



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

## **ORDER M-408**

**Appeals M-9400236 and M-9400348**

**The Corporation of the County of Northumberland**



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## **NATURE OF THE APPEALS:**

These appeals were filed under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Corporation of the County of Northumberland (the County) received a request for access to all records relating to the County's waste management master plan and the West Northumberland Landfill site search, in the possession of a named consultant retained by the County (the consultant). The records sought by the requester are those dated or generated between 1985 and 1990, inclusive. The requester is another municipal corporation, namely the host township for a landfill site proposed by the County.

In response to the request, the County issued an interim access decision and fee estimate, citing a number of exemptions and an estimated fee of \$8,250. The requester appealed the amount of this fee estimate (Appeal M-9400236).

Subsequently, the requester (now the appellant) sought a fee waiver from the County on the basis that payment of the fee would cause the appellant financial hardship and that dissemination of the records would benefit public health or safety pursuant to section 45(4) of the Act. The County decided not to waive the fee and the appellant appealed this decision as well (Appeal M-9400348).

The issues to be decided in this order are whether the fee estimate is in accordance with the terms of the Act and the applicable regulation, and whether the County's decision to deny a fee waiver was fair and equitable in the circumstances. Interim access decisions are not subject to appeal (Order 81). Once the County issues its final access decision, the appellant will have an opportunity to appeal that decision if it sees fit.

A Notice of Inquiry was sent to the County and the appellant. Representations were received from both parties.

Representations were also received from three members of the public on the subject of fee waiver. Because of the way I have decided the issues in this appeal, it was not necessary for me to decide whether to consider these unsolicited representations.

## **DISCUSSION:**

### **FEE ESTIMATE**

Section 45(1) of the Act reads as follows:

If no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours 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; and
- (d) shipping costs.

Section 6 of Reg. 823, R.R.O. 1990 (the Regulation), reads, in part:

The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act:

1. For photocopies and computer printouts, 20 cents per page.  
...
3. For manually searching for a record after two hours have been spent searching, \$7.50 for each fifteen minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each fifteen minutes spent by any person.  
...
6. For any costs, including computer costs, incurred by the institution in locating, retrieving, processing and copying the record if those costs are specified in an invoice received by the institution.

In reviewing the County's fee estimate, my responsibility under section 45(5) of the Act is to ensure that the amount estimated is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the County. In my view, this burden can be discharged if the County provides me with detailed information as to how the fee estimate has been calculated, and if it produces sufficient evidence to support its claim.

In its decision letter, the County indicated that it had asked the consultant to estimate the cost of responding to the request by searching a representative sample of the consultant's files. Based on the consultant's response, the County issued its fee estimate of \$8,250, stating that processing the request would take approximately 75 hours at a cost of \$6,750, and that there would be an additional photocopying charge estimated at \$1,500.

The consultant's cost estimate was provided to the County in the form of a letter. I have reviewed the letter to determine whether it constitutes an "invoice" for the purposes of section 6(6) of the Regulation. The County has not made any submissions to this effect, and based on my independent review I am unable to conclude that the letter qualifies as an "invoice" for this purpose. Accordingly, I must assess the fee estimate based upon the other fee provisions of the Act and the Regulation.

As previously indicated, the County is charging a fee of \$6,750 for 75 hours of staff time. The relevant provisions of the Act in this regard relate to charges for time spent searching for records, and preparing records for disclosure (sections 45(1)(a) and (b) of the Act, respectively). I have not been provided with any indication of whether the 75 hours represents search or preparation time, nor whether the required first two hours of free search time have been taken into account. The maximum charge allowed by the Regulation for these activities is \$7.50 for each fifteen minutes spent. Accordingly, if 75 hours of search and/or preparation time were allowable, and the two free hours of search time had already been deducted, the maximum fee allowed to be charged for this time would be \$2,250.

However, the County has provided no evidence as to the manner in which the requested records are kept and maintained, nor has it explained what actions would be necessary to locate and retrieve the requested records. Nor have I been provided with details of any activities relating to preparation of the records. Moreover, it is noteworthy that in its memorandum to the consultant with regard to calculation of the fee estimate, the County instructed the consultant to:

... include any time required to determine whether any record should not be disclosed on account of section 7 (advice and recommendations), section 10 (third party information), section 12 (solicitor-client privilege) and section 14 (personal privacy).

These activities are not part of a search for records, and it has been previously established that time spent in deciding whether an exemption applies may not be charged as "preparation time" (Order 4).

I would also note in passing that the Act requires access decisions to be made by heads of institutions, or their delegates, and does not authorize delegations of this power to anyone other than an officer or officers of the same institution or another body which qualifies as an institution under the Act (sections 19 and 49(1)).

Because there is no evidence before me to support or explain the amount of search time or preparation time claimed in the fee estimate, I do not uphold any portion of the fee estimate for these items, which amounted to \$6,750.

With respect to the photocopy charges of \$1,500, I have not been provided with any indication of the number of pages to be copied. The Regulation prescribes photocopying charges on a per page basis. In these circumstances, and subject to the discussion of fee waiver below, I am prepared to allow the amount prescribed for photocopies by the Regulation, namely \$0.20 per page, which is to be calculated by multiplying this amount by the number of pages disclosed.

#### **FEE WAIVER**

The provisions of the Act relating to fee waiver appear in section 45(4), which states as follows:

A head shall waive the payment of all or any part of an amount required to be paid under this Act 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 in the regulations.

In Order P-474, Assistant Commissioner Irwin Glasberg found that the appropriate standard of review for decisions under section 57(4) of the provincial Freedom of Information and Protection of Privacy Act (which is the equivalent of section 45(4) of the Act) is one of correctness. In that same order, Assistant Commissioner Glasberg also found that the phrase "in the head's opinion" means only that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee, and this wording does not affect the statutory authority of the Commissioner and his delegates to review the correctness of that decision. I agree with these conclusions and adopt them for the purposes of this appeal.

In its letter to the County requesting a fee waiver, counsel for the appellant cited two factors:

- financial hardship (section 45(4)(b))
- dissemination of the records will benefit public health or safety (section 45(4)(c)).

I will deal with the public health and safety issue first. In Order P-474, referred to above, Assistant Commissioner Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under the section 57(4)(c) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 45(4)(c) of the Act:

1. Whether the subject matter of the record is a matter of public rather than private interest;
2. Whether the subject matter of the record relates directly to a public health or safety issue;
3. Whether the dissemination of the record would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue; and

4. The probability that the requester will disseminate the contents of the record.

I agree with Assistant Commissioner Glasberg's interpretation and I adopt these factors for the purposes of this appeal.

As previously noted, the County is proposing to construct a landfill site within the boundaries of the appellant Township. The following quotations from the appellant's representations are relevant to the issue of whether a fee waiver ought to be granted under section 45(4)(c).

... [I]t is undisputed that the Landfill and the master plan/environmental assessment process which led to the conclusions that (i) a County landfill of this size was required, and (ii) that of all the potential locations in the County, this is the most appropriate location ... is a matter of public rather than private interest.

... [A]ll of the records to which access is requested concern the proposed Landfill, the process which led to its selection and the site itself.

...

It is common knowledge that ... waste landfills are public health and safety issues. Landfills generate hazardous leachate which, if the site is not properly situated and designed, will eventually escape from the landfill and contaminate drinking water and surface water. This, in fact, is exactly what happened in the case of the Cobourg landfill, which is immediately adjacent to the Landfill proposed by the [County]. The Environmental Assessment Board, in the case of the Cobourg landfill, deemed it to be sufficiently unsuitable to require that the site be closed immediately.

Landfills also generate a variety of other harmful or potentially harmful environmental effects. For instance, landfills generate organic airborne compounds, many of which are known carcinogens (e.g. vinyl chloride). Landfills are also significant generators of dust and suspended particulate which can cause significant health effects on those in the vicinity of the site.

The [appellant] undertakes to disseminate any information which emerges from its review of the requested records, to the various citizen groups who are affected by or interested in the Landfill's environmental assessment process. The [appellant] will also disseminate the contents of the records publicly through the hearing process.

In my view, these representations indicate that the subject of the records is a matter of public interest and relates to a public health or safety issue. I am satisfied that dissemination of the records would contribute meaningfully to the development of understanding concerning that issue. In addition, it is probable that the appellant will disseminate the contents of the records. Accordingly, the criteria established in Order P-474

have been met, and I find that disclosure of the record will benefit public health and safety within the meaning of section 45(4)(c).

However, I must go on to consider whether it would be fair or equitable for the fee to be waived in this particular case.

Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors are:

- (1) the manner in which the institution attempted to respond to the appellant's request;
- (2) whether the institution worked with the appellant to narrow and/or clarify the request;
- (3) whether the institution provided any documentation to the appellant free of charge;
- (4) whether the appellant worked constructively with the institution to narrow the scope of the request;
- (5) whether the request involves a large number of records;
- (6) whether or not the appellant has advanced a compromise solution which would reduce costs; and
- (7) whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

With respect to the scope of the request (factor 4), the appellant's representations indicate that it has attempted to limit the request by restricting the time period to the years 1985 to 1990, inclusive. In addition, with reference to factor 6, the appellant has offered to view the records at the consultant's office.

With respect to factor 7, the County submits that "... it is unreasonable to ask the taxpayers of the [County] to subsidize the actions of the appellant." The County's representations in this regard refer to a grant made by it to the appellant to defray the appellant's legal expenses associated with initiating an Environmental Assessment Hearing. In my view, the request under the Act is a separate matter from the appellant's intervention in the environmental approvals process, and I do not find this grant to be a relevant factor in deciding whether waiver of the fee would shift an unreasonable cost burden from the appellant to the County.

Bearing these factors in mind, I find that waiver of the fee would be fair and equitable in the circumstances of this appeal.

Because of the way I have dealt with the issue of fee waiver, it is not necessary for me to consider whether payment of the fee would cause a financial hardship for the appellant.

**ORDER:**

1. I order the County to waive its fees in connection with this request.
2. I order the County to render a final decision on access to the records in accordance with the provisions of sections 19, 21 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20.
3. I order the County to provide me with a copy of its final access decision within 65 days after the date of this order. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ October 20, 1994