Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3894

Appeal MA18-296

City of Greater Sudbury

January 27, 2020

Summary: The City of Greater Sudbury received a request for all records that might demonstrate that a named employee accessed the personal information of the requester or his spouse, or information relating to their primary residence, from 2007 until the date of the request in 2018. The city issued a fee estimate, breaking down the records into two time periods based on when the city migrated to a new backup system in 2016. For the period from 2007 to 2015, the fee estimate for retrieving records from the city's discontinued backup system ranged from $25,890 to $38,010 depending on the process used. For records from the city's new system, covering 2016 to 2018, the fee was $130. The appellant appealed the city's fee estimate. During mediation, the appellant sought a fee waiver from the city, which the city denied. Therefore, both the fee estimate and the denial of the fee waiver request are at issue.

In this order, the adjudicator finds that the requested information from the discontinued backup tapes (covering 2007 to 2015) does not fit within the definition of a "record" under section 2(1) of the *Act*, and therefore the city is not required to produce it. With respect to the records that the city is required to produce, the adjudicator reduces the city's fee estimate because the responsive records would contain the appellant's personal information, and upholds the city's decision not to grant a fee waiver.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, sections 2(1) (definition of "record"), 45(1), and 45(4); and sections 1, 6, and 6.1 of Regulation 823.

Orders and Investigation Reports Considered: Order PO-3002.

Cases Considered: *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20, 93 O.R. (3d) 563; *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2442.

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> […] any and all records that demonstrate and or indicate the access of our personal information/records from 2007 – present, including my spouse [named individual] and our primary residence being [specified address].

[2] The city contacted the requester to clarify the request. The requester narrowed the scope of the request to the following:

> Records that demonstrate and or indicate that [a named city employee in the city's 3-1-1 department] accessed personal information/records from 2007 to present of [the appellant], [the appellant's spouse], or [specified address.]

[3] The requester also provided a consent form signed by his spouse, thereby permitting the city to disclose records containing her personal information to him.

[4] The city issued an interim access decision and fee estimate providing the following fee options:

1. A fee of $130 for records from January 1, 2016 to April 4, 2018.[1] The city requested a $65 deposit before proceeding with a search for records.

2. A fee of $18,010 for records from January 1, 2007 to December 31, 2015. The city requested a $9,005 deposit before proceeding with a search for records.

[5] The city explained that the January 2007 to December 2015 fee estimate was based on the requirement that the city purchase software required to access the discontinued backup system. The city estimated approximately 200 hours of staff time to "install, appropriately configure the software and review each backup tape."

[6] The city's interim access decision also noted that the mandatory personal privacy exemption at section 14(1) of the *Act* might apply to the records, such that partial

[1] The date the city received the appellant's request.

access would be granted.

[7] The requester, now the appellant, appealed the city's decision to this office.

[8] During mediation, the appellant raised the issue of fee waiver under section 45(4) of the *Act*, and provided submissions on the matter. With the appellant's permission, the mediator shared the appellant's submissions with the city. The city issued a fee waiver decision denying the request. The city also advised that it would not be revising the fee estimate. Further mediation was not possible, and the file was transferred to the adjudication stage of the appeal process.

[9] During my inquiry, I sought and received representations from both the city and the appellant on the city's fee estimate and fee waiver decision.[2] The city's representations raised the issue of whether the information that is responsive to the appellant's request constitutes a "record" for the purpose of the *Act*, taking into consideration section 1 of Regulation 823. Therefore, I invited the appellant to respond to this issue as well. I also asked the city to provide a copy of its record retention schedule, and to address its relevance to the matters at issue in this appeal. I then shared the city's record retention schedule and accompanying representations with the appellant, and invited and received his submissions in reply.

[10] The city also issued a revised interim access decision regarding the fee estimate, which reflects the position articulated in its representations. Below, I set out the three options presented in the city's revised fee estimate.

[11] As background, the appellant seeks records that show whether a named employee accessed 3-1-1 information relating to him, his spouse, or their property, and the city uses its Active Citizen Response (ACR) system to log this type of information.

> Option 1 – Records from January 1, 2016 to April 4, 2018
>
> IT staff would identify all the Active Citizen Response (ACR) cases that relate to [the appellant, his spouse, or the specified address] and, using the employee's ID for ACR, they would review the access to each case. The report generated would be very technical in nature.
>
> The estimated cost for processing the request is as follows:

Description	**Rate**	**Total**

[2] For reasons of economy, I have only summarized portions of the parties' lengthy submissions in this order, although I have carefully considered them in their entirety.

Search time & preparation costs	4 hours	$7.50 / 15 minutes	$120.00
Copy Costs	1 CD	$10.00/CD	$10.00
Estimated total costs			**$130.00**
Deposit			**$65.00**

Option 2 – Records from January 1, 2007 to December 31, 2015 Processed by City Staff

Prior to January 1, 2016, the access logs to the city's ACR system were stored on backup tapes created using a backup system that is no longer utilized by the city. In order to access older access logs, the software for the discontinued backup system would need to be purchased at an approximate cost of $12,000.00.

Noting that the tape deck in the possession of the city is currently being used in conjunction with [the city's] new software to backup the city's systems, a separate tape deck would need to be acquired and configured with the discontinued software to perform a search for records. Staff estimates that approximately 200 hours or more of staff time would be necessary to source the tape deck and software, complete the installation, appropriately configure the software and review each backup tape.

The estimated cost for processing the request is as follows:

Description		**Rate**	**Total**
Software installation, configuration, search time, and preparation of records	200 hours	$7.50 / 15 minutes	$6,000.00
Copy Costs	2 CD	$10.00/CD	$20.00
Software costs			$12,000.00
Tape deck			$20,000.00

Estimated total costs	**$38,010.00**
Deposit	**$19,005.00**

Option 3 – Records from January 1, 2007 to December 31, 2015 Processed by External Contractor

[As] an alternative to processing the records internally by city staff as outlined in Option 2, the backup tapes can be shipped to [an external contractor], the company of the previously used backup system, who would process the tapes so that the city staff could search the data contained on them. [The external contractor] will only process the tapes in groups of 250 at a time. Noting that there are approximately 500 tapes, two separate shipments will have to be made.

The estimated cost for processing the request is as follows:

Description		**Rate**	**Total**
Search time and preparation of records	100 hours	$7.50 / 15 minutes	$3,000.00
Copy Costs	2 CD	$10.00/CD	$20.00
[External contractor] costs			$20,250.00
Shipping costs			$2,620.00
Estimated total costs			**$25,890.00**
Deposit			**$12,945.00**

[12] The revised fee estimate stated that the city had not yet reviewed the records, but anticipated that the personal privacy exemption at section 14(1) of the *Act* may apply such that the records would require severing prior to disclosure to the appellant.

[13] For the reasons that follow, I find that the requested information from the discontinued backup tapes (covering 2007 to 2015) does not fit within the definition of a "record" under section 2(1) of the *Act*, and the city is not required to produce it. With respect to the records that the city is required to produce under Option 1, I reduce the city's fee estimate from $130 to $10, on the basis that the records must be processed

under section 6.1 of Regulation 823. I uphold the city's decision not to grant a fee waiver.

PRELIMINARY ISSUE:

Is the requested information a "record" as defined in section 2 of the *Act* and section 1 of Regulation 823?

[14] The appellant seeks access to all responsive records between January 1, 2007 and the date of his request.[3] In order to respond to this request, the city would need to combine the methods described in Option 1 (covering 2016 to 2018) with one of the methods described in Options 2 or 3 (covering 2007 to 2015). Option 2 estimates the costs required for processing the data in-house, which include buying both hardware and software. Option 3 estimates the costs required for hiring an external contractor to complete some of the work, which include shipping and the contractor's fees.

[15] During the inquiry, the city raised the issue of whether the information responsive to the appellant's request is a "record" as defined in section 2 of the *Act*, taking into consideration section 1 of Regulation 823. The city maintains that the records requested by the appellant are not "records" for the purpose of the *Act*, as the process of producing the records in machine-readable format would "unreasonably interfere" with the city's operations.

[16] Given the city's position, I must determine whether the records sought by the appellant are "records" for the purpose of the *Act*, before I can consider the fee estimate and fee waiver issues.

[17] The term "record" is defined in section 2(1) of the *Act* as follows, in part:

> any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
> >
> > (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an

[3] As noted above, the city received the appellant's request on April 4, 2018, and has treated that date as the date of his request.

> institution by means of computer hardware and software or any other information storage equipment and technical expertise **normally used** by the institution. (emphasis added)

[18] This definition must be read in conjunction with section 1 of Regulation 823, which states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the *Act* if the process of producing it would **unreasonably interfere** with the operations of an institution. (emphasis added)

Representations

[19] In support of its position that the information sought by the appellant is not a "record" for the purpose of the *Act*, the city explains that it implemented a new backup system at the end of 2015, which does not use the same software as its discontinued backup system. Because the city "does not have the software or hardware to be able to read or use the [discontinued backup] tapes in any way," it submits that processing data from before 2016 would be "exceptionally costly."

[20] In Option 2 of the city's fee estimate, the city sets out the costs involved to process the discontinued tapes in-house. The city submits that it would take multiple individuals from its IT department over 200 hours in order to build the necessary programs and systems that it does not currently have. In doing so, the city says that its IT staff would be unable to perform their regular work, which includes "pressing jobs" and "major projects." The city also submits that it would need to purchase a new tape library at a cost of approximately $20,000 in order to process the discontinued tapes. The city justifies this expense on the basis that using its existing tape library would require it to shut down its current backup system. In other words, the city submits that the only way to continue backing up its current data while processing the appellant's request is to first obtain a new tape library.

[21] Alternatively, the city submits that it could hire an external contractor with the appropriate technical expertise to process the backup tapes into a format that the city is able to work with. The city has identified the company that provided its former backup system as a suitable external contractor for this task. This option is presented as Option 3 in the city's revised fee estimate.

[22] The city advises that in generating its fee estimate, it consulted with individuals who are familiar with the type and content of the information requested. This includes the city's Manager of Software and Business Applications and Manager of Hardware Technology. The city maintains that both of these individuals have worked with the city since the 1990s, and have held their current positions since 2005 and 1999, respectively.

[23] To provide additional context for the alleged difficulty in processing the requested information, the city supplied a copy of its current record retention schedule, which was implemented in 2015.[4] The city notes that its retention schedule does not specify a retention period for access logs, such as those at issue in this appeal. However, the city explains that if a type of record is not specified in its retention schedule, then the record will be stored according to the most similar category of records. In this case, the city says that it retains ACR access logs for a period of two years, which is in accordance with the retention period for IT backups (on which, the city explains, ACR access logs are stored), and the general "catchall" retention period for general files.

[24] The city offers an explanation for why it provided a fee estimate for records dating back to 2007, despite the fact that, according to its retention schedule, it should only have responsive records dating back to April 2016 (two years prior to the date the appellant's request was received). In short, the city explains that when it updated its backup system at the end of 2015, it maintained its discontinued backup data on LTO5 tapes for use in in the event that the new backup system failed or was subject to an attack. The city submits that while reverting to the old system would be "exceptionally costly," it would still be preferable to losing all of the city's records.

[25] The city says that as of 2018, the discontinued LTO5 backup tapes were no longer needed; however, the city's IT Department did not have the opportunity to destroy them before the city received the appellant's request. Because the city's former backup system and retention schedule did not have the same two-year retention periods as the new system and retention schedule, those tapes may include information responsive to the entirety of the appellant's request. Therefore, the city opted to include the discontinued tapes in its access decision, even though accessing that data is a costly and technical process. As the work involved in processing the data on the discontinued tapes is quite different from processing the data on the city's current backup system, the city chose to provide three fee "options" in its revised fee estimate, as outlined above.

[26] In response, the appellant maintains that the city has "deliberately" implemented bylaws and retention periods for the sole protection of its own interests. The appellant further submits that the cost of obtaining archived information is the city's "cost of doing business." The appellant says that the city provided "no evidence" that it does not already have the software required to complete the job, or that such software is, in fact, required. Regardless, the appellant maintains that the cost of implementing a program to process the requested information would be a "reasonable expense incurred at the city's expense in order to protect the privacy of victims from the city's

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[4] Bylaw 2015-226, A By-law of the City of Greater Sudbury to Establish Retention Periods for City Records.

negligence."

[27] The appellant maintains that the city has its own IT department, and "works closely and regularly with a firm from the US/California for various reasons related to IT." The appellant also argues that the city's submissions regarding the diversion of resources from other projects is "absurd and despicable," given that the city is "notorious for mismanaging funds."

Analysis and finding

The relevance of the city's record retention schedule

[28] Before considering whether the information sought by the appellant constitutes a "record" under the *Act*, it is important to note that the *Act* does not dictate how or for how long institutions should retain records, beyond requiring that institutions have measures in place to ensure the preservation of records.[5] In this case, the records at issue are ACR access logs. Although the city's record retention schedule does not specifically address this type of record, the city advises that it retains these logs for two years, which is in accordance with its retention periods for general records and IT backup data.

[29] Therefore, although the appellant requested records dating back to 2007, if the city had destroyed its records in accordance with its retention schedule, then it would have been justified in saying that it was unable to produce records pre-dating April 2016. In this case, however, the city explains that older data remained available because the city migrated to a new backup system at the beginning of 2016, and maintained the older data for use in the event that the new system failed. Since data from prior to April 2016 remained available to the city, the city considered the time and effort required to process that data when preparing its fee estimate in response to the access request at issue in this appeal, which was received in April 2018.

[30] To account for the different methods and resources required to process data stored on its current and discontinued backup systems, the city divided its fee estimate into three "options." Option 1 outlines the fee for creating responsive records from data stored on the city's new backup system, which includes data beyond the city's two-year retention period, dating back to January 1, 2016. Options 2 and 3 outlines the fees for creating responsive records from data stored on the city's discontinued backup tapes, dating from December 31, 2015 back to January 1, 2007. Option 2 sets out the fees for processing the data in-house, while Option 3 sets out the fees required if the city hires an external contractor.

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[5] Section 4.1.

[31] In doing so, the city signalled its ability to process data for the period responsive to the entirety of the appellant's request. Therefore, I will consider whether the city is required to do so by addressing the city's argument that much of the information responsive to the appellant's request is not a "record" as defined in section 2 of the *Act.*

Is the requested information a "record" under the Act?

[32] In order for a record to satisfy the definition of "record" in section 2(1) of the *Act*, and, in particular, paragraph (b) of the definition,[6] it must be:

a. capable of being produced from a machine-readable record;

b. under the control of the institution; and,

c. capable of being produced "by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution."

[33] If any of these three requirements are not satisfied, then the information will not constitute a "record" for the purpose of the *Act*.[7] If all three requirements are satisfied, then there remains the requirement in section 1 of Regulation 823, that producing the record must not "unreasonably interfere" with the operations of the institution.[8]

[34] There does not appear to be any dispute that the records sought by the appellant are capable of being produced from machine-readable records by either conducting the work in-house or hiring an external contractor. There is also no dispute that the backup tapes from which the records would be produced are under the city's control. Accordingly, I must now consider whether the records are capable of being produced "by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution."

[35] While it is clear that the phrase "normally used by the institution" modifies the immediately preceding "technical expertise" in paragraph (b) of the definition of "record," it is less clear whether the phrase also qualifies the "hardware and software" component of the definition.[9] In *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, the Ontario Court of Appeal left it open for this office to determine "whether the phrase 'normally used by the institution' should be interpreted

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[6] Paragraph (a) of the definition is not germane to this analysis because it simply describes the types of information that qualify as a "record" under the *Act*.
[7] See, for example, Order P-1572.
[8] Order PO-2730.
[9] *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20, 93 O.R. (3d) 563 at paragraph 42.

as precluding the need for an institution to acquire or purchase new software that is beyond its technical expertise to develop using its existing software."[10] On this, I adopt the interpretation given to the phrase by the court below in the same matter.[11] The Divisional Court's interpretation and reasoning was as follows:

> In construing s. 2(b), I conclude that the words "normally used by the institution" qualify both "by means of computer hardware and software" and "any other information storage equipment and technical expertise". I do so for two reasons.
>
> First, the use of the words "any other" convey the sense that the two phrases connected by "or" speak of equipment, similar in nature, capable of producing a record from a machine-readable record.
>
> Second, it would make no sense to have different requirements of the institution to "produce a record" depending on whether it could be done "by means of computer hardware and software" or whether "by any other information storage equipment and technical expertise".[12]

[36] In my view, this interpretation is plausible in the context of the *Act*, and is aligned with the "modern approach" to statutory interpretation described by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed:

> The words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[13]

[37] Therefore, I conclude that the "normally used by the institution" requirement qualifies both the "hardware and software" and the "information and storage equipment and technical expertise" components of paragraph (b) of the definition of "record" in section 2(1) of the *Act.*

[38] Although both parties were invited to provide submissions on whether the information sought by the appellant is a "record" for the purposes of the *Act*, neither party addressed the "normally used" requirement in paragraph (b) of the definition. Rather, the city relies on the "unreasonable interference" to its operations that would

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[10] *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20, 93 O.R. (3d) 563 at paragraph 42.
[11] [2007] O.J. No. 2442. The Court of Appeal overturned this decision on appeal, but with regard to a different issue.
[12] *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2442 at paragraph 39.
[13] Markham: LexisNexis Canada Inc, 2008, at page 1.

be caused by purchasing, installing, and configuring new software, and purchasing a new tape library in order to process the discontinued backup tapes.

[39] I have considered the evidence before me, which was generated, in part, with the assistance of two city employees who are well versed in the city's technical capabilities and limitations. Based on the evidence, and for the following reasons, I find that the city is not able to process the discontinued backup tapes using computer hardware and software or technical expertise that it "normally uses," as required by paragraph (b) of the definition of "record" in section 2(1) of the *Act*.

[40] With respect to Option 2, I accept the city's evidence that it has one tape library that it "normally uses," and the existing tape library cannot be used to both process the appellant's request and carry out its usual functions (backing up the city's current data). Therefore, in order to process the appellant's request in-house, the city would be required to purchase new hardware consisting of an entirely separate tape library. On this basis, I am satisfied that the city is not able to process the discontinued backup tapes internally using hardware that it normally uses.

[41] I am also satisfied that the city does not have the software required to process the discontinued backup tapes in the manner required to respond to the appellant's request. Rather, the city would need to purchase, install, and configure new software in order to do so. Accordingly, I am satisfied that the city does not normally use the software required to process the discontinued backup tapes in order to respond to the appellant's request.

[42] With respect to Option 3, I accept that as an alternative to processing the tapes in-house, the city could hire an external contractor with the proper technical expertise to complete some of the data processing work. The city has identified the company that provided its former backup system as a suitable external contractor for this task. Although the appellant maintains that the city "works closely and regularly with a firm from the US/California for various reasons related to IT," I accept the city's submission that it stopped using this company's backup system at the end of 2015. Additionally, unlike the situation in Order PO-3002, where an external contractor was already engaged by the institution to develop other reports similar to the one at issue in that appeal, there is no evidence before me to suggest that the city is currently using this company's services to conduct data processing similar to that which would be necessary here. Accordingly, I am satisfied that the city does not normally use the technical expertise of the external contractor that it would need to engage for the purpose of responding to the appellant's request using Option 3.

[43] As a result, I find the third requirement under paragraph (b) of the definition of "record" in section 2(1) of the *Act* has not been established because it is not possible for the city to process the discontinued backup tapes using the computer hardware and software or technical expertise that it *normally uses*. Therefore, the requested information does not fit within the definition of a "record" under section 2(1) of the *Act*, and the city is not required to produce it using the methods identified in Options 2 and

3 of its revised fee estimate.

[44] In reaching this conclusion, I note that it is only because of unusual circumstances that the city initially offered to process the data from 2007 to 2015. Had the city not undergone a backup system migration, which resulted in it maintaining its discontinued backup tapes for far longer than its mandated retention periods, then any data pre-dating April 2016 would presumably have been destroyed in accordance with the city's record retention schedule. Therefore, in my view, the fact that the discontinued backup tapes are particularly inaccessible for the purposes of providing access under the *Act*, does not amount to the city's disregard of its obligations under the *Act*.

[45] Finally, although the city relied heavily on the "unreasonable interference" provision section 1 of Regulation 823, it is not necessary for me to consider this argument given my findings above. It would only be necessary to make a determination on whether producing the records would unreasonably interfere with the city's operations if I found that all three requirements under paragraph (b) of the definition of "record" had been met.[14]

[46] With respect to Option 1, the city has not claimed that processing the data from 2016 to 2018 would require hardware, software, or technical expertise that it does not normally use, or that its operations would be unreasonably interfered with by doing so. Therefore, I am satisfied that these exceptions to what constitutes a "record" do not apply. I find that the city is able to produce "records" responsive to the appellant's request for the time covering January 1, 2016 to April 4, 2018, using the method described in Option 1. I will consider the city's fee estimate and waiver decision regarding the production of these records below.

ISSUES:

A. Should the city's fee estimate for Option 1 be upheld?

B. Should the fee be waived?

DISCUSSION:

Issue A: Should the city's fee estimate for Option 1 be upheld?

[47] As outlined above, the city's revised fee estimate was $130 for Option 1, which

[14] Order MO-1989 at para 36; upheld on judicial review in *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20, 93 O.R. (3d) 563.

covers records from January 1, 2016 to April 4, 2018.

General principles

[48] Where the fee exceeds $25, section 45(3) of the *Act* requires an institution to provide the requester with a fee estimate. 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.[15]

[49] 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.[16] The fee estimate also assists requesters in deciding whether to narrow the scope of a request in order to reduce the fees.[17]

[50] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[18] 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.

[51] 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.

[52] More specific provisions regarding fees are found in sections 6 and 6.1 of Regulation 823, which read:

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[15] Order MO-1699.
[16] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[17] Order MO-1520-I.
[18] Orders P-81 and MO-1614.

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.

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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD- ROM.

3. For developing a computer program or other method of producing the personal information requested from machine readable record, $15 for each 15 minutes spent by any person.

4. 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.

Representations

The city's representations

[53] The city explains that the employee named in the appellant's request is an employee in the city's 3-1-1 department. The 3-1-1 department uses the city's ACR system to log certain requests or complaints by citizens. The city maintains that while the ACR system generates a log for all records that are accessed, it does so in text files that must be accessed and reviewed by the city's IT staff. The city explains that the text files grow quite large and are then broken up into multiple files.

[54] The city submits that in order to process the appellant's request, its staff would use the ACR system to search for cases involving the specified names and property. The staff would record relevant case numbers and then run reports through all of the available log files in order to identify instances where the case numbers were accessed. Once that information was gathered, the staff would need to determine whether the cases were accessed by the city employee named in the appellant's request, by checking the log for that individual's user ID. The staff would then sever the record and generate a new file showing only the lines where the cases were accessed by the named employee.

[55] The city submits that the lines of text contained in the log file are "very difficult to read, and resemble a very long web link." The city also states that the responsive lines of text would not contain any contextual information. To illustrate this point, the city provides the following example:

> If one record was found for user id "user1" and case ID number "12345", the resulting line found in the log file would appear as the following:
>
> 2018-01-01 13:35:17,812 [13] {4.7.0.18} <**user1**> INFO ACR.Web.PageBaseNew – Page_Unload – /acr47/Web/Features/CaseOperations/CaseDetails_General.aspx?cvstid=3e2g3d1 a-d809-4b62-b547-f3e600812654&CaseID=**12345**
>
> The above line example indicates that user1 accessed the ACR file with case id number 12345 on January 1, 2018 at 13:35:17.

[56] Based on the above, the city submits that the responsive records would not contain any of the appellant's personal information. Rather, they would simply contain technical data, including the employee's user ID, a string of text identifying the backup data location accessed, the relevant case ID, and the time the case ID was accessed. In other words, the city submits that the responsive information shows an employee's access to a particular file that contains personal information, but that the responsive information itself would not contain any personal information. In addition, the city submits that records pertaining only to the appellant's spouse or the specified address would not contain the appellant's personal information. As a result, the city has based its fee estimate on the fees allowable under section 6 of Regulation 823, and not section 6.1.

[57] In the alternative, the city maintains that if the records contained the appellant's personal information, which it denies, then the only fees that would not be recoverable under section 6.1 would be those associated with search and preparation time.

[58] The city advises that in generating its fee estimate, it consulted with its Manager of Software and Business Applications and its Manager of Hardware Technology, who have both worked with the city since the 1990s. Due to their knowledge and experience, the city maintains that they are the most appropriate individuals to seek

advice from concerning how the responsive information would be processed.

[59] With respect to the $130 fee estimate for Option 1, the city explains that the fee includes four hours of search and preparation time, at $7.50 per 15 minutes, during which the city's IT staff would complete the steps set out above.[19] In doing so, the city's staff would generate reports, run queries, and sever information to generate new files containing the responsive information. The city's staff would create a record containing the responsive lines of text and provide it to the appellant on a CD at the cost of $10. The city confirms that it did not include any time spent by its Legislative Compliance Coordinator to review each responsive record to see if any exemptions apply.[20]

The appellant's representations

[60] The appellant maintains that the city's fee estimate is unreasonable. He also suggests that the city's position regarding the steps required to provide him with access to the requested information "is unreasonable and appears grossly fabricated/misrepresented." The appellant says that it is evident that the city requires the ability to access information "pertaining to corporate keystrokes from previous operations, for disciplinary purposes, internal research, etc," given that "we live in a highly electronic […] society [and] that information of any kind requires access regularly for various reasons."

Analysis and findings

[61] As noted above, the purpose of a fee estimate is to give the requester sufficient information to make an informed decision as to whether or not to pay the fee and pursue access. Where a fee is $100 or more, as it is in this case, the 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.[21]

[62] For the reasons that follow, I uphold the city's fee estimate in part. I reduce the allowable fees for Option 1 to $10 on the basis that they must be calculated under section 6.1, and not section 6, of Regulation 823.

Determining the appropriate basis for the fees

[63] The city maintains that the records responsive to the appellant's request would not contain his personal information for the purpose of section 6.1 of the Regulation.

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[19] See paragraph 54.
[20] Such fees are not permissible under the *Act* or Regulation 823. See Order 4.
[21] Order MO-1699.

Therefore, the city based its fees on those permissible under section 6 of Regulation 823, which, unlike section 6.1, allows an institution to charge a requester for the time spent searching records and preparing them for disclosure.

[64] I am not, however, persuaded by the city's position that the responsive information would consist of technical data as opposed to personal information. First, I note that the appellant specifically sought records demonstrating incidents when his and his spouse's personal information had been accessed by the named employee.[22] While the resulting records will be about incidents of access, rather than the specifics of the information accessed, it would be incongruous to find that such records do not also reveal something of a personal nature about the appellant and his spouse. The record would reveal that the employee in question accessed the personal information of the appellant, or his spouse, which is, in itself, the appellant's personal information.

[65] In addition, according to the city, each entry in the ACR system is assigned a case ID. I find it compelling that records responsive to the appellant's request can only be generated by first searching the ACR system for relevant case IDs using the appellant's and his spouse's names, and their home address. This too leads me to conclude that the responsive records would contain a personal element as contemplated by paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[66] Given the spouse's consent for the appellant to obtain this information, I find it appropriate to treat her personal information as the appellant's for the purpose of determining the appropriate fee. Therefore, I find that the responsive records would contain the appellant's personal information as defined in section 2(1) of the *Act* and as contemplated by section 6.1 of Regulation 823. I will consider whether the fees outlined in the city's revised fee estimate are permitted by section 45(1) of the *Act* and section 6.1 of Regulation 823.

Search and preparation fees

[67] Unlike the fees permitted under section 6 of Regulation 823, section 6.1 does not allow an institution to charge a requester fees for manually searching a record or preparing a record for disclosure. Given that the fees permissible in this appeal are those set out in section 6.1 of Regulation 823, I will not uphold the fees in the city's revised fee estimate that are associated with searching or preparing records for disclosure to the appellant.

[68] For the records covering January 1, 2016 to April 4, 2018 (Option 1), the city estimates that its staff will require four hours of search and preparation time, using the

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[22] As noted above, the appellant has his spouse's consent to obtain access to records relating to her.

methods described above,[23] in order to search for and sever the records. Based on these time estimates and the prescribed fee of $7.50 per fifteen minutes,[24] the city estimates that its fees for search and preparation of the records for this time period would be $120. As these fees are not permitted under section 6.1 of Regulation 823, I will not uphold them.

Cost of CDs: section 45(1)(c) of the Act and section 6.1(2) of Regulation 823

[69] Section 45(1)(c) of the *Act* requires institutions to charge a fee for copying a record. Section 6.1(2) of Regulation 823 sets the cost of copying records onto a CD-ROM at $10 for each CD-ROM.

[70] In this appeal, the city proposes to copy the responsive information onto a CD for the purpose of providing access. The city estimates that one CD will be required to provide access to the responsive records for January 1, 2016 through to April 4, 2018. Given that the city's fee for the CDs is based on the fee prescribed in section 6.1(2) of the Regulation, I find that it is reasonable and I uphold this portion of the city's fee estimate.

[71] As search and preparation fees and the cost of one CD are the only fees listed in the city's fee estimate for Option 1, my analysis of the city's fee estimate is concluded. Next, I will consider whether the allowable $10 fee for Option 1 should be waived.

Issue B: Should the fee be waived?

[72] During mediation, the appellant raised the possibility of fee waiver under section45(4) of the *Act* on the basis that it would be fair and equitable for the city to waive the fees in the circumstances. For the reasons that follow, I find a waiver of the allowable fees under Option 1 would not be fair and equitable in the circumstances.

General principles

[73] The fee provisions in the *Act* establish a user-pay principle, which 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. 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.[25] The determination of the issue is based on section 45(4) of the *Act* and section 8 of Regulation 823. These provisions state:

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[23] See paragraph 54.
[24] Regulation 823, section 6.
[25] Order PO-2726.

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> > (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
> >
> > (b) whether the payment will cause a financial hardship for the person requesting the record;
> >
> > (c) whether dissemination of the record will benefit public health or safety; and
> >
> > (d) any other matter prescribed by the regulations.
>
> 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.

[74] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, 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.[26] The institution or this office may decide that only a portion of the fee should be waived.[27]

Representations

[75] It should be noted that the parties' submissions about fee waiver were made when the large fee estimates for Options 2 and 3 were still at issue.

The city's representations

[76] The city submits that the fees associated with the appellant's request should not

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[26] Orders M-914, P-474, P-1393 and PO-1953-F.
[27] Order MO-1243.

be waived as the appellant's fee waiver request did not establish or refer to any of the criteria in section 45(4) of the *Act*, or the other relevant factors. Rather, the city submits that the appellant's fee waiver request accuses the named employee of having a "personal agenda against him" and the city of "continuing to protect [its] staff members behind the corporate veil and political red tape." The city maintains that the appellant's request stems from a neighbour dispute, which is a matter of private interest.

[77] With regard to the factors set out in section 45(4) of the *Act*, the city maintains that the appellant has not provided any evidence of his income, expenses, assets, or liabilities that would substantiate a claim that the fees would cause the appellant financial hardship. The city also says that dissemination of the records would not benefit the public health or safety by disclosing a health or safety concern or meaningfully contributing to the development or understanding of an important health or safety issue.

[78] With regard to other factors that may be relevant to a determination of whether a fee waiver would be fair and equitable, as required by the *Act*, the city submits that it worked with the appellant to clarify and narrow the scope of his request. The city also notes that it divided the request into two time periods in order to make access to the most recent information more affordable for the appellant. Finally, the city submits that waiving the fee would shift "an unreasonable burden of cost from the appellant to the institution."

The appellant's representations

[79] The appellant submits that the city is a "multi-hundred million dollar corporation" and that while the costs are unreasonable for him, they would be immaterial for the city to cover.

[80] The appellant explains that he requested a fee waiver because he seeks information as a result of an alleged privacy breach that affected him as well as others. He suggests that the city is "concealing evidence" of the privacy breach because it does not want to incriminate itself with regard to any wrongdoing. He argues that the city is accountable to its citizens for its decisions, actions, and wrongdoings. He raises concerns about the named employee taking personal matters into her own hands, and maintains that any wrongdoing on behalf of the employee is the city's responsibility.

[81] In support of his fee waiver request, the appellant refers to the financial hardship factor set out in section 45(4)(b) of the *Act*, though he requested that his submissions on this point remain confidential.

[82] The appellant refers to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*,[28] though he did not elaborate on this position nor did he submit a Notice of Constitutional Question.

Analysis and findings

[83] As noted above, the parties' submissions on this issue were prepared when the total fee estimate provided by the city ranged from $26,020 to $38,140, depending on whether the city processed the data using Options 1 and 3 or Options 1 and 2, respectively. Regardless, I will still consider whether it would be fair and equitable to waive payment of all or part of the allowable $10 fee based on the evidence and arguments before me.

Section 45(4) factors

[84] 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.[29] Factors that must be considered in deciding whether it would be fair and equitable to waive the fees include:

- whether the actual cost varies from the amount of the fee, and if so, to what extent;[30]
- financial hardship of the appellant;[31]
- public health or safety;[32] and
- other relevant factors as prescribed by the regulation.

[85] The appellant's submissions rely primarily on the "financial hardship" grounds for a fee waiver. Generally, a requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities.[33] While providing this evidence is not intended to be an onerous task, some form of proof is required.[34]

[86] The appellant maintains that the cost of obtaining access to the requested records would cause him financial hardship as contemplated by the factor in section

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[28] The appellant's submissions refer to sections 7 and 12 of the *Constitution Act, 1982*, though I take this to be a reference to these sections of the *Charter*.
[29] See *Mann* v. *Ontario (Ministry of Environment)*, 2017 ONSC 1056.
[30] Section 45(4)(a) of the *Act*.
[31] Section 45(4)(b) of the *Act*.
[32] Section 45(4)(c) of the *Act*.
[33] Orders M-914, P-591, P-700, P-1142, P-1365, and P-1393
[34] Order PO-3743.

45(4)(b). He provided confidential submissions regarding the relevance of this consideration. The city submits that the appellant has not provided evidence substantiating his claim.

[87] I have carefully considered the parties' representations. In my view, the evidence submitted to this office by the appellant provides limited insight into his financial situation. Although he made confidential representations regarding his income, he did not submit any documents, to this office or the city, that might demonstrate his overall financial situation. Accordingly, I find that financial hardship, as contemplated by section 45(4)(b), has not been established as a consideration in support of a determination that a fee waiver is fair and equitable in the circumstances of this appeal.

[88] The appellant does not raise or rely on any of the other factors in section 45(4) of the *Act*, and I find that none apply in favour of a fee waiver. For example, there is no evidence to demonstrate that there is a connection between the disclosure of the records and a public health or safety issue, as required by section 45(4)(c).

Other considerations

[89] Other relevant factors must also be considered when deciding whether or not a fee waiver is "fair and equitable," including:

- 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.[35]

[90] In my view, the remainder of the appellant's submissions do not provide a persuasive argument that it would be fair and equitable for the city to grant the

[35] Orders M-166, M-408 and PO-1953-F.

requested fee waiver based on any of the considerations listed above.

[91] In addition, I acknowledge that when both parties believed that the city may be required to provide records dating back to 2007, the city responded in a manner that recognized the scope of the appellant's request and the fact that he may not be able to afford access to all of the records he seeks. In particular, the city attempted to work with the appellant to clarify and narrow the scope of his request, and provided the appellant with the option to obtain fewer records at a greatly reduced fee. I find that the city responded in a manner that acknowledged the scope of the appellant's request, and the fact that he may not have been able to afford access to all of the records he seeks, and that the city offered options to mitigate this outcome. Given the manner in which the city responded to the request, I am not persuaded that it would be fair and equitable to waive the remaining fee.

[92] Therefore, upon review of the evidence before me, I find that it would not be fair or equitable to waive the remaining $10 fee chargeable under Option 1. For these reasons, I uphold the city's decision to deny the appellant's fee waiver request.

ORDER:

1. The information on the city's discontinued backup tapes cannot be processed into a "record" as defined under section 2(1) of the *Act*, and the city is not required to produce that information in response to the appellant's request.

2. I uphold the city's fee estimate for Option 1, in part; only $10 of the $130 fee estimate is permissible under the *Act* and Regulation 823.

3. I uphold the city's decision to deny a fee waiver.

Original signed by: January 27, 2020

Jaime Cardy
Adjudicator