the appellant a fee waiver with respect to the entire fee, including the search and preparation time as well as the photocopy charges.

Accordingly, I do not uphold the TCHC's deemed refusal of the waiver of fees and will order the TCHC to waive any fees for the appellant's request, in their entirety.

ORDER:

1. I do not uphold the TCHC's fee estimate of \$600 for the search and preparation of the record.
2. I uphold the TCHC's decision to charge a fee for photocopying the record disclosed to the appellant at a rate of \$.20 per page.
3. I order the TCHC to waive all fees in this appeal, including photocopy charges.
4. I order the TCHC to issue a final access decision regarding the contract that is responsive to the appellant's request, without charging a fee and without recourse to a time extension, in accordance with the requirements of sections 19, 21 and 22 of the *Act*, as applicable, treating the date of this order as the date of the request and to send me a copy of the decision when it is sent to the appellant.
5. In order to verify compliance with the provisions of this order, I reserve the right to require the TCHC to provide me with a copy of any records which are disclosed to the appellant along with the final access decision of provision 4.

Original Signed By _____
Catherine Corban
Adjudicator

February 28, 2006 _____