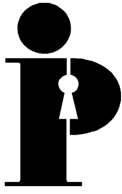

ORDER MO-2376

Appeal MA07-368

Corporation of the City of Orillia

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

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

> … all correspondence between the City of Orillia Planning Department and the developer of our condo, [name of condominium] pertaining to the submitted site plan and its implementation, including:
>
> - The original letter (2002) submitted with the developers' application, including reference to the deposit,
> - All correspondence, including invoices, between the city, the developer and the landscape architect, [named individual], on this subject between 2002 and 2007, and
> - The February 2007 letter to the developer acknowledging the return in securities, and the amount returned.

The requester is a committee of condominium residents that deals with landscaping issues. The City issued an interim access decision to the requester that presented it with a choice:

> I have provided a fee estimate for "Option A" which includes correspondence, invoices, etc. between the City Planning Department, the developer and the landscape architect between January 1, 2002 and August 7, 2007 on *landscaping issues* and "Option B" which includes Option "A" as well as correspondence, invoices, etc. between the City Planning Department, and the developer pertaining to the submitted site plan and its implementation during the same period.

The City provided a fee estimate of $163.00 for accessing the records available under "Option A" and a fee estimate of $482.50 for accessing the records under "Option B." It indicated that it would resume processing the request once the requester had chosen one of the options and paid a deposit equal to 50% of the fee estimate for that option.

The requester sent a letter to the City stating that it was selecting "Option B," and that it was seeking a fee waiver because "the dissemination of the record will benefit public health or safety" [the factor in section 45(4)(c) of the *Act*].

Subsequently, a representative of the requester met with the City's staff to further discuss his committee's request. During these discussions, the requester's representative decided to choose "Option A" instead of "Option B." The City then sent a letter to the requester's representative confirming that his committee had now decided to choose "Option A." The letter further stated that the City had located 62 records under "Option A" that were responsive to the request.

In the same letter, the City issued a final access decision, granting the requester full access to 33 records and partial access to 29 records. It denied the requester access to portions of the 29 records pursuant to the exemptions in sections 11 (economic and other interests) and 14(1) (personal privacy) of the *Act*. The letter further stated that the final fee for accessing the severed records was $163.20 and confirmed that the requester had paid a fee deposit of $81.50. In addition, it denied the request for a fee waiver.

The requester (now the appellant) appealed the City's decision to deny it a fee waiver. It did not appeal the amount of the City's final fee for accessing the "Option A" records or the City's decision to deny it access to portions of the records pursuant to sections 11 and 14(1) of the *Act*.

This office appointed a mediator to assist the parties with the appeal, and the appellant's representative confirmed that the only issue his committee is appealing is the City's decision to deny its request for a fee waiver. The City advised the mediator that it would not agree to waive the fee.

The appeal was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry to the appellant, inviting it to submit representations. The appellant's representative submitted representations in response.

I then sent the same Notice of Inquiry to the City, along with a copy of the appellant's representations. The City submitted representations in response.

DISCUSSION:

FEE WAIVER

Should the final fee of $163.20 be waived?

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].

Part 1: basis for fee waiver

Section 45(4)(a): actual cost in comparison to the fee

In deciding whether it is fair and equitable to waive payment of all or part of the fees, an institution must consider whether the actual cost of processing, collecting and copying the record varies from the amount of the fee.

The City submits that the actual cost of searching, processing and copying the records exceeds the fee that it is charging the appellant:

> The final fee was $163.20 consisting of $28.20 for photocopies and $135.00 for record search and preparation. As can be seen on the Attachment to Representation – Time Journal – Request #601156 – the search and preparation charges actually totalled [7.75] hrs or $232.50. In addition, the requester was only charged the nominal 20 cent photocopying fee for the scanning and reproduction of 10 large plans for a plotter. It has been the City's practice to stay as close to a fee estimate as is realistically possible, therefore we decided not to charge the full [7.75] hours.

The appellant did not provide representations that specifically address whether the actual cost of processing, collecting and copying the record varies from the amount of the fee.

In my view, the City's representations make it clear that it incurred costs that have not been charged to the appellant. For example, although the City spent 7.75 hours searching for the

records and preparing them for disclosure and could have charged the appellant $232.50, it only charged him a final fee of $163.20, including photocopying costs. Consequently, I find that the actual cost of processing, collecting and copying the record is higher than the amount of the fee.

Section 45(4)(b): financial hardship

In deciding whether it is fair and equitable to waive payment of all or part of the fees, an institution must consider whether the payment will cause a financial hardship for the person requesting the record.

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

Generally, a requester should 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 City submits that the appellant "has not indicated financial hardship or submitted proof that the payment will cause a financial hardship." The appellant did not provide representations as to whether payment would cause a financial hardship.

In the circumstances, I find that paying the fee would not cause a financial hardship for the appellant.

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]

The appellant submits that dissemination of the records will benefit public safety under section 45(4)(c) of the *Act*.

The appellant states that it filed an access request for records, because the City failed to require a condominium developer to carry out specific actions to protect the safety of the public. In particular, the appellant cites the following allegations:

1. Refusal of the City to have the willow tree on condo lands “made safe” by removing branches that were a safety hazard to people using the public walkway on condo property, and

2. Refusal by the City to construct adequate barriers on the bridges and stairs on the public walkway on condo property.

To support its representations on this issue, the appellant submitted documentation from a certified arborist, including a letter stating that one of the purposes of removing deadwood from the willow tree was to enhance “safety” with respect to the “walking trail” next to the tree. The appellant also included a picture of the condominium property, which purports to show the hazardous tree and the lack of adequate barriers on the bridges and stairs of the public walkway.

The appellant further submits that it filed an access request with the City "to acquire documentation between the City, developer and the City's consultant to try and determine why these public safety hazards were not managed in the best interests of the condo residents and the general public."

The City submits that dissemination of the records will not benefit public health or safety under section 45(4)(c) of the *Act*.

In particular, the City provided the following submissions on the factors that this office has previously found may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- The subject matter of the record is a matter of private rather than public interest. Specifically, the City asserts that the tree and the barriers on the bridges and stairs are on private, not public, property, and that "maintenance and liability issues are the responsibility of the condominium corporation as the owners of the property."

- The subject matter of the records does not "appear" to directly relate to a public health or safety issue.

- Dissemination of the records would not yield a public benefit by disclosing a public health or safety concern, or contribute meaningfully to the development of an important public health or safety issue.

- The appellant will likely not be disseminating the contents of the records to the public at large but rather to a few people. In addition, the City cites Order 2, in which former Commissioner Sidney Linden states that a fee will not be waived "where a record simply contains some information relating to health or safety issues."

- The appellant would be provided with full access to 33 records and partial access to 29 records.

I have considered the representations of both the City and the appellant and other relevant factors. For the reasons that follow, I find that dissemination of the records will not benefit public health or safety, as contemplated by section 45(4)(c).

I acknowledge that the records at issue may touch on issues relating to safety, because it is evident that an inadequately maintained tree or the lack of proper barriers on a walkway could pose a risk to the safety of individuals. In my view, however, the subject matter of the records is primarily a matter of private rather than public interest. The appellant is a committee of condominium residents that deals with landscaping issues on the property. Although the walkways may be used by the public occasionally, they are on private property. In short, although the subject matter of the records may cross over slightly into the public realm, I find

that it is primarily a matter of private interest to the condominium's residents, not the general public.

I would note as well that the appellant has not provided any indication in its representations that it would disseminate the contents of the records at issue outside of its membership. I conclude, therefore, that dissemination of the records will not benefit public health or safety, as contemplated by section 45(4)(c).

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 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]

The City submits that its staff communicated with the appellant before the access request was filed and also arranged to meet with the appellant to further clarify and narrow the scope of the request. Although the City acknowledges that the appellant worked to advance a compromise solution that would reduce costs, it submits that waiving the fee would shift an unreasonable burden of the cost from the appellant to the City, particularly since the actual fee was "reduced considerably."

In its representations, the appellant does not specifically address whether it would be "fair and equitable" in the circumstances to grant the fee waiver.

I have carefully considered the parties' representations and concluded that it would not be "fair and equitable" to grant a fee waiver in the circumstances of this appeal. I have already found that payment of the fee will not cause financial hardship for the appellant, and that dissemination of the records will not benefit public health or safety. Moreover, although it is evident that the appellant worked to advance a compromise solution that would reduce costs, I am particularly swayed by the City's evidence that the actual cost of processing, collecting and copying the records ($232.50) was higher than the amount of the fee charged to the appellant ($163.20).

The *Act* contemplates a "user pay" principle for accessing government-held records, subject to the fee waiver provisions in section 45(4). In my view, waiving the fee, either in whole or in part, would shift an unreasonable burden of the cost from the appellant to the institution. Consequently, I find that it would not be fair and equitable in the circumstances of this appeal to grant a fee waiver.

ORDER:

I uphold the City's decision to deny a fee waiver.

Original signed by: December 10, 2008
Colin Bhattacharjee
Adjudicator