

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3852

Appeal MA19-00254

Toronto Transit Commission

October 24, 2019

Summary: The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for video footage related to an incident involving the requester. The TTC located responsive records from camera footage, and issued an access decision, granting partial access to the request and withholding footage of individuals other than the appellant and TTC employees. The TTC also advised the appellant that she would have to pay a \$339 fee, based on the \$339 fee estimate provided by that third party to the TTC. The appellant asked for a fee waiver, but was denied that request. The TTC's decisions were appealed to the IPC. Only the issues of fee and fee waiver remained at adjudication.

During the inquiry, the appellant requested a different adjudicator, citing bias or possible bias. The adjudicator invited the appellant to submit representations about bias (or reasonable apprehension of bias), in addition to representations about the issues of fee and fee waiver. In this order, the adjudicator dismisses the allegation of bias, or reasonable apprehension of bias. She also upholds the TTC's fee in part (finding that only \$203.40 is an allowable fee under the *Act* and Regulation), and upholds the TTC's decision to deny a fee waiver.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1) and (4); R.R.O. 1990, Reg. 823, sections 6.1 and 7(1).

Orders Considered: Orders P-1536, PO-2214, M-1090, MO-2154.

Cases Considered: *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 107; *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015

ONCA 596 (CanLII) at para. 71; *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

OVERVIEW:

[1] The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for video footage related to a particular incident involving the requester.

[2] The TTC identified the responsive records as being camera footage from two locations, and issued an access decision. It granted partial access to the records. The TTC relied on both the mandatory personal privacy exemption at section 14(1) of the *Act*, and the discretionary personal privacy exemption at section 38(b) of the *Act* to withhold some information. The TTC further stated that a named third party company would be needed to extract and edit content, and apply face-blurring technology to it. The TTC's decision stated that once the TTC was in receipt of \$339 ("cheque payable to [the named third party company] being the total amount quoted,") the TTC would then process the appellant's request.

[3] The requester submitted a request for a fee waiver, which the TTC denied.

[4] The requester (now the appellant) appealed these decisions to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Through mediation at the IPC, the appellant advised that the personal privacy exemptions claimed are no longer at issue. She only wanted to challenge the fee and decision to deny a fee waiver.

[6] Those issues could not be resolved through mediation, and the appeal proceeded to the adjudication stage, where an adjudicator conducts a written inquiry.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the TTC. I sought and received written representations in response from the TTC. I then sent the Notice of Inquiry to the appellant, along with a full copy of the TTC's representations, and gave the appellant an opportunity to provide representations in response.

[8] This office then received a letter from the appellant indicating that she did not want to proceed with any submission before the deadline for representations, and wanted a change of adjudicator "as there may be a bias in the decision-making process."

[9] Since I am the decision maker assigned to adjudicate the appeal, an allegation of bias (or a reasonable apprehension of bias) on my part has to be addressed by me, in accordance with long-held legal principles, which include the necessity of raising an allegation of bias at the earliest possible opportunity.¹ Therefore, I invited the appellant to provide me with written representations for the basis of her allegation of bias, or suspected bias, along with her representations on the issues of fee and fee waiver.

[10] In response, the appellant provided this office with copies of cases and articles related to bias and the reasonable apprehension of bias. She did not explain the relevance of the principles in those materials to the adjudication of her appeal, and provided no representations on the issues of fee and fee waiver.

[11] For the reasons that follow, I dismiss the appellant's allegation of bias, and allow the appeal, in part. I uphold the TTC's fee estimate, in part, only \$203.40 of the \$339 fee estimate is permissible under the *Act* and Regulation. I also uphold the TTC's decision to deny a fee waiver.

RECORDS:

[12] The information at issue is footage from two camera locations.

ISSUES:

- A. Has the appellant established bias, or a reasonable apprehension of bias, on my part?
- B. Should the TTC's fee estimate be upheld?
- C. Should a fee waiver be granted?

DISCUSSION:

Issue A: Is there bias, or a reasonable apprehension of bias, on my part?

[13] The appellant has made an allegation of bias, or reasonable apprehension of bias, but as set out below, she has not substantiated her allegation. It is, therefore, dismissed.

¹ *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 107, 2006 FC 461 (CanLII). In this case, the Federal Court of Canada discussed bias at length.

Correspondence with the appellant at adjudication

[14] The appellant is not known to me, and has not claimed that she is.

[15] My interactions with her have been limited to the following three instances (in writing), during this inquiry:

- first, to advise her that the inquiry had begun and that I was seeking representations from the TTC at that stage;
- second, to invite her to provide representations in response to a Notice of Inquiry and the TTC's representations; and
- third, to invite her to provide representations in support of her allegation of bias or reasonable apprehension of bias (simultaneously granting her an extension to provide her representations on the fee and fee waiver issues).

[16] The first two letters reflect the standard course of events in the adjudication of a fee and fee waiver appeal: the institution is invited to explain why its fee and fee waiver decisions should be upheld first, and an appellant is then invited to respond.

[17] I sent the third letter to the appellant because she contacted this office with an allegation of bias, and it is well-established that such allegations must be put to the decision maker.

Who bears the onus of proof that there is bias on the part of a decision maker?

[18] The onus of demonstrating bias is on the person who alleges it, and mere suspicion is not enough. However, actual bias need not be proven.

The test for establishing bias or reasonable apprehension of bias

[19] The Ontario Court of Appeal has noted that "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."²

[20] In inviting the appellant to prepare her representations about bias, I stated that she may wish to consider that presumption of impartiality and the high threshold, as well as the test for establishing a reasonable apprehension of bias that was articulated by the Supreme Court of Canada:

² *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para. 71.

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."³

[21] In response to my request for submissions on bias or the reasonable apprehension of bias, the appellant submitted:

- copies of four IPC decisions that addressed the issue of bias or reasonable apprehension of bias of particular IPC adjudicators, or the IPC more generally;
- a copy of an article about the reasonable apprehension of bias a law firm;
- the online source address for the Ontario Human Rights Commission policy statement on Francophones, language, and discrimination; and
- the following excerpt from an article by another law firm:

'White Burgess Langille Inman v Abbot and Haliburton Co., [citation] the Supreme Court of Canada released a comprehensive decision on expert bias and how it relates to the admissibility and weight of expert evidence. At the threshold stage, expert evidence will only be inadmissible if the expert is *unable* or *unwilling* to discharge his or her duty to provide a fair, objective and non-partisan opinion. [Emphasis is the appellant's.]

[22] The only comment submitted with the above was: "*The undersigned would like to mention that, case of bias and/or apparent bias in the decision-making process of the IPC, the above-mentioned principles would be applied.*"

[23] The appellant did not, however, explain how the principles reproduced in the materials she sent this office apply to the adjudication of her appeal by me as a decision maker. None are evident to me, given the standard processing of her appeal at adjudication.

[24] Without providing any evidence of bias or reasonable apprehension of bias on my part in the adjudication of her appeal, I find that the appellant has not met her burden on this issue.

³ *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

[25] Accordingly, her claim of bias or reasonable apprehension of bias is dismissed.

Issue B: Should the TTC's \$339 fee estimate be upheld?

Preliminary issue: should the fee estimate at issue be considered under the Act?

[26] The TTC takes the position that the \$339 fee is "not a TTC fee whereby we can consider the fee/fee waiver provisions set out in the [Act]," on the basis that the fee is payable to a private contractor. However, for the following reasons, the fee estimate at issue is the TTC's under the *Act*.

[27] First, the TTC is an institution under the *Act*. As the recipient of a request for access to records made under the *Act*, it was required to charge fees for the processing of such requests under section 45(1) under the *Act*. Section 6.1 of Regulation 823 contemplates that fees that are "specified in an invoice" are to be passed on to a requester. In this case, the invoice is an estimate for work that has not yet been performed. The IPC has previously considered such circumstances and found that its responsibility is to arrive at an estimate that is fair to all concerned.⁴ The institution must charge a requester for these costs, unless the institution decides to waive the fee; see Issue C.

[28] Second, the *Act* requires an institution to issue a fee estimate if a fee exceeds \$25⁵ to give a requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access,⁶ and to help a requester decide whether to narrow the scope of a request in order to reduce the fees.⁷ Neither of these reasons for a fee estimate relates to the party who would be performing a task to process a request.

[29] Third, section 45(4) of the *Act* is instructive. It requires an institution to waive fees in whole or in part ("the head *shall* waive...") if it is fair and equitable to do so.

[30] Therefore, given the statutory and regulatory framework related to fees, the decision to charge a fee for the records is properly a TTC decision under the *Act*, even if it involves costs incurred by a third party.

Calculation of the fee estimate

[31] This office may review an institution's fee and determine whether it complies

⁴ Order MO-2154.

⁵ Section 45(3) of the *Act*.

⁶ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁷ Order MO-1520-I.

with the fee provisions in the *Act* and Regulation 823. For the reasons set out below, I uphold only part of the \$339 fee estimate issued to the appellant.

Basis of the fee

[32] If a fee estimate is \$100 or more, as it is here, it 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 [Emphasis added.]

[33] Here, the TTC states that it provided a third party company that edits videos with specifics about the length of footage and approximate number of faces to be blurred out, and that the third party provided a \$339 fee estimate in response. I am satisfied that the basis of the fee estimate was the advice of an individual who is familiar with the type and content of the records. Accordingly, I uphold the basis of the fee estimate.

Breakdown of the fee estimate

[34] Regardless of the basis of the fee (discussed above), the institution must show that that fee estimate is reasonable.⁹ To discharge this burden, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.¹⁰

[35] The TTC provided the third party company's breakdown of the fee estimate, as follows:

Extracting and importing footage from two cameras (four minutes total) of the encoded footage:	\$120
Total editing for redaction (faces only) of four minutes of footage:	\$120
Outputs - \$25 for each final file (2 total):	\$50
Burn onto high grade disc:	<u>\$10</u>
	\$300

⁸ Order MO-1699.

⁹ Order 86.

¹⁰ Orders P-81 and MO-1614.

Total with [13%] HST included:

\$339

[36] The TTC did not provide further details about the breakdown, though the onus was on it to do so, as the institution to whom the access request was made.

[37] Nevertheless, I have considered the itemized charges and the records themselves to assess whether the fees listed are permissible under section 45(1) of the *Act* and Regulation 823, and whether they are reasonable.

"Extracting and importing footage"

[38] Section 45(1)(c) states that an institution shall charge fees "for costs computer and other costs incurred in locating, retrieving, processing and copying a record."

[39] Section 6.1(4) of Regulation 823 also specifies that an institution shall charge for:

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.

[40] Although what is meant by "extracting and importing footage" was not further explained by the TTC, I observe that each record was retrieved from a different camera, is about twenty minutes in length, and contains about two minutes of responsive information. I find that this qualifies as "locating" and "retrieving" the records under section 6.1(4) of Regulation 823, so I find that the \$120 fee estimate for these tasks is permissible under the *Act* and Regulation. Furthermore, I accept that the \$120 figure identified by the third party company is reasonable, without evidence to suggest otherwise.

Redacting faces

[41] It is undisputed that the records each contain the appellant's personal information.¹¹

[42] The fee estimate includes a \$120 charge to redact faces of individuals other than the appellant and a TTC employee.

[43] The *Act* mandates that institutions charge fees to prepare records under section 45(1)(b), including, if allowed by Regulation, fees to sever records.¹² However, as the

¹¹ As defined under section 2(1) (definition of "personal information") of the *Act*.

¹² Order P-4.

Notice of Inquiry sent to the parties stated, section 45(1)(b) does not include fees to sever records that contain the requester's information (under section 6.1 of Regulation 823). This office has repeatedly held that when a fee estimate is based on an invoiced cost, costs can only be upheld for activities that the institution would have been allowed to charge under the *Act*, if performed by the institution's employees.¹³ Applying this principle, since the TTC would not be allowed to charge the appellant for costs related to its own employees severing records containing the appellant's personal information, the \$120 portion of the fee estimate relating to redacting faces is likewise, not permitted.

CD and "Output" file charges

[44] Under section 6.1(2) of Regulation 823, fees for records provided on CD-ROMs "shall be charged" for records containing a requesters personal information, at \$10 per CD-ROM. I find that the \$10 charge for a high-grade disc qualifies as such a charge, and is reasonable.

[45] As mentioned, section 6.1(4) of Regulation 823 mandates the charging of fees for "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." I find that the \$50 fee estimate for the production of two final "output" files qualifies as such a charge. I accept that this fee estimate identified by the third party company is reasonable, as I have no evidence before me to suggest otherwise.

Summary of permissible fees

[46] The following fees are permissible and reasonable, under the *Act* and Regulation:

Extracting and importing footage from two cameras (four minutes total) of the encoded footage:	\$120.00
Outputs - \$25 for each final file (2 total):	\$50.00
Burn onto high grade disc:	<u>\$10.00</u>
	\$180.00
HST (13% harmonized sales tax in Ontario):	\$ 23.40
Total including HST:	\$203.40

¹³ Orders P-1536, PO-2214, M-1090, and MO-2154.

[47] Since the \$203.40 fee estimate exceeds \$100, the TTC may require the appellant to pay a deposit equal to half of it (or \$101.70) before it takes any further steps to respond to the request.¹⁴

Issue C: Should a fee waiver be granted?

[48] For the reasons that follow, I uphold the TTC's decision not to grant a fee waiver.

General principles

[49] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. 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.¹⁵ The institution or this office may decide that only a portion of the fee should be waived.¹⁶

[50] The fee provisions in the *Act* establish a user-pay principle that is 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.

[51] 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.¹⁷ Section 45(4) lists factors that must be considered in deciding whether it would be fair and equitable to waive the fees. That section of the *Act* says:

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

¹⁴ Section 7(1) of Regulation 823.

¹⁵ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁶ Order MO-1243.

¹⁷ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

d) any other matter prescribed by the regulations.

[52] The fees referred to in section 45(1) and outlined in section 8 of Regulation 823 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 or the *Act* requires the institution to waive the fees.¹⁸

No evidence from the appellant

[53] Without any representations from the appellant on the issue of fee waiver, it cannot reasonably be said that she has persuasively argued that she has met the above-noted burden of proof, and I find that she has not.

The TTC's position

[54] In defending the decision to deny a fee waiver, the TTC's representations emphasize that a request for a fee waiver should include the reasons that the requester thinks that they are entitled to the waiver, and that the appellant had not provided sufficient evidence that the considerations at sections 45(4)(b), 45(4)(c), and 45(4)(d) apply. Since the appellant has not submitted representations on the issue of fee waiver, and since none of the factors at section 45(4) are self-evidently relevant from the records before me, I agree with the TTC's position, as I will explain below.

[55] Regarding section 45(4)(a), the TTC has not claimed that section is relevant in this case. Therefore, I have no basis to find that it is.

[56] For section 45(4)(b) to apply, the appellant must provide some evidence regarding her financial situation, including information about income, expenses, assets and liabilities.¹⁹ As she has not done so, section 45(4)(b) does not apply.

[57] Similarly, without representations from the appellant, and based on my review of the responsive records, I find that section 45(4)(c) (public health or safety) does not apply. To determine whether dissemination of a record will benefit public health or safety under section 45(4)(c), a number of factors are considered,²⁰ such as whether the subject matter of the records relates directly to a public health or safety issue. The responsive portions of the records show the incident involving the appellant. I find that, despite the nature of the incident and the fact that it occurred on public property, the interests involved are private, not public interests. It is not evident from the information before me that any other relevant considerations apply to the records at issue either, under section 45(4)(c). Even if the interests were public, there would still need to be

¹⁸ Order PO-2726.

¹⁹ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

²⁰ Orders P-2, P-474, PO-1953-F and PO-1962.

sufficient evidence that there is some connection between the public interest and a public health and safety issue,²¹ but I find that that is not the case here.

[58] Under section 8 of Regulation 823, the TTC was to consider whether to waive the fee (in whole or in part), if the requester was given access to the record or the payment was \$5 or less, but neither of those considerations is applicable here.

[59] Any other relevant factors must also be considered when deciding whether or not a fee waiver is "fair and equitable." Relevant factors may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the 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.²²

[60] I find that any deficiencies in the manner in which the TTC responded to the request have been adequately remedied by the appeal process, and specifically, my findings above about the impermissibility of one charge included in the fee estimate.

[61] I agree with the TTC's position that there is insufficient evidence to justify departing from the user-pay principle in the *Act*, in considering the relevant factors that may be considered, listed above, and the circumstances of this case. Without representations from the appellant demonstrating that other relevant factors could weigh in favour of a fee waiver, viewing the circumstances independently, I find that the narrow scope and low number of records at issue weigh modestly in favour of a fee waiver. Having reviewed the records, I find that I have insufficient evidence before me to consider the nature of the incident involving the appellant as another relevant factor favouring a fee waiver. I find that waiving the \$203.40 fee in these circumstances

²¹ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

²² Orders M-166, M-408 and PO-1953-F.

would shift an unreasonable burden of the cost of processing the request from the appellant to the TTC, and that this outweighs the positive factors I have found to exist.

[62] For these reasons, I uphold the TTC's decision to deny a fee waiver to the appellant.

ORDER:

1. I dismiss the appellant's allegation of bias, or reasonable apprehension of bias.
2. I allow the appeal, in part. I uphold the TTC's fee estimate, in part; only \$203.40 of the \$339 fee estimate is permissible under the *Act* and Regulation. I also uphold the TTC's decision to deny a fee waiver.

Original signed by _____
Marian Sami
Adjudicator

_____ October 24, 2019