

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2764

Appeal MA09-406-2

Toronto Community Housing Corporation

July 12, 2012

Summary: The appellants sought access to recovered emails from four named Toronto Community Housing Corporation employees. This order upholds the Toronto Community Housing Corporation's fee estimate and decision to not waive its fee.

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

OVERVIEW:

[1] The Toronto Community Housing Corporation (the TCHC) originally received a 14-part request followed by another 13-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for information contained in the appellants' tenant file.

[2] The TCHC issued a decision on the combined requests granting partial access to the requested information. The appellants subsequently appealed that decision and Appeal MA09-406 was opened and disposed of in Order MO-2664.

[3] During the inquiry process of appeal MA09-406, the appellants requested that the TCHC provide a quote for the recovery of deleted emails from four employee accounts.

[4] The TCHC issued a fee estimate of \$6,700.00 USD plus taxes and shipping for the recovery of each mail box of deleted emails.

[5] The appellants appealed the TCHC's fee estimate which became the subject-matter of this appeal (MA09-406-2).

[6] During mediation, the appellants clarified that they were seeking access to the deleted emails from the accounts of four named staff members, for the month of October 2007. The mediator relayed this information to the TCHC and requested that it provide the appellants with a detailed invoice related to the narrowed request.

[7] The TCHC subsequently revised its fee estimate based on the narrowed request. The TCHC requested a deposit of \$2745.00 representing 50 per cent of its \$5490.00 fee estimate. A spreadsheet identifying the breakdown of the fee estimate accompanied the TCHC's fee estimate letter to the appellants.

[8] In response, the appellants submitted a fee waiver request to the TCHC, on the basis that payment of the fee would cause financial hardship. In support of their request, the appellants referred the TCHC to the financial information they provided during the course of recent hearings involving both the TCHC and the appellants.

[9] The TCHC issued a decision denying the appellants' fee waiver request.

[10] No further mediation was possible and the issues remaining in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry setting out the facts and issues in the appeal and invited the representations of parties. The TCHC provided representations which were shared, in their entirety, with the appellants. The appellants did not provide representations in response to the Notice of Inquiry. However, the appellants confirmed that they wanted to pursue this appeal.

[11] In this order, I uphold the TCHC's fee estimate and decision to not waive its fee.

ISSUES:

- A. Should the fee estimate be upheld?
- B. Should the fees be waived?

DISCUSSION:

A. Should the fee estimate be upheld?

[12] 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 [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. In all cases, the institution must include a detailed breakdown

of the fee, and a detailed statement as to how the fee was calculated [Orders P-81 and MO-1614].

[13] 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 [Order MO-1699].

[14] The TCHC submits that its revised \$5490.00 fee estimate is based on the advice of its manager of Client Support and Network Services, Information Technology Services Department. TCHC submits that this individual has extensive familiarity with TCHC's backup system, retention policies and records. He is also the liaison between the TCHC and the American computer company that the TCHC advises it must retain to retrieve the requested information from its record holdings. TCHC goes on to state:

[He] contacted [the computer company] to obtain a more precise estimate of the cost of obtaining the relevant records, based on the information known about the size and volume of the mailboxes which house the material. The fee amount was not based on a representative sample of records, but rather a specific quote from [the computer company] after instructing them on what the exact details of the retrieval would be.

[15] As previously mentioned, the TCHC provided the appellants with a spreadsheet containing a breakdown of the computer company's quote. The appellants also received an electronic copy of the quote directly from the company. As previously stated in this order, the appellants did not provide representations in response to the Notice of Inquiry. However, the appellants' representations in appeal MA09-406 discussed the TCHC's original fee estimate. The relevant portions of those representations state:

We have reviewed TCHC's estimate for the email recovery and would like the following concerns addressed:

- What exactly is being 'shipped' to the U.S.?
- Why is it being shipped to the U.S. and not locally for processing?
- Is the \$6700 U.S. + taxes + shipping for each email account?

- We would like the company's information that would be responsible for the recovery. This should include but is not limited to:
 - Company name, address, telephone number and web address.
- The logged information from TCHC's IT department in regards to the recovery estimate. This should include but is not limited to:
 - The names of the TCHC employee(s) that searched for the estimates.
 - The logged contact/correspondences between the TCHC employee(s) and the company conducting the recovery. This should include but is not limited to:
 - Emails, letters, faxed and other correspondences between the two institutions in regards to the email recovery process.
 - The correspondences should have ... a breakdown of the estimate from the company.
- What is the processing time involved per email account?
- Will TCHC consider a company that [we] recommend for the email recovery process? If not, why?

[16] In its representations, the TCHC provided the following additional information about the calculation of its revised estimated fee:

- Records produced from employee mailboxes are managed by a document management system serviced by a company. The backup software records all emails sent and received from an employee's mailbox account and saves the information to tapes. These tapes are barcoded and sent to the document management service company.
- The responsive records are located in two different 'post offices', PO1 and PO2 which contain records of staff mailboxes. Due to the nature of the document management system, the entire post office must be extracted in order to obtain the contents of a specific mailbox.

- To begin the process of locating the responsive records, the TCHC would have to request that the document management service company retrieve the tapes relating to the four employees mailboxes for the specified time period set out in the request.
- The tapes then would have to be delivered to the consultant computer company located in New York State who has the capacity to read the tapes.
- TCHC advises that it does not possess the machine to read the tapes due to the prohibitive cost of the necessary machinery and lack of employees to manage and operate the required machinery.
- The consultant company charges \$300 for the recovery of the entire post office from each tape; \$85 for the initial 2 gigabytes of mail recovered; and \$65.00 for each additional gigabyte of mail thereafter.
- The consultant company's \$5490.00 quote includes \$4500.00 for reading 51 tapes and converting them into the appropriate format, and a further \$990.00 for the quantity of material in the mailbox, expressed in gigabytes.

[17] The TCHC representations also identified approximate additional costs not reflected in the computer company's quote, such as shipping costs and the cost to upload the readable information on CD-ROMs. However, the TCHC's revised fee estimate did not identify these costs and as a result I find that they are outside the scope of this appeal. However, additional costs, other than computer costs at issue in this appeal, such as shipping costs, may be charged by the TCHC when it completes the processing of the request. If the appellants disagree with these costs, the appellants can file an appeal with this office.

[18] I will now go on to consider whether the TCHC's fee estimate in the amount of \$5490.00, relating to its computer costs is reasonable.

Findings and Analysis

[19] This office may review an institution's fee and determine whether it complies with the fee provisions in section 45(1) of the *Act* and Regulation 823. The burden of establishing the reasonableness of the fee estimate rests with the institution (Order M-1123).

[20] 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
- (e) any other costs incurred in responding to a request for access to a record.

[21] Section 6.6 of Regulation 823 provides for computer costs and 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:

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.

[22] The costs claimed by the TCHC are computer costs specified in a quote. Section 6.6 of Regulations 823 provides for computer costs that are specified in an invoice. The TCHC states in its representations that it "has neither received nor paid any invoice from external organizations [such as the software management company or consultant computer company] for costs relating to the appellants' request".

[23] Though the TCHC does not characterize the quote it received from the computer company as an invoice, in my view, the quote constitutes an invoice for the purposes of section 6.6. of Regulation 823. In any event, this office has previously accepted quotes when determining whether a computer cost is in accordance with section 6.6 of Regulation 823. For example, in Order MO-2595, a quote from a computer consulting firm to search and retrieve emails was accepted as an invoice specifying computer costs.

[24] I have carefully reviewed the representations of the parties, along with the quote, and find that the TCHC's fee estimate of \$5490.00 is reasonable under the circumstances. The appellants has requested records which must be retrieved from backup software. The TCHC does not have the hardware or personnel to retrieve the

requested information. Accordingly, it sought an estimate from a computer company to retrieve the responsive records and format them in order to process the appellants' request.

[25] In my view, the revised fee estimate and quote provided to the appellants, along with the TCHC's representations provide the appellants with sufficient information, including the name of the consultant computer company, to make an informed decision on whether or not to pay the fee and pursue access. I also note that, most of the questions raised by the appellants do not address the question as to whether the revised fee estimate is in accordance with section 6.6 of Regulation 823. Rather, they address matters that are outside the scope of this appeal.

[26] Having regard to the above, I find that the TCHC's computer costs specified in the quote are reasonable.

B. Should the fee be waived?

[27] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellants rely on section 45(4)(b) and claim that payment of the estimated fee would cause them financial hardship. Section 45(4)(b) states:

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 whether the payment will cause a financial hardship for the person requesting the record;

[28] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. 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 [Order PO-2726].

[29] 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 [Orders M-914, P-474, P-1393, PO-1953-F]. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

[30] As stated above, the appellants did not provide representations in response to the Notice of Inquiry. However, the TCHC provided a copy of the appellant's fee waiver request to this office during the mediation process of this appeal. In it, the appellants argue that payment of the fee would cause financial hardship for the following reasons:

- Ongoing litigation before the Ontario Landlord and Tenant Board “has put an extreme strain on our finances as has the continuing Freedom of Information requests and appeals;
- One of the appellants is on disability and as a result his income “has been drastically reduced”;
- The other appellant is “currently unemployed and receiving Social Assistance”; and
- Both appellants have provided sworn testimony about their financial situation before the Ontario Landlord and Tenant Board.

[31] Finally, the appellants’ state:

In good faith, we believe that TCHC should provide these emails to us if they believe that there was no malice or ill intent toward [us], as we resided as tenants of TCHC. It seems that this fee is another way to deter us from obtaining the true facts of the events that took place which led to the applications filed to the Landlord and Tenant Board against [TCHC]. It would be in [TCHC’s] best interest to produce these emails to help support their claim that they have always been fair and honest and never malicious in their actions towards [us] as tenant of TCHC. Hiding or blocking access to information suggests the contrary.

[32] In its representations, the TCHC states:

The appellants have not provided evidence to demonstrate genuine financial hardship, and therefore the waiver should not be granted simply because the fee estimate is a substantial amount of money.

Insufficient information has been provided by the appellants, making it uncertain whether the payment of the fee will cause financial hardship. In order for a requester to claim financial hardship, he or she must provide evidence regarding his or her financial situation, including information pertaining to their income, expenses, assets and liabilities. The parties to this appeal have appeared before the Landlord and Tenant Board of Ontario on related matters numerous times. [One of the appellants] referenced financial hardship at that point, but provided no clear details regarding his financial situation.

[33] The Notice of Inquiry sent to the appellants invited them to provide written representations and/or documentary evidence in response to the question “Will payment of the fee cause the requester financial hardship? Please explain.” As noted

above, the appellants did not provide representations in response to the Notice of Inquiry.

Decision and Analysis

[34] Having regard to the evidence presented to me, I am not satisfied that the appellants have demonstrated that payment of the requested fee would cause them financial hardship. The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402]. Accordingly, for section 45(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393].

[35] Though the appellants were given an opportunity to submit documentary evidence to this office in support of their claim that payment of the fee would cause them financial hardship, they choose not to provide further representations or documentary evidence which would demonstrate their income, expenses, assets or liabilities. I have carefully considered the appellants' submissions contained in their initial fee waiver request and find that it fails to demonstrate that payment of the fee would cause them financial hardship.

[36] Having regard to the above, I find that there is no basis to waive the fee on the ground of financial hardship. As a result of my finding, the first part of the two-part test in determining whether a fee waiver should apply has not been met. Given my finding, it is not necessary that I also determine whether it is fair and equitable in the circumstances of this appeal to waive the fee (the second part of the test). Accordingly, I uphold the TCHC's decision to not grant a fee waiver in the circumstances of this appeal.

ORDER:

I uphold the TCHC's fee estimate and decision to not grant a fee waiver.

Original signed by: _____
Jennifer James
Adjudicator

July 12, 2012 _____