Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3936

Appeal PA17-109

Assessment Review Board

March 20, 2019

Summary: The appellant made an access request under the *Freedom of Information and Protection of Privacy Act* to the Assessment Review Board (the board) for records relating to an identified law firm and the board from 2010 to 2016. The board issued an interim access decision and fee estimate to the appellant. The appellant's request and the board's fee estimate were subsequently clarified and revised. The appellant requested a fee waiver and the board denied it. The appellant appealed the board's fee estimate and denial of fee waiver. The appellant also raised the issue of reasonable search. In this order, the adjudicator upholds the board's fee estimate, in part. The adjudicator also upholds the board's denial of the appellant's fee waiver request. Finally, the adjudicator finds that the issue of reasonable search is premature because the board has not completed the search for responsive records, which would only occur after the deposit is paid.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17, 57(1) and 57(4); Regulation 460 sections 6 and 8.

Orders and Investigation Reports Considered: Order MO-3568.

OVERVIEW:

[1] The Assessment Review Board (the board or ARB) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to

> Copies of all written communications between the law firm [named law firm] and the Assessment Review Board (ARB) during the years 2010 to

> 2016 inclusive, that relate to the Board's exercise of its jurisdiction, including its interpretation, and commentary upon policy issues.

[2] On July 29, 2016, the board issued an interim access decision and a fee estimate to the appellant. In its decision, the board noted that the appellant clarified its request on July 8, 2016 to

> All correspondence… that were received by the ARB or its internal "review panel" as per the following criteria:
>
> > 1. Where [named law firm] acted on behalf of the Municipal Property Assessment Corporation (MPAC) where MPAG objected to ARB decision not in MPAC's favour.
> >
> > 2. Where [named law firm] acted on behalf of MPAC where MPAC was seeking a reversal, cancellation or change to a decision of an ARB member.
> >
> > 3. All responses i.e. letters, emails, notes, minutes of meeting etc. and final decisions from the ARB chairman, associate chairman or "review panel" of the ARB to [named law firm] generated from 1 & 2 above.

The board stated that it interpreted the request to include a search of all records where the named law firm, acting on behalf of MPAC, filed a Request for Review of a Decision with the board. The board advised the appellant that it conducted a preliminary search for records which revealed that during the period of 2010 to 2016, approximately 75 such requests were received. The board noted that it would have to retrieve and review each file to determine whether it is responsive to the request. Given the number of files, the board estimated the fee for search time at $3,375.00, including 1.5 hours of search time for each of the 75 files. The board advised the appellant it would confirm the other charges for the search upon completion.

[3] In addition, the board noted it anticipated that the exemptions at sections 13 (advice and recommendations), 17 (third party information), 19 (solicitor-client privilege) and 21 (personal privacy) may apply to withhold portions of the records. Finally, the board advised the appellant that it may have to provide notice to the law firm identified in the request.

[4] The appellant then requested a fee waiver pursuant to section 57(4) of the *Act*. The board denied the appellant's request for fee waiver.

[5] Following further communication between the appellant and the board, the board issued a revised fee estimate on October 24, 2016. In its letter, the board referred to a further clarification of the appellant's request. Specifically, the board stated,

> This is in response to your email of October 18, 2016 in which you have clarified your original request made under the [*Act*]. Your request has been clarified and you are seeking records of the Environmental and Land Tribunal Ontario, namely
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> > where [named law firm] acting for the Municipal Property Assessment Corporation solicited the Associate chairman [the named Associate chairman] and/or his administration review community of the Ontario Assessment Review Board (ARB) to alter its policies and decisions of its member adjudicators with which MPAC did not agree.
>
> I understood your clarified request to be for copies of the Request for Review of a Decision filed and the associated Decision which arose during the years 2010 to 2016. Your clarification has reduced the processing fees significantly, and thus the Ministry [of the Attorney General, on behalf of the board] has revised the Interim Fee Estimate.

[6] In the October 24, 2016 letter, the board revised its fee estimate. The board advised the appellant the records are not maintained electronically in either a case management system or other database. It advised the appellant that its preliminary search identified approximately 75 instances where records indicate that the named law firm filed a Request for Review based on a log of incoming Requests for Review of Decision. The board further stated that to satisfy the request, a manual search is required and each file will need to be retrieved and the correspondence reviewed. The board calculated the revised fee estimate at $750.00, representing 20 minutes to search each of the 75 files at a rate of $30 per hour. The board indicated that other charges would be determined upon completion of its search. The board noted that section 17 of the *Act* may apply to withhold some of the records and it may provide a third party notice. The appellant requested a fee waiver and the board denied the request.

[7] The board subsequently notified the law firm of the request and advised the appellant that access to the responsive records (i.e. the Requests for Review and the board decisions) would likely be granted in full.

[8] The appellant appealed the board's fee decision.

[9] During mediation, the appellant confirmed it only sought access to the board decisions authored by the named associate chairman along with the corresponding letters of Request for Review authored by the named law firm. In response, the board issued a revised fee estimate and final access decision on August 14, 2017, where it advised the appellant it identified 24 instances from 2014 to 2016 where records indicate the named law firm filed a Request for Review. The board explained that the named associate chairman was not with the ARB prior to 2014. The board stated that it conducted a manual search for records and each file needed to be retrieved so that the correspondence may be reviewed. The board confirmed it would grant the appellant

complete access to the records once the appellant paid the $183.60 fee. In this revised fee estimate, the board advised that its fee was comprised of a $63.60 photocopying fee as well as a search fee of $120, representing 10 minutes to search each of the 24 files.

[10] The appellant advised the mediator that it seeks access to all 75 records that the board identified in its October 24, 2016 letter. The appellant took issue with the $750 fee and claimed that additional responsive records ought to exist.

[11] Mediation could not resolve the issues and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. The adjudicator who had carriage of the appeal began the inquiry by seeking representations from the board. The board submitted representations. The adjudicator then sought representations from the appellant in response to the board's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[12] The appeal was then transferred to me to complete the inquiry. In the discussion that follows, I uphold the board's fee estimate, in part. I uphold the board's denial of the appellant's fee waiver request. Finally, I find that the issue of reasonable search is premature and do not make a finding on it because the board has not completed its search for responsive records, which would only occur after the appellant pays the deposit.

ISSUES:

A. Should the board's fee estimate be upheld?

B. Should the board's refusal to waive the fee be upheld?

C. Did the board conduct a reasonable search for records?

DISCUSSION:

Issue A: Should the board's fee estimate be upheld?

[13] During mediation, the appellant confirmed that it pursues access to responsive information contained in the 75 files the board identified in its October 24, 2016 letter. In its October 24, 2016 letter, the board provided the appellant with a $750 fee estimate, which was calculated as follows:

> 75 Requests x 20 minutes per file @ $30.00/hour = $750.00

In its fee estimate, the board advised that other charges, including preparation of the records, scanning and photocopying fees will be determined upon completion of the search.

[14] Section 57(1) requires an institution to charge fees for requests under the *Act*. Section 57(1) states, in part,

> 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,
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> > (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;

[15] Section 6, 7 and 9 of Regulation 460 contain more specific provisions regarding fees for access to general records. Relevant to this order, section 6 of Regulation 460 reads, in part,

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> > 1. For photocopies and computer printouts, 20 cents per page.
> >
> > 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.

[16] Where the fee for access to a record exceeds $25, an institution must provide the requester with a fee estimate.[1] 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.[2]

[17] 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.[3] The

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[1] See section 57(3) of the *Act*.
[2] Order MO-1699.
[3] Orders P-81, MO-1479, MO-1614 and MO-1699.

fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fee.[4]

[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.[5]

[19] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

Representations

[20] In its representations, the board states that it estimated a search time of 20 minutes to search each of the approximately 75 responsive files. In its later revised fee estimate dated August 14, 2017, the board allocated 10 minutes of search time per file for 24 files. The board states that 10 minutes of search time per file is "a more accurate allocation" of time in its representations. While the board did not issue a formal revised fee estimate, it is my understanding that the board reduced it from $750 to $375 for the search time.

[21] The appellant takes the position that search fees should not be allowed when the board has recognized that its decision should be made "freely available." The appellant refers to the board's rules of practice and procedures which states,

> A person may examine and make copies of any document filed with the Board, except documents filed with the Board for the purposes of a settlement conference or mediation, unless prohibited by law or prohibited by these Rules.[6]

[22] The appellant refers to a previous access request for all unpublished ARB decisions for an earlier period. The appellant states that the board produced a CD-ROM that contained the responsive records and did not charge the appellant any search fees. The appellant submits that response is "consistent with the principle that the information should be freely available." However, the appellant notes that the board did not provide any of the "Requests for Review" decisions in that previous disclosure. The appellant states that the board should provide it with the records without charge in the interests of transparency and accessibility and upon consideration of the fact that the appellant is a small not for profit organization.

[23] The appellant also refers to the recent *Toronto Star v. Attorney General of*

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[4] Order MO-1520-I.
[5] Orders P-81 and MO-1614.
[6] Section 42 of *Rules of Practice and Procedure of the Assessment Review Board*.

Ontario[7], which found that the application of section 21 of the *Act* to the "adjudicative records" of 14 listed tribunals breaches the "open court" principle as a facet of the *Canadian Charter of Rights and Freedom*'s section 2(b) freedom of expression rights. While the appellant does not elaborate on the relevance of this decision to the issue of the board's fee estimate, it appears the appellant takes the position that this decision supports the claim that the board should not be permitted to charge a search fee to process this access request.

[24] I note that the appellant submits that past and unpublished decisions on "Requests for Review" should be made freely available as a general practice. However, this issue is not within the scope of the appeal and I will not comment on this issue. Similarly, I will not comment on the appellant's submissions regarding the board's relationship with MPAC. These concerns are beyond the scope of the appeal.

[25] The appellant concludes its representations by stating that the fee provisions of the *Act* are not consistent with the board's own *Rules of Practice and Procedure*, which allow free access to records. The appellant submits the board's search fees should not be allowed in this appeal and the principles of transparency and ability to freely review the board's conduct should prevail in the public interest.

Analysis and Findings

[26] In the circumstances of this appeal, I find that I have not been provided with sufficient evidence to determine whether the fee estimate quoted by the board is reasonable. As a result, I will uphold it only in part.

[27] The board identified 75 instances or files as potentially containing records that are responsive to the request. The board indicates that 10 minutes of search time per file should be sufficient to complete the search in response to the appellant's request. Applying the time estimates to the search fee of $30 per hour in Regulation 460, the board estimates a $375 fee for its search time.

[28] The board did not provide any explanation of how it arrived at this 10 minute estimate either in its representations or its decision letter. As stated above, where a 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.[8] However, the board did not provide any evidence regarding the approximate size of each file or a representative sample of the files in its representations or fee estimates. The board only states that "each file will need to be

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[7] 2018 ONSC 2586, but incorrectly cited by the appellant as 2017 ONSC 7559.
[8] Order MO-1699.

retrieved and the correspondence reviewed" in its October 24, 2016 fee estimate. The board did not provide any description of the size or nature of the 75 files. Therefore, there is no basis for me to evaluate the estimate of 10 minutes to search each of the 75 files.

[29] Having considered the evidence provided by the board, I will reduce its search fee estimate by 25%, thereby allowing the board a fee of $281.25 for 9.375 hours of search time.

[30] The appellant submits that the board should not be allowed to charge requesters for information that should be "freely available" to the public. The appellant refers to section 42 of the board's *Rules of Practice and Procedure* to support its claims. I reviewed section 42 and find that it is not relevant to the appeal before me. As stated above, section 57(1) of the *Act* requires an institution to charge requesters certain fees for processing an access request. In any case, section 42 of the board's *Rules of Practice and Procedure* does not appear to prohibit the board from charging fees under the *Act*.

[31] I note the board states in its October 24, 2016 fee estimate that "other charges, including preparation of record, scanning and photocopying fees are to be determined upon completion of the search." As stated above, an institution must include a detailed breakdown of its fee and provide the requester with sufficient information in a fee estimate to make an informed decision on whether or not to pay the fee and pursue access. In this case, the board has not provided the appellant with sufficient information to allow it to make an informed decision on whether to pay the fee and pursue access. Furthermore, the board has not provided this office with sufficient information for me to evaluate the reasonableness of fees that it anticipates charging, such as preparation of the records, scanning or photocopying. In fact, the board has not provided any information regarding these fees other than stating that it will determine these charges upon completion of the search.

[32] In Order MO-3568, the adjudicator stated at paragraph 30,

> … the purpose of a fee estimate decision is to give the requester sufficient information to make an informed decision as to whether or not to pay the fee and pursue access. The appellant is entitled to rely on this information in deciding to proceed with his request and pay the deposit. I acknowledge that a fee estimate is in fact an estimate. However, in my view, adjustments to the estimated fees should be limited in nature. While I accept that a final fee for access to the responsive records might be different from that quoted in the estimate, allowing for variances to copying charges based on the actual number of responsive records

> located, I do not accept that it permits the city to charge entirely new fees not specified in its fee estimate.[9] Previous orders have found that to conclude otherwise would, "defeat the purpose of providing the appellant with a reasonable fee estimate made"[10] and would, "compromise and undermine the underlying principles of the Act."[11]

[33] I adopt this analysis for the purposes of my review of the board's fee estimate. Regulation 460 allows an institution to charge $7.50 for each 15 minutes spent by any person on the preparation of a record for disclosure. Preparation may include severing a record. In its October 24, 2016 fee estimate, the board states that section 17(1) of the *Act* may apply to exempt some information from disclosure. However, the board did not provide an estimate of the fee associated with severing, or preparing, the record for the disclosure. Nor did the board provide any information regarding the number of pages that may require severance. While the board advised the appellant that it would likely grant it full access to the records in later correspondence, it is not clear at this time whether this is indeed the case. Therefore, the board may still sever portions of the records at issue and seek to charge a preparation fee. Given these circumstances and in the absence of evidence regarding the records, I find that the board is not allowed to charge the appellant for preparation fees under section 57(1)(b) of the *Act* to sever information from the records that it considers exempt prior to disclosure.

[34] Similarly, I do not allow the board to charge the appellant for any scanning or photocopying or related fees under section 57(1)(c). As stated above, the purpose of a fee estimate is to provide a requester with sufficient information to make an informed decision on whether to pay the fee and pursue access. The board has not provided any information regarding the number of pages that it expects to locate, process and scan or copy in response to the request. Accordingly, I do not allow the board to charge the appellant for any computer and other costs incurred in locating, retrieving, processing and copying the records under section 57(1)(c).

[35] In conclusion, I uphold the board's fee estimate, in part, but reduce it to $281.25 for its search for responsive records. I do not allow the board to charge the appellant any preparation fees under section 57(1)(b) or computer and related fees under section 57(1)(c). As before, pursuant to section 7(1) of Regulation 460, the board is entitled to request a deposit of 50%, or $140.63, prior to proceeding with any additional work in furtherance of this request.

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[9] See, for example, Orders 81 and MO-1699.
[10] Order MO-1699.
[11] Order 81.

Issue B: Should the board's refusal to waive the fee be upheld?

[36] The fee provisions in the *Act* establish a user-pay principle founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so. The fees referred in section 57(1) of the *Act* and outlined in section 6 of Regulation 460 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.[12] The determination of the issue is based on section 57(4) of the *Act* and section 8 of Regulation 460. These provisions state,

> 57(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,
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> > (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);
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> > (b) whether the payment will cause a financial hardship for the person requesting the record;
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> > (c) whether dissemination of the record will benefit public health or safety; and
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> > (d) any other matter prescribed in the regulations.
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> 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.

[37] A requester must first ask the institution for a fee waiver before this office will consider whether a fee waiver should be granted. 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.[13] The institution or this office may decide

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[12] Order PO-2726.
[13] Orders M-914, P-474, P-1393 and PO-1953-F.

that only a portion of the fee should be waived.[14]

[38] For a fee waiver to be granted under section 45(4), the test is whether any waiver would be *fair and equitable* in the circumstances.[15] The following factors must be considered in deciding whether it would be fair and equitable to waive the fees:

- Section 57(4)(a): actual cost in comparison to the fee
- Section 57(4)(b): financial hardship
- Section 57(4)(c): public health or safety
- 57(4)(d)/section 8 of Regulation 460: whether the institution grants access, fee of $5 or less

Any other relevant factors must also be considered when deciding whether a fee is fair and equitable.

[39] The appellant does not address the issue of the board's fee waiver in its representations. The appellant notes it is a small not for profit organization. The appellant submits that the board should not be allowed to charge any search fees in the interests of transparency and accessibility. The appellant also submits that its ability to freely review the board's conduct should prevail in the public interest.

[40] In its representations, the board submits that it considered a number of factors in deciding whether it would be fair and equitable to waive the fees. Specifically, the board states that the appellant did not provide any details regarding its financial situation to support a financial hardship claim under section 57(4)(b) nor did it explain how paying the fee may cause financial hardship. The board submits that while the appellant claims there is a public interest in the records, public interest in the records is not enough on its own. The board states there must be a connection between the public interest and a public health and safety issue. In this case, the board states there is no connection between the dissemination of the records and a public health or safety issue. Finally, the board found that the waiver of the fee would shift an unreasonable burden of the costs from the appellant to the board.

[41] Upon review of the evidence before me, I uphold the city's decision not to grant a fee waiver. Specifically, I accept the board's position that none of the four factors in section 57(4) of the *Act*, or any other relevant factors, weigh in favour of a finding that it would be fair and equitable to grant a fee waiver in this appeal.

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[14] Order MO-1243.
[15] See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

[42] While the appellant submits that the disclosure of the records would be in the public interest, it does not provide any evidence to demonstrate there is a connection between the disclosure of the records and a public health or safety issue, as required by section 57(4)(c). Previous orders of this office have found that there must be a direct relation between the subject matter of the record and a recognized public health or safety issue.[16] I considered the evidence before me and find that the subject matter of the records does not relate directly to a public health or safety issue.

[43] In addition, I have reviewed the remaining factors in section 57(4) of the *Act* and section 8 of Regulation 460 and find that none apply.

[44] Finally, I have considered whether it would be fair and equitable, in the circumstances, to grant the appellant a fee waiver. I find that it would not. As stated above, the Legislature created a user-pay principle in the *Act*. This principle is founded on the premise that requesters should be expected to pay the fees associated with a request unless it is fair and equitable that they not do so. The fees outlined in section 57(1) are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.[17] The appellant has not provided a persuasive argument that it would be fair and equitable for the board to grant the fee waiver. Accordingly, I find that it would not be fair and equitable to waive the fee.

[45] I uphold the city's decision to deny the appellant's fee waiver request.

Issue C: Did the board conduct a reasonable search for records?

[46] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.[18]

[47] In this case, the appellant submits that "there is reason to believe more responsive decisions exist other than the ARB has reported to the IPC."

[48] As of the present time, the board has not completed its search for the records responsive to the appellant's request. The board has merely identified approximately 75 files that may include the records responsive to the appellant's request. If I had found that the appellant was entitled to a fee waiver in this order, the search would have proceeded. Although I did not make that finding, the appellant has the option of paying the deposit, and if it does so, the search will proceed.

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[16] Orders MO-1336, PO-2592 and PO-2726.
[17] Order PO-2726.
[18] Orders P-85, P-221 and PO-1954-I.

[49] Without a fee waiver and/or payment of the deposit, the board is not required to proceed with an actual search for responsive records.[19] Given that the appellant's concerns relate to a search that could not proceed until the fee estimate and fee waiver issues were resolved, I find it is premature for me to assess the reasonableness of the board's search.

[50] Therefore, I make no finding with regard to this issue on appeal because the board has not completed its search for responsive records.

ORDER:

1. I uphold $281.25 of the board's fee.

2. I uphold the board's decision to deny the appellant's request for fee waiver.

Original signed by
Justine Wai
Adjudicator

March 20, 2019

[19] See section 7 of Regulation 460 and Order PO-3466.