

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3353

Appeal MA15-338

City of Toronto

August 30, 2016

Summary: The City of Toronto (the city) received two requests from a media requester under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for access to records concerning the Scarborough Light Rail Transit and the Scarborough subway extension. The appellant appealed the city's search fee estimate of \$1,755.00 and its time extension request of nine months. The city then sought an additional time extension of at least one year to respond to the request. In this order, the adjudicator reduces the search fee estimate to \$1,485.00 and reduces its new revised time extension request to four months.

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

OVERVIEW:

[1] The City of Toronto (the city) received two requests from a media requester under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)*, which after clarification, sought access to:

1. Between January 1, 2014 and May 21, 2015: All emails, briefing notes, internal reports or presentations about the ridership projections or models for the Scarborough Light Rail Transit (the LRT) and Scarborough subway extension received by or originating from (but not limited to) the following people:

[the city's (former) City Manager (the CM), Deputy City Manager (the DCM), Chief Financial Officer & Deputy City Manager (the CFO), Chief Planner,¹ and seven Transportation Planning² staff members].

2. Between January 1, 2013 and May 21, 2015: Any emails, briefing notes, internal reports or presentations including mention of "14,000/14000" or "14,000 peak hour ridership or "14,000 pph [persons per household]" or a reasonable variation thereof sent or received by any of the above mentioned people.

3. Between January 1, 2013 and May 21, 2015: Any emails, briefing notes, internal reports or presentations including mention of the city's Regional Travel Demand model sent or received by the above mentioned people

4. Between January 1, 2013 and May 21, 2015: All emails, briefing notes, internal reports or presentations about the Scarborough LRT and Scarborough subway extension received by or originating from (but not limited to) the above mentioned people.

[2] In response, the city issued a search fee estimate of \$1,755.00, in which it stated that:

...Staff of city Planning and the Deputy City Manager/Cluster B's Office have advised us that in order to provide the requested information, staff would have to go through approximately 1800 pages of physical records and 6650 email correspondence to locate records and review them for responsiveness. For paper records, it has been estimated than an average of 1 minute is needed for every 10 pages of physical records. For email correspondence, it has been estimated that each document would require 30 seconds for review to determine if the records is responsive to your request...

[3] The city indicated that this fee estimate was for search time only and that it did not include estimated fees for photocopying (\$.20 per page) or for severing information (\$30 per hour at 2 minutes per page = \$1 per page).

[4] The city's fee estimate for search time, was calculated as follows:

City Planning:

1 The city's Chief Planner is also the Executive Director of the city's Planning Division.

2 Transportation Planning is part of the city's Planning Division.

• Estimated search time for electronic records	\$1290.00
43 hours @ \$30 per hour	
<i>Deputy City Manager / Cluster B's Office</i>	
• Estimated search time for electronic records	
12.5 hours @ \$30 per hour	
• Estimated search time for physical records	
3 hours @ \$30 per hour	
• Total Estimated search time	
15.5 hours @ \$30 per hour	\$ 465.00
Total estimated cost of records search	\$1755.00

[5] The city asked the appellant to pay a 50% deposit and indicated that once the deposit was received, the city would proceed with processing the request. It further indicated the following with respect to timing:

Once we receive half of the search fee estimate from you, we will proceed with processing your request. However, in view of city Council's directive for staff to report on SmartTrack/[Regional Express Rail], Scarborough Subway extension and the Relief line in the fall, staff would not be able to complete the search until after the October 20, 2015 Executive Committee meeting deadline. In view of the volume of the records, we will advise you of the time extension required to process the request after staff have completed their records search.

Alternatively, you may wish to consider revising the scope of your request and advise us accordingly.

[6] On July 6, 2015, the appellant emailed the city, expressing concern with a delay until after October 20, 2015. The appellant stated that none of the records requested are for future dates beyond May 2015 and she sees no reason to delay any disclosure of records to a specific future date. She expressed concern that the city's intention was to conceal information ahead of a vote on the Scarborough subway.

[7] On July 8, 2015, an Access and Privacy Analyst of the city emailed the appellant, stating the following:

City Planning staff have advised that they would not be able to complete the records search until after the October 20, 2015 Executive Committee

meeting, when the report on the SmartTrack Work Plan (2015-2016) prepared in partnership with the province, Metrolinx and the TTC, will be considered by the Committee...

The records search respecting the employees named in your request involves staff that are responsible for reporting travel demand forecasting on SmartTrack, as well as the Scarborough Subway Extension project and the Relief Line Project.

City Planning staff are working on all four of these initiatives, and given the challenge of trying to address this request at the same time as the current work program demands, it will negatively impact on the operations of the city to conduct a search at this time.

[8] On July 8, 2015, the appellant emailed the city asserting that SmartTrack's work does not have to do with the records requested.

[9] The appellant appealed the city's decision to the Office of the Information and Privacy Commissioner on July 10, 2015.

[10] During the mediation stage, on August 31, 2015, the city issued a formal notice of time extension and an interim access decision, citing sections 7(1) (advice or recommendations), 9 (relations with other governments), 11 (economic and other interests) and 14(1) (personal privacy) of the *Act* as the possible exemptions to be applied to the responsive records. With respect to the time extension, the city stated the following:

We wish to advise you that the time limit for responding to your request has been extended in accordance with section 20(1) of the *Act*. The time will be extended for an additional nine months upon receipt of the requested search fee estimate deposit of \$877.50. The reason is that the request involves the searching and reviewing of a large volume of records (approximately 1800 pages of physical records and 6650 email records) and meeting the time limit would unreasonably interfere with the operations of the institution.

We however, would attempt to provide partial decisions as and when staff from individual program areas have completed their search and the records have been duly reviewed.

[11] The appellant paid the 50% deposit (\$877.50) on October 19, 2015 in order that the city could resume its processing of her request, however she still objected to the amount of the fee estimate and the duration of the time extension.

[12] During the adjudication of this appeal, the city sought a further time extension of at least another year from the nine month time extension it had sought from date of

the payment of the fee estimate deposit.

[13] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the city and the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[14] In this order, I partially uphold the city's search fee estimate and its new revised time extension request.

ISSUES:

- A. Should the search fee estimate of \$1,755.00 be upheld?
- B. Should the city's new revised time extension be upheld?

DISCUSSION:

A. Should the search fee estimate of \$1,755.00 be upheld?

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

[16] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.³

[17] 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.⁴

[18] 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.⁵

[19] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁶

[20] In all cases, the institution must include a detailed breakdown of the fee, and a

³ Section 45(3).

⁴ Order MO-1699.

⁵ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁶ Order MO-1520-I.

detailed statement as to how the fee was calculated.⁷

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

[22] 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.

[23] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 823. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.

⁷ Orders P-81 and MO-1614.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[24] The city provided representations in response to the Notice of Inquiry where it states that, as the appellant had specifically asked for all emails with specified keywords, each individual email account, both active and archived, of the named city staff would need to be searched and each document reviewed to determine if it is responsive to the request.

[25] The city states that it did not base its search fee estimate on actual work done to locate the responsive records, but on its guideline on doing keyword searches for archived emails. It states that its Director, Transportation Planning, City Planning Division did a preliminary search on the email account of a staff member most heavily involved with the project. This individual also estimated that about 30 seconds would be necessary to review each email to determine if it is responsive to the request, as the keyword search would result in emails being located that are not responsive to the request. The city provided a breakdown of the estimated 5150 emails for its Chief Planner, and the Transportation Planning staff members.

[26] The city further states that the Administrative Assistant for the DCM Cluster B likewise provided an estimate of 1500 emails respecting the DCM's records, all of which would require a review to determine if they are responsive to the request. It states that this individual also advised that there are approximately 1750 pages of paper records that would need to be searched and reviewed to locate any responsive records. It estimated that 1 minute is needed for every 10 pages of records to be reviewed. The city states:

Although the city Planning Division would also have to go through their physical files to locate any responsive records, the city has not included the time for this physical search in the fee estimate. The city will conduct the search through approximately 20 paper files free of charge. For

records respecting [the former City Manager and the CFO], no search fees apply...

Between the time the appeal was filed and the writing of these representations, the search respecting [the DCM's] records is now complete. The actual time spent on the search and review of records to determine responsiveness was reported as [34.5] hours. This is significantly more than the estimated 15.5 hours. This additional time will be accounted for in the final tally of the entire search for this request, and the [appellant] will be charged accordingly.

[27] The city maintains that the estimate of requiring 30 seconds to review each email to determine responsiveness is not unreasonable as it is not to determine the applicable exemptions, but to determine if a particular email is responsive to the request. It submits that because the actual time taken (34.5 hours) to complete the records search for the DCM alone is actually quite a bit higher than the estimated time proves that the city has provided a conservative estimate.

[28] Regarding the search time for physical records, the city states that other than the 3 hours estimated for the DCM's records, the search time for the physical records by the Planning staff was not included in the search fee estimate.

[29] To show good faith, the city states that it is will just charge the appellant the search fee of \$1,775.00 based on the estimated time, regardless of the final tally for search time.

[30] While preparing this order, I asked the city to provide me with the representative sample of records that it referred to in its representations. In response, it states that it does not know the exact batch of records used to determine how long it would take to review each email for responsiveness as the city is far into the process and many records have now been released.

[31] I followed up with the city to obtain copies of the supplementary decision letters. I received three decision letters, dated January, May and July 2016. The city explained that one decision letter,⁸ was for the records of the CM and the CFO and the other two decision letters were for the DCM's records,⁹ with one more decision regarding the DCM's records to come within the next 4 to 6 weeks, depending on the time for consultations with the TTC¹⁰ and Metrolinx.

⁸ The supplementary decision letter of January 22, 2016, concerns disclosure of the CM's and the CFO's records.

⁹ The other two supplementary decision letters, dated May 13, and July 20, 2016, were for the DCM's records.

¹⁰ The Toronto Transit Commission.

[32] The city states that the records of the Planning staff consist of 3,000 to 4,000 pages.¹¹

[33] The city also provided further representations concerning the processing of the appellant's request:

The fee estimate only covered search for responsive records from the (originally) 8 named city Planning staff.¹² The email archive system has limited ability to locate records on an exact topic, therefore using the keywords provided by the [appellant], thousands of emails came up as a result of that search. Each email needed to be reviewed (read) to determine if it did indeed respond to the request. Subsequent to both the city's reps and reply reps submitted last year, the [appellant] since narrowed the request to 3 main staff¹³ of city Planning [the Chief Planner, the Director, Transportation Planning and the Program Manager, Transportation Planning]. City Planning records received from [the Director, Transportation Planning and the Program Manager, Transportation Planning] total 1890 pages. These have all been reviewed by City Planning for responsiveness prior to submitting to our office. Time spent by [the Director, Transportation Planning] is 11 hours and [the Program Manager, Transportation Planning] is 5 hours. Deputy City Manager's staff spent 34.5 hours searching for responsive records where the original estimate was 15.5 hours. The city will, in good faith as this request is late, uphold the original estimate for [the DCM] records at 15.5 hours. Thus far search costs total \$945.00. The fee estimate deposit was \$877.50.¹⁴ A balance owing to date is \$67.50. This balance will be requested on our next decision letter. Please note, [the Chief Planner] has not reviewed her records for responsiveness. Additional fees will be applied after that is completed...

[34] The appellant is contesting the search fee estimate on the basis that the original estimated search time is unreasonable for records that are largely electronic (emails). She submits that the city's estimate of its search fee of \$1,755.00 for an estimated 6,650 emails is not reasonable. She proposes that a search fee of \$1,000.00 is reasonable in the circumstances of this appeal.

¹¹ As per the revised request, these three Planning staff members are the Chief Planner, the Director, Transportation Planning and the Program Manager, Transportation Planning.

¹² The eight Planning staff members in the original request consisted of the Chef Planner and seven named Planning Division staff.

¹³ Instead of the eight Planning staff set out in the original request.

¹⁴ The fee estimate deposit of \$877.50 has been paid by the appellant.

Analysis/Findings

[35] After narrowing her request, the appellant is seeking the responsive records of the following city staff:

- the former City Manager (the CM),
- the Chief Financial Officer & Deputy City Manager (the CFO),
- the Deputy City Manager (the DCM),
- the Chief Planner,
- the Director, Transportation Planning,
- the Program Manager, Transportation Planning,

[36] The city states that no search fees apply for the records of the first two staff members, the CM and the CFO.

[37] For the records of the third staff member, the DCM, the city has fixed the search fees at 15.5 hours at \$30.00 per hour.

[38] The city states that the Director, Transportation Planning and the Program Manager, Transportation Planning reviewed 1890 pages, which took a total of 16 hours.¹⁵

[39] As of now, the actual search time is as follows:

DCM's records	15.5 hours
(reduced from 34.5 hours)	
Director, Transportation Planning	11 hours
Program Manager, Transportation Planning	5 hours
Total search hours	31.5 hours
The <u>total search fee to date</u> ¹⁶	<u>\$945.00</u>

¹⁵ The 16 hours is broken down as follows:

Director, Transportation Planning - 11 hours

Program Manager, Transportation Planning - 5 hours.

¹⁶ Thirty-one and half hours at the search fee of \$30.00 per hour equals \$945.00.

[40] Although additional DCM records will be disclosed, as the city has fixed the search fee for these DCM records at 15.5 hours, no additional search fee will be charged.

[41] Remaining to be determined is the search fee time estimate for the remaining records, namely those of the Chief Planner.

[42] The city states there are 3,000 to 4,000 Planning staff member records. Of this amount, 1890 have been accounted for as records of the Director, Transportation Planning and the Program Manager, Transportation Planning. These 1890 pages were reviewed for responsiveness at a search time of 16 hours. This works out to 118 pages per hour.

[43] Using this calculation of 118 pages per hour, I find that it is reasonable to estimate that the Chief Planner's records of 2110 pages would take 18 hours to review. At the search fee set out in section 6 of Regulation 823 of \$30.00 per hour, this works out to an estimated search fee of \$540.00.¹⁷

[44] Therefore, the search fee estimate, including the actual search time, would be as follows:

Search fee to date	\$ 945.00
Estimated search fee to complete request	<u>\$ 540.00</u>
Total	\$1,485.00

[45] Accordingly, I am upholding the city's fee search estimate in the amount of \$1,485.00 as a reasonable, which is comprised of the actual search fee to date of \$945.00 plus an estimated search fee of \$540.00 for the remaining records, which are the Chief Planner's records.

[46] I will now consider whether the city's time extension decision is reasonable.

B. Should the city's new revised time extension be upheld?

[47] Time extensions are governed by section 20(1) of the *Act* which states:

A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, where,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time

¹⁷ Eighteen hours at \$30.00 per hour equals \$540.00.

limit would unreasonably interfere with the operations of the institution; or

(b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

[48] The issue in this appeal is whether a time extension is reasonable in the circumstances of the request, in the context of the provisions of section 20(1). Factors which might be considered in determining reasonableness include:

[49] Section 20(1)(a):

- the number of records requested;
- the number of records the institution must search through to locate the requested record(s);
- whether meeting the time limit would unreasonably interfere with the operations of the institution;

[50] Section 20(1)(b):

- whether consultations outside the institution were necessary to comply with the request and if so, whether such consultations could not reasonably be completed within the time limit.

[51] The city originally sought a time extension of nine months from receipt of the deposit. The fee deposit was paid on October 19, 2015. It is now over nine months since the deposit was paid. The city is now seeking at least an additional year from now to complete the request. The city submits that this is a very complicated request with a lot of information that has or has not yet been made public and that the review and consultation process is taking longer than anticipated.

[52] The city states that it receives an increasing number of requests each year (it anticipates approximately 3000 this year), thus it can only devote a limited amount of time and resources to this request. It states that it must balance the staff resources available for processing access requests to ensure that it provides all requesters with an acceptable level of service and that the right to access information not be unfairly jeopardized by an unusually large request from one individual requester.

[53] The city states that it did not receive any Planning records until early June 2016. It states that:

Due to the changing scope of the Scarborough Subway project as a whole, City Planning staff, including the Chief Planner, were completely

... tied up with new studies, further community consultations, staff reports to Council, etc. The search for responsive records was interfering with their operations. Realistically, it'll be at least another 9 months to a year before we can complete this entire request, but that is simply an estimation... The number of requests and appeals received are both up this year over last year. Our current compliance rate is 64% which is indicative of our workload this year...

[W]e [are] not in a position to start the review of [the Chief Planner's] records for quite some time. The estimated time of 1 year to complete [the Director, Transportation Planning's and the Program Manager, Transportation Planning's] records review, is just that, an estimate. We will attempt to cut down on this time, but the consultations, both internal and external, are very time consuming. We will continue to release records in increments. We will ask [the Chief Planner] to conduct the review of the records and submit the responsive records to our office, once we are getting close to completing the records we have already received.

[54] The appellant states that the time extension sought by the city is unreasonable. She states that the records pertain to a decision of great public interest where City Council voted again in July 2016 to continue with revised plans for a Scarborough subway. She points out that, as the city stated, the records contain a substantial amount of information that has not been made public and deserves to be made public, subject to applicable exemptions. She submits that given the unreasonable delay and the unresponsiveness of the city, a reasonable time extension would be no more than three months from the date of the order.

[55] In her initial representations, the appellant stated that these records relate directly to previous staff advice and directly impact the upcoming discussions and decisions at council. Enforcing an unnecessary delay of nine months in the release of this information is denying the public and policymakers important information regarding these decisions, rendering these files useless to both the appellant and thus the public.

[56] The city replied to the appellant's initial representations by stating that the time extension is not solely for the purpose of completing the records search but that after the records search is completed, a significant amount of time would be required for the records to be organized and reviewed for applicable exemptions to be applied under *MFIPPA* before decisions are made regarding disclosure. It states that once the files are organized, the records will need to be scanned as the appellant has asked to receive the records in electronic format.

Analysis/Findings

[57] From my review of the city's representations, it appears that the city is relying on

both sections 20(1)(a) and (b) in support of its time extension request.

[58] For section 20(1)(a), the city's position is that the request is for a large number of records, and responding to the request necessitates a search through a large number of records. The city argues that meeting the legislated time limit would unreasonably interfere with its operations.

[59] For section 20(1)(b), the city's position is that consultations with persons outside the city are necessary to comply with the request and cannot reasonably be completed within the time limit.

[60] Initially the city wanted a nine month time extension from the payment of the fee estimate deposit to complete the request. This nine month period is now over and the city is now seeking at least another year time extension, while the appellant submits that three more months from the date of the order is reasonable.

[61] As stated above, although the city has located records in response to the request, approximately 2110 pages of records of the Chief Planner need to be reviewed for responsiveness. A well, not only do the responsive portions of the Chief Planner's records, but another 1890 pages of records from the Director, Transportation Planning and the Program Manager, Transportation Planning still have to be prepared for disclosure. Certain portions of these responsive records may require consultations with outside parties.

[62] Based on my review of the parties' representations, it appears to me that the city has located all of the records it needs to review to complete this request. All of these records have been reviewed for responsiveness, except for the Chief Planner's records. I found above that 18 hours of search time would be needed to complete the review of the Chief Planner's records for responsiveness.

[63] The city has indicated that it can devote a limited amount of time to this request. Taking the city's own estimated time that it can devote to this, and considering my finding that the review of the Chief Planner's records for responsiveness should take 18 hours, the search should be completed in less than six weeks. The city will also need to time to review the records for disclosure, as set out above. It appears from the city's latest correspondence that it takes less than six weeks to consult with outside institutions on the records.

[64] The city will also need time to prepare the records for disclosure, including severing records. The city has not indicated how long it would take to prepare the records for disclosure after review for responsiveness and outside consultations. Based on the time set out for consultations, I find that this could take approximately another six weeks.

[65] Therefore, I find that it should take approximately 18 weeks for the city to complete the processing of this request. As such, I will grant the city a four month time

extension from the date of this order to issue a final access and fee decision.

[66] In finding that a four months' time extension is appropriate for the city to complete the processing of the appellant's request and issue a final access decision, I have considered the entirety of the city's representations concerning its workload, staff resources, and the large number of records at issue. With an additional four months to complete the request, the city will have had over 14 months to process the request since the appellant paid the fee estimate deposit on October 19, 2015. I find that this is sufficient time, in the circumstances of this appeal, to complete the processing of this request.

ORDER:

1. I uphold the city's search fee estimate in the reduced amount of \$1,485.00.
2. I order the city to issue a final access and fee decision to the appellant on all of the records responsive to the request within four months from the date of this order.

Original Signed by: _____
Diane Smith
Adjudicator

_____ August 30, 2016