



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-1018

Appeal M-9700196

Regional Municipality of York



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The requester represents a community organization interested in the environmental assessment of septic systems within King City. The assessments were conducted by the Regional Municipality of York (the Municipality). The requester filed a request with the Municipality under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the environmental assessment of the septic systems for the period between 1988 and 1997. Specifically, the requester sought access to information about the number of septic system problems, the nature of the problems, the geographical area (street) where the problem systems are located and how the problems were corrected.

The Municipality responded by issuing a fee estimate of \$300 for its initial search costs. The requester asked for a waiver of the fee. The Municipality then issued a second fee estimate of \$2720, which includes \$2280 for 76 hours search time, \$300 for 10 hours of preparation and \$140 for photocopying 700 pages. The Municipality agreed to waive 50% of this amount and issued a fee estimate of \$1360. The requester paid the deposit of \$680 on a "without prejudice" basis and appealed both the fee estimate and the partial waiver of fee.

This office provided a Notice of Inquiry to the appellant and the Municipality. Representations were received from both parties.

DISCUSSION:

FEE ESTIMATE

I will begin this discussion by setting out the relevant provisions of the Act and Regulation 823 (the Regulation). The charging of fees is authorized by section 45(1) of the Act, which states:

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 cost 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.

Section 6 of the Regulation also deals with fees. It states, in part:

The following are 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.
- ...
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.
- ...

The Municipality submits that during mediation, a meeting was arranged with the appellant for the purpose of clarifying the scope of the request and with a view to reducing the cost to the appellant. It was agreed that the information in the records would be provided in the form of a summary rather than copies of individual records. This resulted in a substantial reduction of costs as both preparation and photocopying charges were avoided.

In its representations, the Municipality states that its initial estimate of \$300 was based on an initial search of the computer system, log books and application files, which was estimated to take between 5 and 9 hours. The Municipality also anticipated that this estimate would have to be adjusted following the search and identification and preparation of the responsive records.

The Municipality has provided an affidavit by its Director of Public Health Inspections who states that the actual search took a total of three hours. The search resulted in 146 files being located. The Director states that each file was reviewed to ascertain the street location, the substance of the complaint and the corrective action taken to rectify the problem. The Municipality states that this process took 22.5 hours. The information was then summarized in a summary record for the appellant. The Municipality has charged a revised fee of \$675 which is based on search time of 22.5 hours @ \$30 per hour. The Municipality has not charged for the initial search time of three hours nor has it charged for the time preparing a summary record. This is the revised fee that the Municipality has arrived at.

Further, the Municipality has also waived 50% of this amount and the total fee charged and payable by the appellant is \$337.50. The appellant has already paid a deposit of \$680. In its representations, the Municipality indicates that the record has been forwarded to the appellant and that a refund of \$342.50 is due to the appellant and will be forwarded to her shortly.

I have reviewed the evidence before me and I find that the fee estimate of \$337.50 is in accordance with the Act and the Regulations.

FEE WAIVER

The provisions of the Act relating to fee waiver are found 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 the dissemination of the record will benefit public health or safety; and
- (d) any other matter prescribed in the regulations.

In this appeal, the appellant has paid the deposit which far exceeds the revised amount now charged by the Municipality and has received the records requested. The regulations permit the refund of any fee that has been paid and is subsequently waived.

It has been established in previous orders that the person requesting a fee waiver must justify the request and demonstrate that the criteria for a fee waiver are present in the circumstances (Order M-429 and M-914). I am also mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 45.

In Order P-474, former 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, former 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 her delegates to review the correctness of that decision.

The appellant states that the fee should be waived because the records relate to the issue of public health and safety (section 45(4)(c)). She submits:

We are not requesting the information out of private interest. We are a residents' group pursuing this matter as it relates to public health and safety, and community planning; we consider it our responsibility to inform all residents of King City as to the problem facing our community (if there really is one) and the most effective solution to it... We have also asked repeatedly that a regular inspection and public education program be implemented to protect residents, and the environment.

The appellant goes on say that the “[r]esidents are confused and upset by the declaration of a health hazard posed by failing septic systems (witness public advisories posted in parkland, and frequent statements made by politicians and public officials) with no proof provided”.

In Order P-474 referred to above, former Assistant Commissioner Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under 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 records is a matter of public rather than private interest;
2. Whether the subject matter of the records relates directly to a public health or safety issue;
3. Whether the dissemination of the records 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 records.

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

I am satisfied that the condition of the septic systems are of public interest, relating directly to a public health issue. I am also satisfied that the dissemination of this information would contribute meaningfully to the development of an understanding of the standards applied and the tests used by the Municipality's consultants to complete their report. Finally, I believe it to be likely that the appellant would disseminate the contents of the records.

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:

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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.

I have considered each of the factors listed above together with the circumstances of this particular appeal. I note that the Municipality has conducted an extensive search for the records and has already waived 50% of the fee. I note further that the Municipality has provided the information sought in the summary form requested by the appellant and has absorbed much of the actual cost of processing this request. In my view, a waiver of the remaining fee would shift an unreasonable burden of the cost to the Municipality. I uphold the Municipality's decision not to waive the fee and the appellant's request for fee waiver is dismissed.

ORDER:

I uphold the decision of the Municipality.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

October 8, 1997