



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2163

Appeal MA-050457-1

City of Hamilton



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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a proposed industrial quarry. The request was filed on behalf of a community group (the Group) and sought:

... all records in the possession of the City, respecting water, geological, natural features or ecological functions for:

lands or waters on or within a 5 kilometre radius of Lots 2 & 3 and Part of Lot 1, Concession 11 East, in the former Township of East Flamborough, now the City of Hamilton, Ontario.

In general, our request is intended to include but is not limited to photographs, maps, reports, reviews, assessments, classifications, evaluations, studies, policies, guidelines, correspondence (including memoranda, notes to file, letters, e-mail, faxes, meeting minutes), and any other information of the above.

Upon receiving the request, City staff suggested that it might be useful for the requester to discuss the matter with other City departments, either to narrow the scope or to obtain records available through routine disclosure. Staff from the City's Public Works Department (Water and Wastewater Division) subsequently provided some assistance in the clarification of the request.

In consultation with the Public Works and Planning and Development departments, the City prepared an initial fee estimate of \$1740.00, which was comprised of 58 hours of search time by staff in several divisions. However, the fee estimate did not include other divisions that might ultimately participate in the search and did not include fees for preparation and copying of any records identified as responsive.

After this fee estimate was issued, the requester sought to work with City staff to narrow the scope of the request. Communication by letter and email, as well as a meeting between the requester and key City staff members, was successful in narrowing the request to focus on information related to the potential impact of the proposed industrial quarry on the local water table and water quality.

The City issued an interim access decision in May 2005, releasing a first batch of responsive records comprising 994 pages to the requester upon partial payment of a fee.

The City issued its final access decision in August, advising the requester that the remaining records identified as responsive to the revised request totaled approximately 788 pages. The City conveyed its intention to apply the mandatory third party information exemption (section 10(1)) and the discretionary solicitor-client privilege exemption (section 12) to withhold 157 pages in their entirety. The City informed the requester that the personal information of individual homeowners would be severed from eight additional pages pursuant to the mandatory personal privacy exemption (section 14(1)) prior to their release.

The City also advised the requester that the final fee had been calculated as \$1,100.50 and provided details regarding the calculation of this amount as follows:

Records search 23 hours and 20 minutes @ \$ 7.50 per 15 minutes	= \$ 700.00
Records preparation 15 minutes @ \$7.50 for 15 minutes	= \$ 7.50
Copy of 994 pages @ 20 cents per page (Interim decision records)	= \$ 198.80
Duplicate 6 CDs at \$10 each	= \$ 60.00
Sever 8 pages @ 2 minutes per page @ \$7.50 per 15 minutes	= \$ 8.00
Copy 631 pages @ 20 cents per page (Final decision records)	= <u>\$ 126.20</u>
 Sub-Total	 \$ 1,100.50
 Less search fee deposit (February 8, 2005)	 (350.00)
Less interim decision payment (May 16, 2005)	(266.30)
 Balance due	 \$484.20

The requester paid the balance of the fee and received the second batch of records from the City. He then submitted a request to the City to waive the entire fee associated with providing access, on the basis that dissemination of the requested information would benefit public health or safety, as contemplated by section 45(4)(c) of the *Act*.

After reviewing the requester's submissions on fee waiver, the City issued a decision, advising that it would not grant the waiver.

The requester, now the appellant, appealed the City's decision.

During the mediation stage of this appeal, the appellant confirmed that the only issue under appeal is the City's decision not to grant a fee waiver. The appellant also clarified that his appeal is premised on two factors: that payment of the fee would impose financial hardship on the Group (section 45(4)(b)) and that the dissemination of the information will benefit public health or safety (section 45(4)(c)).

The City maintained its position that the appellant had not established the case for a fee waiver and no resolution was possible at mediation. The appeal was transferred to adjudication where it was assigned to me to conduct an inquiry.

I initially sent a Notice of Inquiry to the appellant, seeking representations on the issue of fee waiver. The appellant provided representations. I then sent a Notice of Inquiry to the City, along with a complete copy of the appellant's representations, inviting representations in response, which I received.

For ease of reference, the reader should note that I will be referring to the appellant and the Group he represents interchangeably in this order.

DISCUSSION:

General principles

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

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.

The 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. On appeal of the decision by an institution to deny a request for a fee waiver, in whole or in part, I may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The standard of review applicable to an institution's decision is "correctness" [Order P-474].

There are two parts to my review of the City's decision under section 45(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria

listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee to be waived.

Part 1: Basis for Fee Waiver

As noted above, the appellant cites sections 45(4)(b) and (c) of the *Act* in support of the assertion that this fee should be waived.

Financial hardship

Under section 45(4)(b), the appellant bears the onus of establishing financial hardship. Generally, the appellant must provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365, P-1393].

The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402].

Representations

The appellant's request to the City for a fee waiver includes the claim that payment of the fee caused financial hardship to this not-for-profit community group because it has no source of funds apart from contributions from community members. On this basis, the appellant suggests that the group "should not have to bear a financial burden simply to obtain the information required to professionally and substantive[ly] participate in the approval process [for the industrial quarry]."

It appears that the appellant's assertion of financial hardship is premised on a "David and Goliath" argument. In the submissions to the City, the appellant points out that his community group is

already at a significant disadvantage as compared to the Corporate entity attempting to secure approval for a commercial undertaking. To be effective in opposition to this kind of matter significant expenditures must be made to retain expert legal and technical advice. These expenditures are already straining the Community funds.

In denying the request for a fee waiver, the City referred to the group as "a well-organized, federally-registered not-for-profit non-charitable organization with its own distinct letterhead and sufficient resources to hire legal, scientific and technical experts."

In its representations to this office, the City pointed out that the audit statements contained on the group's own website demonstrate that the group has "in excess of \$75,000 in funding available to them. Having a surplus of this amount is the antithesis of financial hardship". The City seeks to similarly refute the appellant's argument of being disadvantaged in the hiring of experts by

referring again to the group's website which "clearly identifies companies and individuals with a wealth of experience, education, and credentials working on their behalf."

In representations provided to me in this appeal, the appellant admits to the Group's success in raising funds but maintains that the Group is

still disadvantaged in comparison to the commercial corporate entity we are opposing... [which] has significantly more financial resources as compared to [the Group].

We are routinely forced to make difficult decisions about where we invest our limited funds, and at times we have had to undertake our submissions with local knowledgeable resources rather than hire experts due to a lack of funds...

Requiring a Community organization to pay additional funds to our own municipal government in order to get the information we require to appropriately participate in the process is a financial hardship.

In the initial letter of appeal to this office, the appellant also mentions that

In follow-up conversations with the City in regards to their decision, we were informed that there was no possible way for our request for a fee waiver to be granted. It was explained that the City has a policy of never granting fee waivers to groups. We were told that fee waivers are only considered for individuals in cases of extreme poverty when the requested information is in relation to obtaining social support payments.

... [We] do not think that [the *Act*] supports this limited interpretation of applicants eligible for a fee waiver.

The City does not deny this approach to the consideration of fee waiver requests and states the following in its representations:

I will begin by addressing the issue of 'whether the payment will cause a financial hardship for the person requesting the record.'

One of the intents of the [*Act*] is to allow individuals to access records, and, if there was a hardship in paying for these records, to have the fee waived. An example of this would be someone trying to access their Ontario Works file and not being in a position, through no fault of their own, to pay for such a request. This defining of the individual is made clear in the *Act* when it identifies someone requesting a record as "the person".

Analysis and Findings

For the reasons that follow, I find that payment of the fee would not constitute financial hardship for the appellant as contemplated by section 45(4)(b) of the *Act*.

I have taken into consideration all of the information before me with respect to the issue of whether the payment of the fee results in financial hardship to the appellant. Included in the information available about the Group's financial position is that which is presented in the audited financial statements on its website. On this website, I have been able to review the most recently available Audit Statement for the Group, and I note that as of December 31, 2005, the unrestricted net assets for the Group total over \$27,500. This figure is lower than that quoted by the City as being available to the Group. However, I note that it represents revenue minus expenses, but also accounts for a \$50,000 reserve set aside to fund the Group's participation in the hearing process for the proposed quarry.

Conversely, I note that the appellant has failed to provide an adequate explanation related to the Group's expenses or other commitments that might help support a finding that the financial hardship asserted by the appellant is actually manifested.

While I accept that the appellant's financial resources may be significantly more limited than those of its "opponent", my responsibility under the *Act* is to consider the resources of the individual or group requesting the fee waiver in an absolute, not relative, sense. In my view, the Group has adequate financial resources to cover the cost of the request without suffering financial hardship.

Having made this finding, however, I would express reservation about the City's admitted practice of only considering fee waiver requests from individuals. I agree with the appellant that this represents an overly restrictive interpretation of the *Act*. The *Act* does not distinguish between individuals or groups in conferring a right of access to information under the control of institutions and, in my view, a categorical distinction between them with regard to the consideration of fee waiver requests is inappropriate. I would encourage the City to consider each fee waiver request on a case by case basis according to its merits.

Given my finding that financial hardship under section 45(4)(b) has not been established by the appellant, it is not necessary for me to consider whether it would be fair and equitable to waive the fee on this basis. However, I must now consider the appellant's claim that a waiver is warranted on the basis of benefit to public health or safety.

Public health or safety

In past orders of this office, the following factors have been found to 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
 - disclosing a public health or safety concern, or
 - 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]
- expansion of a landfill site [Order PO-2514]
- 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]

Representations

The appellant explains the public health or safety basis for waiver of the fee associated with obtaining access to the records in the following manner:

The situation leading to this FOI request is of interest to a broad cross section of the local community. Hundreds of concerned citizens have banded together to form [the Group] and it was on their behalf that this information request was made.

The proposed development at the center of this request is for a large industrial open pit mine and it is common knowledge that these operations have a significant impact on the existing environmental conditions both within their site boundaries and over extended distances surrounding their operations. One of the areas most significantly impacted is ground water. A significant portion of the FOI request dealt directly with groundwater studies. Nothing could have a greater impact to public health than safe clean groundwater for human consumption. Without a safe supply of drinking water life is not possible.

The appellant submits that the information forms the foundation for the Group's submissions during the municipal approval process, and "the anticipated appeal and provincial hearing processes."

In its decision letter regarding the fee waiver request, the City took the position that the Group had not substantiated the claim that the release of the information would benefit public health or safety. The City stated:

[There] is no information that indisputably identifies an environmental problem at this particular location, and as the site is not in operation, identifying potential health or safety concerns would be hearsay.

In providing representations to me, the appellant provided additional detail in support of the reasons already provided to the City to establish that dissemination of the information would benefit public health or safety. The appellant referred specifically to concerns about,

the potential impact on our drinking water, both quantity and quality, as all area residents rely on well water including the community of Carlisle population 3,000. Our submissions [to the City during the approval process] also deal with road safety as the proposed quarry truck routes impact the bus routes of two local elementary schools. We have also made submissions regarding the impact of dust and noise on human health.

... [One] of the FOI items was a recent study on where the wellhead protection zones were located for the Carlisle Municipal Water System.

It is our contention that a proposed large scale industrial open pit quarry operating below the established water table quarry represents the same kind of health and safety concerns as a proposed landfill site which has been found to be public health and safety related as per Order M-408.

In reply, the City adopted essentially the same position on the public health or safety basis as it had upon responding initially to the request. The City's FOI Coordinator stated that the Group's arguments had been rejected due to "a lack of significant evidence" and a preponderance of speculation as to the dangers of the proposed quarry. The City also sought to dispute the applicability of Order M-408 to this appeal on the basis that a landfill and quarry are "distinct and different" entities.

Analysis and Findings

I have considered the representations of the City and the appellant, as well as other relevant factors. In my view, the appellant has tendered sufficient evidence to persuade me that the dissemination of the information relating to the proposed industrial quarry would benefit public health and safety for the purposes of section 45(4)(c) and I find that this basis for fee waiver has been established.

In particular, I agree with the appellant that concerns about the quarry's possible effects on the groundwater supply for the local community, as an example, are a matter of interest to the public, and that these concerns relate directly to health or safety. I also note that the Group has

already disseminated some of this information in the form of its submissions in opposition to the quarry.

I specifically reject the City's contention that the dissemination of the records will not benefit public health and safety because, in the opinion of the City, they contain "no information that indisputably identifies an environmental problem" at the proposed quarry's site. In my view, section 45(4)(c) of the *Act* does not demand that there be absolute, or indisputable, certainty as to the existence of a threat to public health or safety before the basis can be properly relied upon in seeking waiver of a fee.

However, even though I have accepted that dissemination of the information would benefit public health or safety, I must continue my analysis by reviewing whether it would be fair and equitable to grant a waiver of the fee in this particular instance.

Part 2: 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 requester worked constructively with the institution to narrow the scope of the request;
- whether the institution provided any records to the requester free of charge;
- 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]

Representations

In submitting the request to the City for waiver of the fee, the appellant asserted that the Group, as "City rate payers[,] should not have to bear a financial burden simply to obtain the information required to professionally and substantive[ly] participate in the approval process." Furthermore, the appellant stated:

It is our belief that we acted cooperatively and in good faith during our interactions with the City, and that we worked constructively with the City to clarify and narrow the scope of the request to make it reasonable and effective for

all parties. In addition the information needs identified by this request were identified by City staff to be the same kinds of information that the Planning and Economic Development department required to process the application. In other words, it was work that the various City departments would have had to do regardless of this request.

The City's decision letter denying the fee waiver cited several factors, including:

- the actual cost of processing, preparing and copying the records for disclosure did not diverge from the amount charged as prescribed by the Regulation;
- the City's effort to work with the Group to narrow the scope of the request resulted in reduction of the original search component of the fee from \$1740.00 to \$700.00; and
- granting a fee waiver would shift an unreasonable burden of the cost from the Group to the City.

In providing representations during my inquiry into this appeal, the appellant acknowledges that both parties worked constructively to narrow and clarify the request and that the requested material represented a large number of records. However, the appellant submits that charging the Group these fees would unfairly shift the burden of costs from the City to the Group.

The appellant argues that during the meeting held with City staff prior to the narrowing of the request, a senior planning staff member asked that the same information requested by the Group be forwarded to his office, as it would be required for the City's processing of the quarry application. In view of this, the appellant suggests that the search portion of the fee (\$700.00) should be waived, as it would have to be performed in any event.

In reply to this argument, the City contends that the senior planning staff member referred to by the Group actually asked to receive information "gathered by all of the representative groups that attended that meeting. He made no reference to information that he currently had or would require at a future date." The City concludes by pointing out that the request necessitated extensive search time for a large number of records, as well as several meetings between representatives of the Group and City staff to modify the request.

Analysis and Findings

In answering the question of whether it would be "fair and equitable" to grant a fee waiver to the appellant in the circumstances of this appeal, I find that a number of the factors discussed in previous orders of this office are relevant to my determination.

Based on the information before me, it is evident that the City responded to the request in a prompt manner and worked diligently, and in a good faith effort, with the requester to clarify and narrow the scope of the Group's request. In my view, these efforts by several different City staff members were productive and resulted in considerable reduction of the fees that might otherwise

have been incurred for the search component of the request. I find that this factor weighs against granting the appellant a fee waiver.

However, I note that the appellant also worked constructively with the City towards a common goal of narrowing the request to the records most closely responsive to the appellant's own area of interest. I find that this is a consideration that weighs in favour of granting a fee waiver.

Under section 45(4)(a) of the *Act*, the City is required to compare the assessed cost and the actual cost of processing the request. Although this factor has not been addressed under a separate heading in this order, I have considered it in making my findings. I accept that the City has charged the appellant a fee in keeping with what it may charge under the Regulation for the cost of processing, collecting and copying the responsive records. Furthermore, in my view, the information available to me strongly suggests that the City incurred costs in processing this request that were not charged to the appellant. I find that these considerations also weigh against granting a fee waiver.

This request involves a considerable number of records. The records from the interim and final access decisions together total 1625 pages. Preparing this number of records for disclosure took a significant amount of time and effort by City personnel. I find that this is a significant factor weighing against the granting of a fee waiver, as well.

As noted in the introduction to this section, another important factor to consider is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the institution. In my view, this factor tips the balance against the granting of a fee waiver to the appellant. I find that granting a waiver of the fee would shift an unreasonable burden of the cost from the appellant to the City.

In making the above finding, I am mindful of the Legislature's intention to include a user-pay principle in the *Act*, as evidenced by the provisions of section 45 of the *Act*. The user-pay system is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 6 of Regulation 823 are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it. I agree with this approach.

I have found that dissemination of the information about the industrial quarry will benefit public health and safety within the meaning of section 45(4)(c) of the *Act*. However, after considering the factors that are relevant in deciding whether or not a fee waiver would be fair and equitable, I have concluded that the factors that weigh in favour of granting a fee waiver are outweighed by those weighting against granting it.

Furthermore, I find that a waiver of the search component of the fee, as requested by the appellant, would not be fair and equitable given the appreciable efforts by the City to narrow the scope of the request and reduce the search time from 58 hours to just over 23 hours. Reducing or

eliminating this component of the fee would, in my view, represent an unreasonable shift of the burden of the cost of processing the request from the appellant to the City.

In conclusion, I find that it would not be fair and equitable in the circumstances of this appeal to order the City to grant the appellant a fee waiver under section 45(1) of the *Act*.

ORDER:

I uphold the City's decision not to grant the appellant a fee waiver.

Original signed by: _____
Daphne Loukidelis
Adjudicator

February 22, 2007 _____