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

ORDER MO-1839

Appeal MA-030140-1

City of Windsor

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NATURE OF THE APPEAL:

The City of Windsor (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> [A]ll 'records' as defined under the [*Act*] that have been sent to and received from the Government of Canada and the Government of Ontario that deal with or are in respect to border crossing issues from November 1, 2002 to March 18, 2003.
>
> All 'records' as defined under the [*Act*] that have been sent to and received from the Government of Canada and the Government of Ontario that deal with or are in respect to the Joint Management Committee or its Recommendations in the document 'Windsor Gateway: An Action Plan for a 21st Century Gateway' from November 1, 2002 to March 18, 2003.
>
> All 'records' as defined under the [*Act*] that have been sent to and received from the Government of Canada and the Government of Ontario that deal with or are in respect to discussion papers, proposals, suggested proposals, frameworks and suggested frameworks from November 1, 2002 to March 18, 2003.
>
> All 'records' as defined under the [*Act*] that deal with or are in respect to the border issue that were discussed, dictated to Councillors, provided to Councillors, made available or presented at the session held on February 22, 2003 at the conclusion of the strategic planning session, and all records including but not limited to any discussion papers, proposals, suggested proposals, frameworks and suggested frameworks sent to and received from after the meeting to the Government of Canada and the Government of Ontario.

In response to the request, the City issued a decision letter dated April 14, 2003 indicating that the cost of retrieving the requested information would be $360.00 and requiring the payment of a deposit of $180.00 before the City would proceed further with the processing of the request. The City noted that the fee did not include photocopying costs, as the requester wished to examine the original documents to determine which pages he would require to be reproduced. The City also provided contact information for the requester to make arrangements to view the documents.

On April 17, 2003, the requester provided the City with a cheque in the amount of $360.00. In a five-page letter accompanying the cheque, the requester also asked that "… the fee be waived in whole or part or that the amount of the fee be reduced significantly." The letter also identified the reasons why the requester was asking for the fee to be waived or reduced.

On the same day, (April 17, 2003), the requester submitted another letter to the City, which stated, in part:

> Please be advised that I have stopped payment on my cheque of $360 payable to the City. I am of the opinion, after quickly looking through the documents provided this morning (1½ hours in total), that the City has been totally non-

> responsive to my request. Alternatively, if it has been responsive, then it did not take 12 hours to retrieve 4 files from the Clerk's office and a dozen documents from the Mayor's office and that of [a named individual] so that the fee of $360 is not justifiable.

The requester also indicated to the City that he believed there should be additional records responsive to his request.

On April 23, 2003, the requester (now the appellant) appealed the City's decision.

During the mediation stage of the appeal, the appellant identified that the following issues are the subject of this appeal:

1. the fee of $360.00 was inappropriate because the fee for search time was unreasonable;

2. the City refused to grant him a fee waiver or a reduction of the fee;

3. the decision letter was inadequate and the identified records were not responsive to the request;

4. the decision failed to indicate whether any exemptions were likely to apply to the records; and

5. additional records responsive to the request should exist.

During mediation, the Freedom of Information and Protection of Privacy Coordinator for the City (the Coordinator) confirmed that the City's decision of April 14, 2003 was a final decision and that the fee of $360.00 was a final fee (rather than a fee estimate) based upon the actual time required to process the request. The Coordinator advised that the City had located approximately 900 pages of responsive records, and its decision was to grant access in full. No exemptions are claimed for the identified records. The Coordinator also indicated that 12 hours of search time were required to process the request, and provided details regarding the nature and extent of the searches required and the records that were identified. He also advised that there are no additional records relating to this request.

On June 2, 2003, the City issued a supplementary decision to the appellant in which it provided a breakdown of the fees and search time, denied the appellant's request for a fee waiver, and confirmed that no additional records exist in relation to this request. The City also attached an index of responsive records. On June 9, 2003, the appellant responded to the City's supplementary decision, stating that the City's search was unreasonable and that there were many non-responsive documents produced in relation to his request. In further discussions with the mediator, the appellant confirmed the following:

1. he is disputing the fee of $360.00 on the basis that the search time was unreasonable and the majority of records provided were non-responsive to his request;

2. he is appealing the City's decision not to waive the fees in relation to this request; and

3. there should be additional records responsive to his request, such as the types of records outlined in previous discussions and correspondence to the City.

Mediation did not resolve the remaining issues, and the appeal was moved to the adjudication stage of the process. The Commissioner's office sent a Notice of Inquiry to the City, initially. The City indicates that it does not intend to provide further representations beyond those submitted in mediation. This office also provided the appellant with a Notice of Inquiry soliciting his representations and received submissions from him in response.

DISCUSSION:

ADEQUACY OF THE FEE/FEE WAIVER

Was the fee calculated in accordance with section 45(1) of the *Act* and Regulation 460?

General principles

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

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.

More specific provisions regarding fees are found in section 6 of Regulation 823. This section reads:

> 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 floppy disks, $10 for each disk.
>
> 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.

In its original decision letter of April 14, 2003, the City advised the appellant that "the total cost for retrieval of these records is $360.00" and that this fee does not include photocopying charges. In its subsequent decision letter dated June 2, 2003, the City provided the appellant with a more detailed description of the manner in which it calculated the fee. It indicated that searches were conducted in certain locations or service areas for responsive records and matched those items to particular items listed on an Index of Records provided to the appellant. These are broken down as follows:

- Council and Customer Services - item 1 - 2 hours - $60;
- Mayor's office - items 6 to 23 - 8 hours - $240;

- City Manager's office - no records found - 1 hour - $30; and
- Infrastructure Services (Traffic and Public Works) - items 2 to 5 - 1 hour - $30.

The City also advised the appellant that, if he wished to have photocopies of the 952 pages of responsive records, the fee would be $189.00.

In a letter to the City dated April 17, 2003, the appellant argues that the fee "seems excessive". He points out that the City has not provided a breakdown describing the nature and extent of the searches conducted as is required.

In my view, the City's letter of June 2, 2003, when taken with the accompanying index of records and earlier correspondence with the appellant, describes in sufficient detail the searches that were undertaken and the manner in which the fee was calculated. I will address below the issue of whether the scope of those searches was reasonable. Despite the act that the identified records included many that were non-responsive, the appellant was provided with a description of all of the records retrieved and their source, as well as the amount of time required to do so. Based on the evidence provided to this office at the mediation stage of the appeal, I am satisfied that the City has met its obligations under the *Act* and Regulation 460. I will, accordingly, uphold the City's fee and dismiss that part of the appeal.

Is the appellant entitled to a fee waiver under section 45(4) of the *Act*?

Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. This provision states:

> 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.

Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee.

> 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.

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 [Orders M-914, P-474, P-1393, PO-1953-F]. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

In the present appeal, the appellant takes the position that because the records relate to a matter of public health, the fee for accessing this information ought to be waived. He also submits that it is fair and equitable that the fee be waived or reduced significantly for the following reasons:

- the public interest group which he represents operates on a non-profit basis and has only limited resources;
- the City has already made some of the requested records available to the public;
- the subject matter of the records is of great public concern in the community and has a health and safety component as the issue concerns elevated levels of airborne pollutants, as well as concerns about noise;
- the City did not assist the appellant in narrowing or focussing the scope of the appeal; and
- an unreasonable burden of the cost of access would not result from the City's waiving the fee and would not unreasonably interfere with the operations of the City.

Section 45(4)(c): public health or safety

The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- 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
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

This office has found that dissemination of the record will benefit public health or safety under section 45(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- safety of nuclear generating stations [Orders P-1190, PO-1805]
- quality of care and service at group homes [Order PO-1962]

Fair and equitable

For a fee waiver to be granted under section 45(4), it must be "fair and equitable" in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408, PO-1953-F]

Analysis and conclusion

Based upon the representations of the appellant, I am satisfied that the subject matter of the records addresses a public safety and health concern relating to the quality of the air in the region as opposed to a private matter affecting only the appellant. The records are not before me but I accept the position of the appellant that the question of air quality is an important public health concern in the Windsor area, particularly in those neighbourhoods surrounding the proposed truck route that is the subject of the records. Further, I find that the dissemination of the information contained in the records would yield a public benefit by contributing meaningfully to the discussion in the community about the health or safety risks associated with the option outlined in the records for addressing the ongoing border congestion issues. I conclude by agreeing with the appellant that the consideration listed in section 45(4)(c) applies and that it favours the granting of a fee waiver in the circumstances of this appeal.

I further agree with the arguments put forward by the appellant in favour of his position that it would be fair and equitable to grant a fee waiver in light of the manner in which the City has processed his request and the fact that he will receive full access to the requested records. Other considerations favouring the granting of a fee waiver are the fact that the fee is relatively small

and waiving the fee would not unreasonably shift the burden of processing the request on to the City. In my view, taking into account all of these considerations, it would be fair and equitable to require the City to waive the fees relating to search time, in this case. As a result, I will order that those fees relating to the time spent searching for the records or preparing them for disclosure, if that exercise is necessary, be waived.

Bearing in mind the user pay principles in the *Act*, I find that it would shift an unreasonable burden onto the City if it were required to pay the full cost of photocopying those records that are identified as responsive and of interest by the appellant. The City may, however, charge the appellant the applicable fees for photocopying charges, if it so chooses.

REASONABLENESS OF SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In this appeal, the appellant has provided me with a great deal of information relating to the basis for his belief that additional records beyond those identified by the City ought to exist. The scope of the appellant's request was very clear. The City's response was originally to grant him access to several boxes of files that contained information that was not relevant or responsive to the request, as well as information that pertained to the subject matter requested. The appellant also argues that it defies credulity to assume that the relatively small number of records produced by the City to him represents all of the documents that contain responsive information about such an important subject. In particular, the appellant argues that the records forthcoming from the office of the former Mayor were not sufficient to demonstrate that a proper search had been conducted. He relies on a number of public statements given by the Mayor to the media and the City Council respecting the involvement of senior levels of government during the time period covered by the request as grounds for his belief that additional records should exist. In addition, the appellant argues that an insufficient number of records responsive to item #4 of his request have been identified by the City.

As noted above, the City did not respond to the Notice of Inquiry provided to it requesting representations on the nature and extent of the searches it undertook for responsive records. Instead, I am required to rely solely on the decision letters and Index of Records provided to the

appellant on June 2, 2003 and the notes taken by the Mediator in her discussions with the City's Co-ordinator during the mediation stage of the appeal. Those notes indicate that, in a discussion with the Mediator and the Mayor's Deputy Clerk, this office received assurances that the only responsive record beyond those identified in the Index involving representatives of the Federal government was a letter and attached discussion paper dated February 28, 2003. The Index of Records also refers to documents forwarded to or received from representatives of the provincial government.

In this appeal, submissions from the City addressing the nature and extent of the searches undertaken for responsive records would have been of great assistance to me in determining whether the City's searches were reasonable in their scope. In the absence of such submissions, it is difficult for me to determine what exactly was done by the City to address the request, as well as the details of the actual searches that were performed.

In my view, by simply directing the appellant to a box or boxes of documents, containing both responsive and non-responsive information, the City failed to meet its obligations under the *Act*. Instead, the City is required to conduct the necessary searches for responsive records itself and then provide the requester with a decision respecting access in accordance with the requirements of sections 17 and 19 of the *Act*. This was not done until at least June 2, 2003 when the City actually provided the appellant with a decision letter. At that time, access was granted to a large number of records; but the appellant maintains that many of the records provided were not relevant or responsive to the request. In the absence of any evidence to the contrary from the City, I find that it did not comply with the requirements of sections 17 and 19. The City failed to identify those records which were responsive from the Council and Customer Service record-holdings that were made available to the appellant and instead simply left him responsible for doing so.

While it would appear that the City did conduct searches for responsive records, I am not satisfied that those searches were sufficiently comprehensive. Because the City did not make representations in response to the Notice of Inquiry provided to it, I am unable to determine whether the searches were reasonable and in accordance with its obligations under the *Act*. I will, accordingly, require the City to conduct additional searches of its record-holdings for documents that are responsive to the request. In particular, the appellant seeks access to records maintained by the former Mayor regarding his contacts with representatives of senior governments and records relating to a presentation from the Mayor to Council in February 2003. In addition, the appellant maintains that additional records from the Traffic Engineering Department ought to exist documenting meetings and discussions held with the Ontario Ministry of Transportation at the pertinent time. In my view, the City has failed to demonstrate that it expended a reasonable effort to conduct the necessary searches to locate responsive records. I will, accordingly, order that additional searches be undertaken and that a further decision letter be issued to the appellant describing the outcome of those searches.

ORDER:

1. I dismiss the appellant's appeal of the quantum of the fee calculated by the City.

2. I do not uphold the City's decision not to waive those fees relating to the searches undertaken and the preparation for disclosure of the responsive records. However, I uphold the City's decision not to waive those fees relating solely to photocopying charges under section 45(4).

3. I order the City to conduct additional searches for records responsive to the appellant's request and to provide the appellant with a decision letter with respect to the outcome of those searches in accordance with the requirements of sections 17 and 19, without recourse to a time extension under section 20 of the *Act*.

Original Signed by: September 30, 2004
Donald Hale
Adjudicator