



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

ORDER MO-1895

Appeal MA-030281-2

Municipality of Kincardine



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NATURE OF THE APPEAL:

This is an appeal from an interim decision of the Municipality of Kincardine (the Municipality), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). The interim decision arises out of a request for access to information submitted by the requester (now the appellant), to the Municipality. The appellant's request is contained in 40 bullet points and includes records pertaining to the involvement of the Municipality with Bruce Power and/or Ontario Power Generation activities or initiatives, the provision of water within the Municipality, agenda packages and minutes for various Municipality committee and staff meetings, records of Municipality expenditures, records relating to various Municipality projects, and records of the expenses of Municipality staff and officials.

The appellant also requested a waiver of the fees associated with responding to his request.

In a letter dated February 3, 2004, the Municipality provided a fee estimate in the amount of \$11,100 to process the appellant's request, estimating that there are approximately 45,000 pages of responsive records. The Municipality requested a deposit of \$5,500 before it took any further steps to process the request.

Also in this letter, the Municipality indicated that although no final decision has been made regarding access, partial access would be granted. It estimated that approximately 90% of the records requested would be disclosed in whole or in part. The Municipality stated that a number of exemptions might apply to the records, which it then listed.

Finally, the Municipality denied the request for a fee waiver.

This office initially sent a Notice of Inquiry to the Municipality which summarized the facts and issues in this appeal. The Municipality provided representations. This office then sent the Notice to the appellant. The appellant did not provide representations. The appellant then contacted this office regarding his new address. I sent the Notice to the appellant's new address. The appellant did not provide representations and could not be reached by telephone.

DISCUSSION:

FEE ESTIMATE

General Principles

Where the fee exceeds \$25, an institution must 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.

[MO-1699]

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 [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699].

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 sections 6, 7 and 9 of Regulation 823. Section 6 reads:

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 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.

Representations

In its interim decision dated February 3, 2004, the Municipality provided the following fee estimate.

In preparing this response, I have consulted with the Municipality's chief administrative officer, treasurer, treasury staff, public work's manager, members of the buildings department, members of the administrative staff, the municipal records clerk and various other municipal staff members. The estimates set out herein are based upon the results of these consultations.

I have also retrieved and reviewed a representative sample of some of the records that would be responsive to your request. In this respect, we retrieved and copied the agenda packages for 2000, 2001 and 2002, which is one of the many items that you have requested. We made a total of 6,559 copies and, at \$0.20 per page, the cost for this copying was \$1,319. As set out below, we are prepared to provide these specific documents to you without cost.

Fee Estimate

MFIPPA contemplates a user-pay principle. Based on my inquiries of the municipal employees listed above and my review of a representative sample of the responsive records, I estimate that there are approximately 45,000 pages of records responsive to your request and the total fees to process your request will be approximately \$11,100. This fee estimate is broken down as follows:

Search: 140 hours @ \$30 per hour = \$4,200

Preparation: 150 hours @ \$30 per hour = \$4,500
(approximately 10% of the records will have severances or will require full or partial severances, which is approximately 4,500 pages @ 2 minutes per page = 150 hours)

Photocopying: 9,000 pages @ \$0.20 per page = \$1,800
(based on the assumption that approximately 20% of the records will require photocopying and that the remainder of the responsive records can be placed on computer discs)

Other Costs: It is estimated that it will take 5 hours of computer programming in order to retrieve responsive records @ \$30.00 per hour = \$600

The costs outlined above are in accordance with section 6 of Regulation 823, as amended, made under MFIPPA. In accordance with section 7 of the Regulation, where the fee estimate is \$100 or more an institution may request a deposit equal to 50% of the estimated fee before taking any further steps to process the request. Accordingly, please forward to my attention a deposit in the amount of \$5,500 by cheque or money order, payable to the Municipality...

In support of its fee estimate, the Municipality provided the following representations in this inquiry.

Fee Estimate

The Municipality has provided the appellant with a fee estimate of \$11,100. The calculation of that estimate was broken down in great detail by [the Clerk] in her comprehensive response letter... Given the demands placed on the current staff resources of the Municipality, it would be necessary for the Municipality to hire a new staff person in order to respond to the appellant's request.

Basis of Fee

The Municipality's fee estimate was prepared by [the Clerk], who is the person most familiar with the type and content of the requested records, and was based in part upon a review of a representative sample of the requested records.

In our view, the Municipality's estimate is very reasonable. The appellant's request is set out in 40 bullet points and includes extensive documentation spanning several years.

...

Search

The records do not contain the appellant's personal information. Some of the records are contained within computer databases but many of them are only retained in hard copy. In order to search for and prepare all the requested records, it will be necessary to go back through several years of paper documents.

Preparation for Disclosure

The Municipality has estimated that approximately 10% of the records may not be subject to disclosure, but that 90% of the records will likely be disclosed in whole or in part. In order to make this determination, it will be necessary for the Municipality to review all of the pages that are responsive to the request. Given the Municipal estimate of 9,000 pages (which may be low) it would take 9,000 minutes (150 hours) to review and sever those pages if this process took an average of 1 minute per page. As you are aware, the Commission has in some cases accepted that it may take 2 minutes to sever a page that requires multiple severances (Order MO-1169).

Analysis and finding

As stated above, where the fee is \$100 or more, the fee estimate may be based on either the actual work done 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.

In this case, the Clerk for the Municipality chose to both review a representative sample of the records and to speak to several individuals who would be familiar with the type and content of the requested records.

I am satisfied that based on the breadth and depth of the appellant's request, that the 140 hours is a reasonable estimate for the search time required to respond to the appellant's request.

For the preparation time, the Municipality has stated that it will need a 150 hours to sever 10% of the records. In its interim access decision the Municipality noted that the exemptions found at sections 6(1)(b), 7(1), 9(1)(a), 9(1)(b), 10(1), 11(a), 11(c), 11(d), 11(f), 11(g), 12, and 14(1) may apply to some of the records.

Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990].

The Municipality originally estimated that there will be 4500 pages of record that will need severing. At 2 minutes per page, the Municipality said that it would take someone 150 hours to sever the records for disclosure. Considering the appellant's request and the possible exemptions, I am satisfied that the Municipality's estimate for preparation time is reasonable.

In its representations, the Municipality claims that 150 hours or 9,000 minutes would be needed to review 9,000 pages of records. The Municipality states that 9,000 pages of records are 90% of the record. The Municipality has obviously erred in its calculation. Ninety-percent of the estimated 45,000 pages of records would be 40,500 and not 9,000. However, that being said, even if the Municipality wanted to claim preparation time for the 40,500 pages of records, I cannot permit the Municipality to charge preparation time for it to review the records and to give third party notice. In Order MO-1380 Senior Adjudicator David Goodis found the following:

"Preparing the record for disclosure" under subsection 45(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the *Act* (Orders 4, M-376 and P-1536). In my view, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are also not allowable under the *Act*. These activities are part of an institution's general responsibilities under the *Act*, and are not specifically contemplated by the words "preparing a record for disclosure" under section 45(1)(b) (see Order P-1536).

I agree with his finding and apply it here. While I will allow the Municipality to charge the preparation time set out in its original estimate for severing 10% of record (\$4,500), any charges for reviewing and giving third party notice for the rest of the record (90%) is not permitted and I will not uphold. However, this does not preclude the Municipality from claiming actual preparation time in its final fee once it has completed the search.

The Municipality's photocopying charge is \$1,800 based on 9,000 pages at \$0.20 per page. This is in accordance with Regulation 823 and I find it reasonable.

The only other charge made by the Municipality is for computer programming. I find that the Municipality has made an error in its calculation of this charge. Section 6 of Regulation 823 prescribes that the Municipality can charge \$15 for each 15 minutes spent by any person for developing a computer program or other method of producing a record from machine readable record. If the Municipality estimates that it will take 5 hours of computer programming then the estimate for this charge would be \$300. I find that \$300 is a reasonable estimate for the amount of time for the computer programming.

In conclusion, I am satisfied that the Municipality's fee estimate in regards to the search, preparation, photocopying and computer programming (with correction) are reasonable.

FEE WAIVER

General principles

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:

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].

Section 45(4)(b): financial hardship

Generally, to meet the "financial hardship" test, a requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [see, for example, Order P-1393].

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]

Appellant's Representations

The appellant advised the Municipality that he should be granted a fee waiver because of sections 45(4)(b) (financial hardship) and 45(4)(c) (public health or safety). The appellant submitted the following in support of his fee waiver request on July 16, 2003.

I submit that all of the records requested are requested in the public interest. I also submit that records pertaining to:

- nuclear power or nuclear waste or anything nuclear related
- water quality and potable water
- water pipeline development
- development

are public health and safety issues, and this provides a compelling public interest in their disclosure.

...

None of these records are of a personal nature. There are no records which relate directly to me personally or to any issue or topic in which I have a direct or indirect pecuniary interest.

...

Some of the records requested are for expense reports showing how the public monies in the Municipality are being spent. Again, there is an inherent public interest in these records. This public interest is reflected in recent media coverage which illustrated that the expenditures by this Council greatly exceed the expenditures of neighbouring Municipalities.

The records on the topics of water quality, water pipeline, nuclear, and development are directly and causally connected to public health and safety issues (as discussed below)...

Nothing can illustrate the public interest in release of information regarding water quality and potential water contamination more starkly than the E Coli tragedy in nearby Walkerton...

The records regarding development are directly linked to the proposed water pipeline. If installed, the pipeline will result in a greatly increased opportunity for development in certain areas. The proposed funding plan provides for a greatly reduced cost to developers. Many members of the public are questioning why this pipeline is going forward when more than 90% of people surveyed stated that they did not want it.

It is additionally important that the public have access to the information being requested regarding development because the Municipality is pursuing a land-use change in the area covered by my request with the aim of converting land currently zoned for agriculture to a zoning of "rural", resulting in a large increase in potential development acreage. The proposed zoning is contrary to earlier land use strategies. Since effort is underway to abrogate the existing land-use policy, the public has a right to know on what basis these changes are being made and whether these changes are in the public interest, and the potential impact they have to the environment, and thus public health and safety.

The public interest in regards to the topic of nuclear power and nuclear waste is extremely high.

The Municipality of Kincardine and Ontario Power Generation have signed a Memorandum of Understanding regarding the long-term management of low and intermediate level radioactive wastes. The purpose of the Memorandum is to develop a plan for long-term storage of the waste at the Bruce Nuclear site. Ultimately, the ratepayers of the Municipality are expected to make a decision regarding the storage of this waste to decide by referendum. A massive high level Nuclear waste project has been approved on the same site, operated by OPG.

The appellant then went on to provide submissions on the factors this office considers in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c).

1) Whether the subject matter of the record is a matter of public rather than private interest

Discussed above...

2) Whether the subject matter of the record relates directly to a public health or safety issue

The issues of development, the water pipeline, and nuclear related activities are related to public health or safety inherently and through their effect on the environment.

...

The Minister of Environment, in a May 28th decision, recognized a public health and safety issue related to the water pipeline.

The area covered by the Minister's statement includes the area for which I have requested records regarding development. New development would result in the need for more septic systems, thus the issue of development is directly related to public health.

Additionally, the proposed change in land use strategy from agriculture to rural (LEAR Study), allowing for more development, represents a potentially large change in the treatment of the environment and the effect of increased population on the environment. Development of former agricultural areas is certain to have an effect on the soil and water of the area which is developed.

...

The relationship between nuclear waste and activity at a nuclear facility and public safety is inherent. It is recognized by the industry and the Municipality itself, including special Emergency plans required due to the proximity of the nuclear facility.

There is a documented history of releases and problems at the Bruce Nuclear site, including off-site migration of radioactive matter from a low and intermediate level waste site into the groundwater of neighbouring Inverhuron Provincial Park, numerous Certificate of Approval exceedences and toxicity reports, and recognized releases of known carcinogens to water and air.

In each of these cases of water pipeline, development, and operations at the nuclear site, the potential for impact on quality of drinking water is evident.

3) (a) Whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern

3) (b) Whether the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue

Without having reviewed the information being sought, it is difficult to state whether the dissemination of the requested records will disclose public health and safety concerns and in this way benefit the public. However, given the nature of the requested records they will likely benefit the public by disclosing further public health and safety concerns not mentioned here, or by providing more detail as to the concerns raised here. The lack of public disclosure of these matters to date provides one of the reasons for the information request. Access to the records will provide further information so that the public health and safety concerns related to these issues can be adequately understood and investigated by the public.

...

The companies at this site are no longer crown corporations as Ontario Hydro was, but for-profit entities. These companies are no longer open to scrutiny by the public through the FOI Act or other means. It is important that it be recognized that the Municipality and the records it holds are an important avenue for the public to gain an understanding of the operations and occurrences at the site as they relate to public health and safety.

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

My own participation in public disclosure in the topics covered in my request has been through numerous letters to the editor, open letters to Council, a presentation to Council, and interviews and discussions with local and provincial media.

I have further shown my commitment to the dissemination of information with my extensive participation in the Class EA process.

I have also participated by contributing some of the content for a local newsletter "The Watchman". As stated in the first issue, "The Watchman is a result of a group of local citizens, concerned about the lack of focus and action on important local developments and issues". It also states: "we believe there is also a need to document local events in a wider context. We propose to provide context with observation and study of local events from our history as well as the present". The Watchman is published in the public interest, and is available free of charge within the Municipality.

In support of his position that the Municipality should waive the fee based on financial hardship (section 45(4)(b)), the appellant provided: his wife's Income Tax and Benefit Return for 2002; his Canada Customs and Revenue Agency Notice of Assessment for 2002, and a copy of the Canada Customs and Revenue Agency Canada Child Tax Benefit Notice. The appellant further notes that his family's source of income is from his work as an independent contractor with a company in the United States. The appellant further notes that at the time of his fee waiver

request he did not have a contract with that company so he did not have any job security or benefits. The appellant submits that this evidence shows that his family, in 2002, was living in a situation of financial hardship, and would therefore, suffer further financial hardship by having to pay the fee.

Municipality's Representations

In its interim decision the Municipality denied the appellant's request for fee waiver. In its representations, the Municipality elaborates on its reasons for denial. It states:

The Municipality is concerned about the appellant's claims of financial hardship for two main reasons. First, he has indicated that he is a member of an organization that is pursuing the requested records and further indicates that this group will assist in the dissemination of the records. That group has indicated in a newsletter that it has raised funds to pursue its interests and those funds should be utilized to help the Municipality defray the cost of this records request. Alternatively, the members of the group could pool their resources in order to minimize the financial impact of any individual member.

...

Public Health or Safety

The majority of the appellant's request has nothing to do with public health or safety. His request includes such records as councillors' personal expense accounts, various committee agenda packages, property ownership and assessment information and development plans. A review of the 40 bullet points comprising the appellant's request (many of which, in and of themselves, constitute a significant request for records) reveals that the overall thrust of the request has very little, if anything, to do with public safety. The appellant should not be permitted to avoid the normal fee provisions on this basis.

The Municipality also provided a newspaper article about the appellant in support of its position that the appellant would not suffer from financial hardship by having to pay the fee.

Analysis and finding

The appellant submits that dissemination of the records may disclose public health and safety concerns relating to nuclear power, nuclear waste and the water supply in the municipality.

Prior orders of this office support the appellant's position with respect to records of that nature. In Order PO-1909, Adjudicator Donald Hale found that records relating to Ontario's air and water quality would raise a public safety and health concern within the meaning of section 57(4)(c) (the provincial equivalent of section 45(4)(c) at issue here). Adjudicator Hale states,

I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. In Order P-1190, which was upheld by the Ontario Superior Court of Justice (Divisional Court) in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Assistant Commissioner Tom Mitchinson adopted the findings of former Commissioner Tom Wright in Order P-270 with respect to the public interest which exists in information relating to the safety of Ontario's nuclear industry. He determined that:

Commissioner Tom Wright discussed the issue of nuclear safety and section 23 in Order P-270. This appeal involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the *Act*. In considering whether there was a compelling public interest in disclosure of nuclear safety related information, he stated:

In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.

I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.

In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

Similarly, I adopt the findings of the former Commissioner and the Assistant Commissioner and agree that matters relating to the safety of Ontario's air and water, like those concerned with the nuclear industry, by their very nature, raise a public safety concern.

I agree with the findings of Adjudicator Hale and adopt them here. Matters relating to nuclear power, nuclear waste and water supply and quality all raise a public health and safety concern. Accordingly, disclosure of some of the requested records would result in dissemination of information which may disclose a public health or concern. As such I find that some of the information contained in the records which are responsive to the appellant's request will benefit health or safety within the meaning of section 45(4)(c) of the *Act*.

However, the majority of the appellant's request does not deal with matters relating to public health or safety. Out of the 40 bullet points, which make up the appellant's request, I can only find 6 items that deal with either nuclear power/waste or water supply directly. Some of the items only deal with nuclear waste/power and water supply issues tangentially as the real focus appears to be expenditure information. I am unable to find that dissemination of this information would benefit health or safety.

The rest of the items relate to what I would describe as expenditure and financial information that the appellant submits relates to development. The appellant claims that the information relating to development could have an impact on the public health and safety. Prior orders of this office have found that there must be a connection between the public interest and a public health and safety issue. For instance, in Order MO-1718, the appellant requested records from the City of Ottawa relating to the Community Placements Program. The appellant argued that there was a public interest in such documents and that he should be granted a fee waiver under section 45(4)(c). Adjudicator Bernard Morrow found the following:

The appellant has indicated that he intends to write about the Program and contribute to the public debate about these types of programs throughout Ontario and Canada. The appellant appears to assert that there is a public interest in the dissemination of the records to facilitate this debate. In Order P-474, former Assistant Commissioner Glasberg stated that in order to meet the requirements of this factor, the subject matter of the records must relate *directly* to a public health or safety issue. In Order MO-1336 Adjudicator Laurel Croyley built on the former Assistant Commissioner's analysis. She stated that it is not sufficient that there only be a "public interest" in the records or that the public has a "right to know." There must be some *connection* between the public interest and a public health and safety issue. In this case, it is conceivable that there may be a "public interest" in the records that the appellant seeks. However, he has not established in his evidence any *connection*, direct or otherwise, between this suggested public interest and a public "health" or "safety" issue.

The appellant has attempted to make the connection between land developments and the public health or safety issue. The appellant argues that increased development will lead to further pressures on the municipality's water supply. I agree that this may occur, but the appellant has

not established that development is a public health and safety issue or that disclosure of the requested financial information would result in the dissemination of information that will benefit public health or safety within the meaning of section 45(4) (c).

On the other hand, I am satisfied that the appellant would suffer financial hardship if he were to pay the fee. While I agree with the Municipality's arguments that the organization that the appellant is affiliated with could pool resources or contribute to the payment of the fee, in this case the amount of the fee is quite large and I find that it would be onerous even if the cost were spread amongst a number of individuals. As such I find that, should the appellant be required to pay the fee for the records, he would suffer financial hardship within the meaning of section 45(4)(b) of the *Act*.

In conclusion, I am satisfied that dissemination of some of the records will benefit public health or safety (section 45(4)(c)) and that the appellant would suffer some financial hardship (section 45(4)(b)). I must now determine whether it would be fair and equitable for the Municipality to waive the fee in the circumstances.

Whether it would be fair and equitable to waive the fee

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]

In regard to the manner in which the Municipality responded to the request, I note that there was some delay in the Municipality's response to the appellant. The appellant made his revised request on July 2, 2003 to the Municipality and did not receive an interim decision until February 3, 2004. In cases like these where there has been some delay in responding to the request, the argument has been made that the records lose their importance, use and effectiveness. I agree and find that this factor significantly weighs in favour of waiver.

Regarding whether the Municipality worked constructively with the appellant to narrow or clarify the request, the Municipality noted the following to the appellant:

I met with you personally, for over two hours on each occasion, to discuss your request and the ways in which it might be focused. I believe you have done little to scale back the scope of your request in an effort to reduce the cost of responding to it.

You have refused our offer to have access to and review many of the files containing the records that you have requested in order to limit your request to only those documents that appear to you to be relevant upon examination.

The appellant notes in his fee waiver request that in his discussions with the Municipality he “..explained that it was difficult for me to further narrow my request because I do not know the details of records keeping and records classification at the Municipality. “ Furthermore, the appellant notes that he did provide the Municipality with a narrowed request and asked that the Municipality suggest further narrowing where possible.

I note that both the Municipality and the appellant have made attempts within their abilities to narrow the request. As the appellant is no doubt aware, his request for records is both broad and varied. In my view, a factor supporting fee waiver which would weigh strongly in the appellant’s favour is whether the appellant made attempts and aided in any efforts to narrow or clarify his request. In this case, the appellant has declined to review records that may have aided in reducing or clarifying the request. This leads me to find that this is a factor favouring non-waiver.

The Municipality submits that it has provided the appellant with a number of records free of charge. It states in its interim decision:

The Municipality has already provided you a number of documents free of charge, including Council and Committee of the Whole meeting minutes for a two-year period. We are also prepared to provide you with the representative sample outlined above at no cost to you.

I find that this factor favours non-waiver.

The request involves a large number of records. As stated above, the appellant’s request is set out in 40 bullet points and the Municipality estimates that there are approximately 45,000 pages of responsive records. This is a significant factor weighing against the granting of a fee waiver.

The appellant submits that he has advanced a number of compromise solutions which would reduce costs including: limiting time frames and subject matter; receiving records in electronic format and asking that the records be released in three stages. Again, in my view, a compromise solution, which would have further reduced costs, would have included more than mere superficial attempts to narrow the scope of the request. The appellant has not satisfied me that he made attempts to do this. Nevertheless, I find the appellant’s suggestions to reduce costs weigh somewhat in favour of fee waiver.

The Municipality argues that waiving the fee would shift an unreasonable burden of the cost from the appellant to the taxpayers of the Municipality. The appellant argues that because it is the ratepayers who are interested in the information, their interest is being served if the payment of the fees is shifted back to the Municipality. The appellant further argues that the Municipality in the past has failed to provide disclosure and as such, it would be unreasonable to shift the burden of the cost of this request back to a member of the public. I agree somewhat with the appellant; however because not all of the appellant's request deals with a public health or safety issue, and in fact the majority of his request does not, I find that waiving the entire fee would shift an unreasonable burden of the cost from the appellant to the Municipality.

From my review of the factors above, I find that on the balance, the factors against fee waiver outweigh those in favour. However, I am mindful that I have found that the appellant would suffer financial hardship from having to pay the fee and that some of the records relate to public health and safety issues. Thus, while it would not be fair and equitable to waive the entire fee, I find that it would be fair and equitable if the Municipality were to partially waive the fee.

In determining the appropriate amount of waiver to grant, I have taken into consideration the factors set out above and also the fact that the Municipality stated in its interim decision that it would provide some of the records without charging the photocopying fee. Moreover, I did not want the appellant to be rewarded for not making a meaningful attempt to narrow his request. Consequently, I have decided to grant a partial waiver of the fee based on the appellant's request for records that I have found relate to a public health or safety issue. However, as the Municipality has already waived photocopying fees for a number of the records, and in light of the user pay principles in the *Act*, I find that it would not be fair and equitable for the Municipality to bear the cost of reproducing the records. As a result, I will order the Municipality to waive the fees, except photocopying charges, for the following parts of the appellant's request.

- all records regarding the possibility or consideration or evaluation of a hook-up by Bruce Power Inc. or OPG Inc. to a Municipal water supply, and such records pertaining to the possibility or consideration or evaluation of a hook-up to a water supply provided by Bruce Power Inc. or OPG Inc., since January 1st, 2000
- all records regarding the quality of water and suitability for consumption of water within the vicinity of Bruce Power Inc. or OPG Inc., since January 1st, 2000. Vicinity is defined as the area bounded by Concession 6 on the north, Bruce Rd 15 on the South, and west of Albert Rd (or it's equivalent where it ends north of Concession 2)
- all records which deal with the provision or need for provision of water to Inverhuron Provincial Park since January 1, 1998
- nuclear liaison committee agenda packages and minutes since January 1, 1999.

- any record, which discusses or involves nuclear waste (of any “level”), since January 1, 1999, including **but not limited to:**
 - o any agreement
 - o correspondence or communications with the federal government or any of it’s agencies or departments
 - o correspondence or communications with the provincial government or any of it’s agencies or departments

- any record which relates to the Nuclear Host Communities, past present or future, or any other forum or group or activity which has evolved from it’s activities or mandate

In regards to the rest of the appellant’s request, I uphold the Municipality’s decision to deny a fee waiver.

ORDER:

1. I uphold the Municipality’s fee estimate of \$10,800, which takes into account the corrected amount for computer programming (\$300).
2. I order the Municipality to waive all fees for the parts of the appellant’s request set out above. The Municipality may levy photocopying charges only, for these parts of the request.
3. I uphold the Municipality’s decision to deny the appellant’s request for a fee waiver for the rest of his request.
4. I remain seized of this appeal in the event that any questions arise as to the implementation of this order.

Original Signed by: _____
Stephanie Haly
Adjudicator

_____ December 30, 2004