

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4127

Appeal MA20-00016

City of St. Catharines

November 16, 2021

**Summary:** The appellant submitted an access request to the City of St. Catharines (the city) for complaints made by and against a property management company. In Order MO-3850, the adjudicator found that the city had not complied with its obligations under the *Act* because it had refused to conduct a search and she ordered the city to respond to the access request. The city then issued an interim access decision and fee estimate of \$270, which the appellant appealed. The appellant also requested a fee waiver. The city denied the fee waiver and revised its fee estimate to \$210. In this order, the adjudicator upholds the city's fee estimate and its decision to deny the appellant's request for 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 45(4); Regulation 823, sections 6, 6.1, 7, 8 and 9.

**Orders and Investigation Reports Considered:** Orders 81, 1699, MO-1285 and MO-3568.

### OVERVIEW:

[1] The City of St. Catharines (the city) received a four-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

1. A copy of all complaints filed by [a named property management company] in the last 10 years

2. A copy of all complaints filed against [the same named property management company at a specified address] in the last 10 years
3. 10 reports filed to city hall prior to August 28/2017
4. 10 reports filed to city hall after August 28/2017.

[2] The requester later clarified that the last two portions of his request relate to complaint reports of investigations by the city involving the property management company made before and after August 28, 2017, and more specifically, a complaint dated August 28, 2017 that the property management company made against him to the city regarding a shed he built on his property, intended to provide shelter to feral cats.

[3] By way of background, this is the second appeal related to this access request. The first appeal resulted in Order MO-3850, which found that the city had not conducted a reasonable search and ordered it to do so. In particular, the adjudicator noted that the city did not explain why it could not search for complaint records using the addresses for the appellant, for the neighboring condominium property managed by the property management company and for the property management company.

[4] Following Order MO-3850, the city issued an interim access decision and fee estimate of \$270.00. The city provided a breakdown of the fee, requested a 50% deposit before processing the request and advised that exemptions in sections 8(1)(d) and 14(1) of the *Act* may apply to the records.

[5] The requester, now the appellant, appealed the city's fee estimate to the Office of the Information and Privacy Commissioner (IPC).

[6] The appeal was assigned to a mediator to explore the possibility of resolving the issues in dispute. During mediation, the appellant advised the mediator that in addition to appealing the amount of the fee estimate, he was also requesting a fee waiver, explaining that the search time was unreasonable and should be reduced significantly.

[7] In response to the appellant's fee waiver request, the city revised its fee estimate from \$270 to \$210 for search time and requested a 50% deposit of \$105.00. The city also advised that it would not waive the fee because the appellant did not provide detailed information in support of his fee waiver request. The city also maintained that waiving the fee would shift on unreasonable burden of the cost of the search from the appellant to the city.

[8] Mediation did not resolve the appeal and it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[9] The adjudicator originally assigned to this appeal decided to conduct an inquiry.

She sought representations from the city and the appellant. The representations of the parties were shared in their entirety in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*. Other than stating his belief that the responsive records are categorized in the city's database and can be easily printed, and that the city is "dodging" his request to cover up illegal activity, the appellant did not provide representations that directly respond to the issues in this appeal.

[10] The appeal was then transferred to me to continue with the adjudication of the matter.<sup>1</sup> In this order, I uphold the city's fee estimate of \$210 and its decision to deny the appellant's fee waiver request.

## **ISSUES:**

- A. Should the city's fee estimate of \$210 be upheld?
- B. Should the appellant's fee waiver request be granted?

## **DISCUSSION:**

### **Issue A: Should the city's fee estimate of \$210 be upheld?**

[11] An institution must advise the requester of the applicable fee where the fee is \$25 or less. Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.<sup>2</sup> 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.<sup>3</sup>

[12] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether to pay the fee and pursue access.<sup>4</sup> The fee estimate also assists requesters to decide whether to narrow the scope of a request in

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<sup>1</sup> I have reviewed all the file material and representations and have determined that I do not require further information before making my decision.

<sup>2</sup> Section 45(3).

<sup>3</sup> Order MO-1699.

<sup>4</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

order to reduce the fees.<sup>5</sup>

[13] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.<sup>6</sup> The IPC 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.

[14] 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.

[15] More specific provisions regarding fees for access to general records and for access to one own personal information are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

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

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.

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<sup>5</sup> Order MO-1520-I.

<sup>6</sup> Orders P-81 and MO-1614.

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 a record 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.

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

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

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

[16] Sections 6 and 6.1 of Regulation 823 apply to requests for general records and records containing the requester's own personal information, respectively. While fees for search and preparation time must be charged for the former, they cannot be charged for the latter. I return to this later in this order.

***Representations of the parties***

[17] The city submits that its fee estimate is reasonable and reflects its attempt to conduct a reasonable search, as ordered by Adjudicator Kowalski in Order MO-3850.

[18] In its revised decision letter issued during mediation, the city advised the appellant as follows:

The legislation requires requesters to provide sufficient detail to enable experienced staff to identify the requested records. Efforts by the [c]ity to clarify or narrow your request were unsuccessful. To conduct a proper search for complaints [Planning and Building Services (PBS)] requires either the property address or the owner's name. [A named property management company] is a management company and not the owner of the properties. An estimate of \$210.00 is the established amount for search time for PBS and [Information Technology (IT)] for records that may or may not exist.

[19] The city explains that complaints documentation, including the specific forms requested by the appellant, is stored in its database, which can be searched directly based on property owner name or address. Given the appellant's request for complaints for and against a property management company, it also explains that the fields for searching property owner or address would not include the name of a property management company, who is not a property owner, nor would it include the office address of a property management company.

[20] Given that property management companies manage many properties, the city submits that using the address of the property management company would mean searching for complaints made about that address specifically, which is not the intent of the request. Moreover, the city submits that it does not maintain a list of the properties overseen by a property management company.

[21] It submits that the appellant's request does not provide sufficient detail to be able to conduct a "proper" search of its database for responsive records, as the request does not provide an owner name or address of a property. Despite its attempts, the city submits that the appellant has not provided additional clarification for his request.

[22] In support of its position, the city refers to Order M-583, which found that:

...government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed.

[23] While acknowledging that it is theoretically possible to conduct a search as per the appellant's initial request, the city submits that the request is not the sort of search it would conduct in the ordinary course of business. It submits that the fee estimate

takes into account that the search would require exporting data and then manually searching page by page, based on the name of the property management company in the request.

[24] The city explains that one staff member from IT and one staff member from PBS were involved in creating the fee estimate. It submits that these employees are knowledgeable in the subject matter and in the systems in question. It further submits that the actual search time could be longer (or shorter) than the estimated search times used in calculating the fee estimate.

[25] As noted above, the appellant did not submit representations on this issue.

### ***Analysis and findings***

[26] As explained below, I find that the city's fee estimate is reasonable and uphold it.

[27] The city explains that the requested records are stored and maintained in a database, and that the search fields commonly used are property owner name and property address. I disagree with the city that it does not have sufficient details to conduct a "proper" search of its database for the requested records without an owner name or address of a property. It is clear from Adjudicator Kowalski's comments in Order MO-3850 that the city could conduct a "proper" search of the city's database using the names and addresses of the appellant, of the neighbouring condominium property managed by the property management company and of the property management company.<sup>7</sup>

[28] Because the name of the property management company may not be included in the search fields of its database, I understand that the city will also conduct a search by exporting data from its database and then manually searching, page by page, for the name of the property management company. Based on the city's representations, it appears that the city's fee estimate relates to this manual search, as opposed to the "proper" search referred to in the paragraph above.

[29] The city's fee estimate reflects its estimated search time, as contemplated by section 45(1)(a) of the *Act*. As it has yet to conduct the search, the city based its fee estimate on the advice of staff from PBS and IT, who, it submits, are knowledgeable in the subject matter of the request and in the systems in question. The city's fee estimate of \$210 is for seven hours of search time in accordance with section 6 of Regulation 823, which permits institutions to charge \$7.50 for each 15 minutes spent by any person for manually searching for general records.

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<sup>7</sup> There is no evidence before me that the city has conducted such a search and found no responsive records, or that the appellant has narrowed his request to exclude such records.

[30] Although the appellant asked for complaint records related to a property management company and reports filed with the city before and after a specified date, I cannot ignore the possibility that the information in the records could contain recorded information about the appellant, personally, which could qualify as his personal information. The city has not conducted its search and therefore, it has not identified any records. This makes it difficult to assess, in any precise manner, the extent to which the records could contain the appellant's personal information. This is important because, while section 6 of Regulation 823 (relating to requests for general records) provides for fees for search, section 6.1 (relating to requests for one's own personal information) does not.

[31] In Order MO-1285, Adjudicator Cropley addressed a situation where the personal information of a requester was incidentally contained in the records he requested from multiple departments of the City of Toronto. In disallowing the claimed search and preparation fees, she noted that, where there is any doubt as to whether the fees under section 6 or 6.1 of Regulation 823 apply in a particular case due to the mixed character of the requested information, fees should be imposed in accordance with section 6.1 (fees for access to one's own personal information).

[32] Given the nature of the request in the appeal before me, I believe it is distinguishable from the request in Order MO-1285.

[33] In this appeal, I accept that the request is for general information about a named property management company and reports filed with the city before and after a specified date. While the appellant is a property owner and his name could appear in some of the responsive records, this alone is not determinative of whether such records contain his personal information.<sup>8</sup> I therefore also accept that there is only a small likelihood that some of the responsive records will contain the appellant's personal information. Accordingly, it is my view that the appellant is seeking records that will most likely contain general information. In the circumstances, I am not inclined to discount the fee estimate to account for the small possibility that some records might contain the appellant's own personal information.

[34] I note that the city did not assess a fee for preparing the records for disclosure, notwithstanding its position that some records may require severances pursuant to the sections 8(1) and 14(1) exemptions. As indicated above, the purpose of a fee estimate is to give the requester sufficient information to make an informed decision as to whether 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. In the circumstances of this appeal, the city has not included in its estimate fees it might

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<sup>8</sup> This would require an analysis based on the record-by-record approach set out in Order M-514 in determining whether a requester should be charged fees.

charge for preparing the records for disclosure, including any severances it might make pursuant to the exemptions identified in its interim access decision. In keeping with orders<sup>9</sup> mentioned above, it is my view that this would amount to entirely new fees not specified in its fee estimate and defeat the purpose of fee estimate. As a result, the city is not entitled to charge preparation fees in its final fee.<sup>10</sup>

[35] As a result, I find that the city's fee estimate of \$210 to search for general records was reasonable and I uphold it. In calculating the final fee amount, I remind the city to amend its final fee if any responsive records identified as part of its search contain the appellant's personal information.

## **FEE WAIVER**

### **Issue B: Should the appellant's fee waiver request be granted?**

[36] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

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*:

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<sup>9</sup> See Orders 81 and 1699, mentioned above.

<sup>10</sup> See Order MO-3568.

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] 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. The fees referred to in section 45(1) and outlined in section 8 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.<sup>11</sup>

[38] 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. The IPC 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.<sup>12</sup> The institution or the IPC may decide that only a portion of the fee should be waived.<sup>13</sup>

[39] 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.<sup>14</sup>

[40] Any other relevant factors must also be considered when deciding whether 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

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<sup>11</sup> Order PO-2726.

<sup>12</sup> Orders M-914, P-474, P-1393 and PO-1953-F.

<sup>13</sup> Order MO-1243.

<sup>14</sup> See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.<sup>15</sup>

### ***Representations of the parties***

[41] The city submits that it is not fair and equitable to waive the fee and that the appellant's fee waiver request should not be granted.

[42] With respect to section 45(4)(b), the city submits that the appellant has never claimed that the cost would be a financial hardship; instead, it is his belief that the search should take a matter of minutes.

[43] The city submits that it is understandable to suppose that this type of search should be done more quickly, however, this goes against the opinion of the city's subject matter experts and the search capability of its database. The city also submits that it could more quickly conduct a search of its database if the search parameters for the request conformed to the fields available, namely, property owner name and property address. As noted above, the city explains that the search required by the request will entail exporting folders and then manually searching through them, which will take more time. The city submits that it made efforts to reduce the search time by asking the appellant to clarify the request in line with how the data is recorded in the database; however, the appellant did not wish to do so.

[44] The city also submits that in accordance with section 7(1) of Regulation 823, it has not conducted its search yet. Based on the estimate provide by the city's subject matter experts, the city submits that there is currently no reason to suppose the search will take less time. It further submits that it would be unreasonable to transfer the burden of the costs from the appellant to the city.

[45] While not providing representations directly on this issue, the appellant's comments suggest that he believes the city's fee estimate exceeds the actual cost of searching for the responsive records in its database.

### ***Analysis and findings***

[46] As explained below, I find that it would not be fair or equitable to waive the fee and I uphold the city's decision to deny a fee waiver.

[47] The appellant believes that the city can easily retrieve and print the responsive records. It appears he may be arguing that the city's final fee will be less than its fee estimate.

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<sup>15</sup> Orders M-166, M-408 and PO-1953-F.

[48] The appellant does not raise or rely on any of the other factors in section 45(4) of the *Act*. Despite this, I have considered these factors and find that none apply in favour of a fee waiver. For example, there is no evidence to demonstrate that payment of the fee will cause the appellant financial hardship under section 45(4)(b) or that waiving the fees would benefit public health or safety under section 45(4)(c).

[49] I must also consider any other relevant factors when deciding whether a fee waiver is "fair and equitable". In doing so, I considered that the appellant has not provided me with any evidence to support his request for a fee waiver, other than his argument that the search should take minutes. I accept that the city has attempted to work with the appellant to clarify his request and that the final fee for searching for responsive records could be somewhat lower or higher than the fee estimate. In my view, the appellant has not provided a sufficiently persuasive explanation for why the city ought to bear the full cost of processing his requests while he should bear none. I am also not satisfied that this is an appropriate case to order a partial fee waiver.

[50] Therefore, upon review of the evidence before me, I find that it would not be fair or equitable to waive the fee in the circumstances of this appeal. For these reasons, I uphold the city's decision to deny the appellant's fee waiver request.

**ORDER:**

I uphold the city's fee estimate as reasonable and its decision to deny a fee waiver.

Original signed by: \_\_\_\_\_  
Valerie Silva  
Adjudicator

\_\_\_\_\_ November 16, 2021