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

ORDER MO-2383

Appeals MA07-127 and MA07-369

City of Hamilton

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This order will address the issues raised by two requests submitted to the City of Hamilton (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester's appeal of the City's decisions resulted in this office opening Appeals MA07-127 and MA07-369.

NATURE OF THE APPEALS:

Glanbrook was formerly a rural township with a population of 10,000, located just south of Hamilton, Ontario. On January 1, 2002, the Hamilton-Wentworth regional government and that of its constituent municipalities, including Glanbrook, were amalgamated as the new City of Hamilton.

Appeal MA07-127

The City received a request for access to the following information:

1. Any and all stormwater management studies and plans carried out and/or prepared for the following properties: the Glanbrook Municipal Offices (located on Binbrook Road) and the Sports Complex property(ies) and playing fields (which abut and are immediately adjacent to the Glanbrook Municipal Offices to the east, west and north of the Glanbrook Municipal Offices).

2. Any and all design drawings (or as-built drawings) for any storm drains, culverts, berms, etc. for the following properties: the Glanbrook Municipal Offices (located on Binbrook Road) and the Sports Complex property(ies) and playing fields (which abut and are immediately adjacent to the Glanbrook Municipal Offices to the east, west, and north of the Glanbrook Municipal Offices).

3. Any and all drainage plans and site grading plans for the following properties: the Glanbrook Municipal Offices (located on Binbrook Road) and the sports Complex property(ies) and playing fields (which abut and are immediately adjacent to the Glanbrook Municipal Offices to the east, west and north of the Glanbrook Municipal Offices).

4. Any and all siltation and erosion control plans for the following properties: the Glanbrook Municipal Offices (located on Binbrook Road) and the Sports Complex property(ies) and playing fields (which abut and are immediately adjacent to the Glanbrook Municipal Offices to the east, west and north of the Glanbrook Municipal Offices).

Initially, the City sent a letter to the requester informing him that his request was being forwarded to a certain individual in the "Open Space Development Section, Capital Planning & Implementation Division, Public Works Department" (the Public Works Department) for a response. This individual wrote to the requester, advising that there were no records responsive to parts 1, 2, and 4 of the request, but that records responsive to part 3 of the request could be obtained directly through the Public Works Department for a fee of $11.90 plus GST.

There followed a six-week series of email communications between the requester and the Access & Privacy Office regarding the nature of the request, whether or not it was to be construed as a request under the *Act*, and the adequacy of the searches conducted. During this time, the requester received the records responsive to part 3 of the request by email.

The City then issued a decision letter, advising that a further search by staff from the Public Works Department had not located any additional records responsive to what was now confirmed as a request under the *Act*. The City also advised the requester that records related to adjacent cemetery lands of possible interest had been identified by the search and could be obtained directly through the relevant department.

The requester, now the appellant, appealed the City's decision to this office. A mediator was appointed to try to resolve the issues between the parties. During mediation, the appellant advanced the position that additional records should exist which are responsive to his request. The appellant also expressed concern that the records disclosed to him through the Department were incomplete, scanned copies of the originals, and he believes that he should be provided with legible, full-sized copies of these records. The City maintained that there are no other responsive records other than those already disclosed, and advised that the scanned copies of the disclosed records are the only versions available, as the City does not have original hard copies. A mediated resolution of the appeal was not possible.

Appeal MA07-369

The day before he appealed the City's decision in Appeal MA07-127 to this office, the appellant submitted a second request to the City under the *Act* for access to the following records:

> All documents (whether stored electronically or otherwise), and including but not limited to, correspondence, memoranda, planning reports, engineering reports, staff reports, plans, planning approvals, development approvals, studies, photographs, emails, drawings and designs), related to the planning, engineering, construction and/or development of the following properties: (1) the Glanbrook Municipal Offices (located on Binbrook Road), (2) the Sports Complex property(ies) and playing fields (which abut and are immediately adjacent to the east, west and north of the Glanbrook Municipal Offices) and (3) the Cemetery Lands which are in close proximity to the Glanbrook Municipal Offices.

This office subsequently accepted the appellant's request that Appeal MA07-127 be placed on hold pending the City's response to the newly submitted request.

In response to the second request, the City first issued a fee estimate, and then a decision, granting partial access to the records identified as responsive for a fee of $429.60. The City advised the appellant about the option of requesting a fee waiver. The appellant subsequently sought a fee waiver, taking the position that the second request was necessitated by the City's

failure to respond adequately to his first request and that, in the circumstances, it would be "fair and equitable" to waive the fees associated with the second request.

The City then issued a revised decision, granting partial access to additional records for a fee of $282.40. Access to portions of the records was denied based on the third party information and personal privacy exemptions (sections 10(1) and 14(1), respectively). The City also advised the appellant that it was denying the fee waiver request as the reasons cited for claiming it did not meet the requirements of section 45(4).

The appellant paid the fees assessed by the City in order to receive the records. Concurrently, he sent a letter to this office appealing the City's decision to deny the fee waiver. The appellant did not appeal the City's exemption claims.

During the mediation of Appeal MA07-369, the appellant confirmed that he was appealing the fee amounts ($429.60 and $282.40), as well as the denial of the fee waiver. It was at this point that the appellant advised that he wished to seek a fee waiver on the basis of section 45(4)(b) (financial hardship) of the *Act*. These issues could not be resolved through mediation.

Appeal MA07-127 was taken off hold and transferred, together with Appeal MA07-369, to the adjudication stage of the appeal process, where both appeals were assigned to me to conduct an inquiry. Based on my review of the appeal files, I concluded that the issues would best be addressed in a unified fashion through a single Notice of Inquiry. Accordingly, I sent a Notice of Inquiry to the City initially, outlining the facts and issues, and seeking representations on the issues in both of the appeals.

Upon receipt of the Notice of Inquiry, and during the preparation of its representations, the City wrote to the appellant to seek documentation in support of the "financial hardship" basis for a fee waiver. The appellant did not provide the requested documentation, and the City subsequently advised him that it could not make a determination on the fee waiver request under section 45(4)(b) of the *Act*. In the same letter, the City provided a detailed explanation of the fees charged under section 45(1) of the *Act*, as distinguished from the user fees charged by the City for records currently available to the public. The City also clarified that the fee waiver determination could only apply for a fee charged in accordance with section 45(1) of the *Act*.

The City then submitted representations to this office in response to the Notice of Inquiry. Next, I sent a modified Notice of Inquiry to the appellant, along with a complete copy of the City's representations, in order to seek his representations. The appellant forwarded brief representations by email, and indicated that he also wished to rely on all previous submissions.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

As stated previously, the appellant takes the position that records identified by the City as responsive to the second request should have been identified in the searches conducted consequent to receipt of the initial request. In my view, it is necessary to determine the scope of the appellant's two requests as a preliminary step in order to provide proper context for reviewing the adequacy of the searches conducted by the City, as well as for the analysis of the fee and fee waiver issues.

General Principles

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Representations

The City takes the position that the scope of the second request is broader than that of the first request. Specifically, the City states that the records relating to the adjacent cemetery lands, which were incidentally identified during the initial search conducted in response to the first request, were "above the scope of the request." In reference to the second request, the City submits that although it is similar to the first one, it "now included more specific documentation and added the Cemetary lands."

The City notes that it contacted the appellant to determine if he wished to clarify or refine the second request since the search appeared to have identified many records secondary to the appellant's main interest. The City asserts that it complied with its statutory obligation to assist the appellant in reformulating his request, but that searches were conducted based on the original wording since the appellant chose not to narrow the request.

In his Notice of Appeal in Appeal MA07-127, the appellant refers to the initial request as "expansive," while in the letter written to the City regarding the fee waiver regarding his second request, he states that "[t]he Initial FOI request was very narrow in scope..." However, as I understand the context, the appellant's comments regarding the scope of the requests are more expressly intended to convey concern with the "necessity" of making a second request due to the allegedly inadequate response by the City to the initial one. Furthermore, by extension, these concerns relate more directly to the search and fee waiver issues.

Findings

The City argues that the second request "included more specific documentation and added the Cemetary lands." I agree. On a plain reading of the wording of the two requests, there are two features distinguishing the second request from the first: the latter clearly contemplates a broader range of record types, and it also contains a new reference to the cemetery lands adjacent to the Glanbrook Municipal Offices.

I find that the scope of the first request (Appeal MA07-127) is defined by the documents and properties that it specifically lists, namely stormwater management studies or plans, storm drain, culvert or berm design or as-built drawings, and drainage, site-grading, siltation and erosion-control plans, all related to the Glanbrook Municipal Offices and the adjacent Sport Complex/Playing Fields.

I find that the appellant's second request is broader than the initial request, and that its scope contemplates *all* records related to the planning, engineering, construction or development of the Glanbrook Municipal Offices, the adjacent Sport Complex/Playing Fields, *and* the nearby cemetery lands.

These findings are most relevant as they relate to the appellant's arguments on the search issue, the discussion of which follows.

SEARCH

The appellant challenges the completeness of the records identified by the City as a result of its searches in response to his first request.

General Principles

Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an 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 by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the City to carry out further searches.

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

Similarly, 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.

Representations

The City provided an affidavit with its representations to support its position that "it has made more than a reasonable effort to identify and locate records [responsive] to the two requests."

The City describes the steps taken upon receipt of the initial request, which included referral to an individual in the Capital Planning and Implementation Division, Public Works Department to locate and provide records through the regularized system of public access in place for such information. The City notes that it was this individual who initially informed the appellant that only records relating to grading and drainage for the Glanbrook Municipal Offices could be located.

The City indicates that it "assigned the access request [an FOI number] and undertook a formal search for responsive records" when the appellant subsequently requested that another search be conducted based on his belief that additional records must exist. The City submits that the Public Works Department was contacted again to conduct a search for responsive records and staff there advised that the Planning and Economic Development Department (the Planning Department) may have records related to grading and erosion control as part of the development approval process.

According to the City, staff from both of the above departments indicated that no additional records responsive to the first request could be located. A final decision letter (in Appeal MA07-127) was sent to the appellant advising him of the results of the additional search. The City submits that it also:

> advised the Appellant that the [Planning Department] has records relating to adjacent lands (specifically cemetery lands) which were part of the same

> development, which may be of interest to him. Since these records were outside the scope of the request, the Appellant was advised that if he wished to access these records, they were directly accessible through the aforesaid department.

The City submits that it then received the appellant's second request, which was similar, but sought more document-types and included reference to the cemetery. The potentially affected City departments were contacted, and this included the Community Services Department and the Corporate Services Department, as well as the Planning and Public Works Departments, which had previously been contacted. The City states that a search through hard copy and archived files by two individuals from the Planning Department identified no information related to the Sports Complex and Glanbrook Municipal Offices, only records referring to the cemetery lands. The City submits that a further search of hard copy files in three different divisions of the Public Works Department did not locate any records in addition to those provided to the appellant in response to Appeal MA07-127, other than a second group of records related to the cemetery lands.

The City further submits that:

> Records from the former Municipality of Glanbrook for the Community Services Department were packed up to be relocated in 2000 and 2001 pursuant to amalgamation with the City of Hamilton. Unfortunately, City staff has no current knowledge of where these boxes ultimately ended up following the move. However, [staff] undertook a search for the boxes at the Glanbrook Municipal Service Centre and in the Glanbrook Arena and did not find any of the boxes.
>
> I [the Access and Privacy Officer] was advised by [the] Records Clerk for the City … [in the] Corporate Services Department … that a search by her for the files from the former Municipality of Glanbrook determined that the transferred files were not indexed in the Records Repository Data Base. Since the files were not listed in the database, [staff] had to manually search through transfer lists by subject (e.g., Cemetery, Sports Complex, etc.) to pull files stored in the City's Corporate Records Centre that may be applicable to the request.
>
> As a result of [the] manual search, I received two banker boxes of files… concerning the Glanbrook Cemetery that were [searched and were] either expressly related or marginally related to the Appellant's request…

The City admits the possibility that responsive records may have existed previously but "were lost or destroyed during the amalgamation of the Township of Glanbrook with the City of Hamilton." The City also states that current staff may have had other responsive records in their possession at one time but they do not possess such records now. The City takes the position that its staff made proper and reasonable efforts to identify and locate all existing records that are responsive to both of the appellant's requests.

As previously noted, the appellant requested that his previous submissions to this office and to the City should be taken into consideration in this inquiry. The representations set out below are drawn from the appeal letters filed by the appellant with this office, as well as email communications between the appellant and the City prior to the appeals being filed with this office.

After the initial search conducted in response to his first request, the appellant stated the following in an email to staff in the City's Access and Privacy Office:

> … it appears that all the files containing the reports and other documents and plans I have requested have not been located. [Staff] suggested this is the result of the amalgamation of Glanbrook with the City of Hamilton. I find this unacceptable and conclude that little if any effort has gone into this search. In any event, many of these documents (if not all of them) would be readily available from the consulting engineer that prepared the plans on behalf of the City. This being the case, these documents held by the Engineering Consultant are the property of the City and therefore under the City's "control" as per s. 4 of the [*Act*].
>
> In light of the foregoing, I insist that the City comply with its statutory obligations and resume its search.

In the "Notice of Appeal" submitted to this office regarding Appeal MA07-127, the appellant claims that City staff and an engineer retained by him have acknowledged that the requested records are reasonably likely to exist, as their preparation would have been required as part of the development of the specified properties.

In his appeal documentation, the appellant also reiterates that many of the records sought were prepared by consultants retained by the former Township of Glanbrook, and he questions why the City did not contact the consultants when it discovered that its own records-holdings were incomplete. The appellant placed further emphasis on this point, stating:

> Inquiries were not made of those who would have knowledge and those who would likely have copies of many of the documents requested by the [Appellant]. These include the then Township Planner,… the then Township Engineer,… the then Township Clerk,… the City's Supervisor of Drainage,… the Claims Adjuster,… as well as the consultants retained by the Township of Glanbrook to prepare the documents requested in the FOI Request.

Analysis and Findings

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to

indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.

The City has correctly pointed out that the *Act* does not require an institution to prove with absolute certainty that records or further records do not exist (PO-1954). However, based on the evidence provided by the appellant in these appeals, I am satisfied that there is a reasonable possibility that additional responsive records may exist in the hands of outside consultants.

First, based on the City's representations and the affidavit, I am satisfied that the City has made a reasonable effort to identify and locate any existing records within its *internal* record-holdings. I accept that relevant City staff were asked to conduct searches and that they were armed with knowledge of the nature of the records said to exist, at least partly because of the appellant providing specific descriptions of them. Moreover, although the appellant expressed concern in his submissions on Appeal MA07-127 that the City's Drainage Supervisor had not been asked to participate in the searches, I accept the City's evidence that in response to the second request, this individual was asked to, and did search for, responsive records, albeit unsuccessfully.

Furthermore, I accept the evidence of the City that responsive records related to the development and construction of the municipal offices and sporting complex of the former Township of Glanbrook may indeed have been misplaced or destroyed during the amalgamation period. In my view, it is also possible that a similar fate may have befallen the City's copy of a full-sized version of the site and grading plan previously disclosed to the appellant in electronic form. It should be emphasized at this point that in a review of the adequacy of the City's search, my jurisdiction does not extend to a review of record-keeping practices.

Similarly, I am satisfied that any records that may have been in the possession of the former Township staff identified by the appellant in his submissions would have been in their possession in their official, and not individual, capacities. I find that any responsive records those individuals may have held in their official capacities would have been expected to have been transferred to the amalgamated City's record-holdings.

However, as the appellant points out, there is no indication in the City's evidence that outside (engineering) consultants, who might have direct knowledge of pertinent information or records, were contacted regarding the whereabouts of copies of the records specifically listed by the appellant in his first request. I note that the appellant raised this point directly with City staff early on, and before he filed an appeal of the City's decision on that request to this office. I also note that this point was made throughout the appellant's appeal documentation.

Indeed, in spite of the appellant voicing this particular concern about records possibly held by outside consultants several times throughout the processing of the requests and these appeals, the City failed to direct its search efforts accordingly, or to provide any sort of explanation for not doing so. At the very least, in my view, the City might have been expected to address this issue in its representations, but they did not.

In the circumstances of this appeal, I find that the City ought to have acted on the appellant's suggestion to contact the external consultants in an effort to obtain copies of the records he was seeking. In this particular respect, I find that the City's searches were inadequate.

In light of my finding that the City's searches in these appeals cannot be upheld in this respect, I will order the City to conduct additional searches for responsive records by making inquiries with the relevant external consultants regarding the existence of records related to the development and construction of: the Glanbrook Municipal Offices (on Binbrook Road); the Sports Complex property, including its playing fields to the east, west and north of the Glanbrook Municipal Offices; and the cemetery lands proximate to the Glanbrook Municipal Offices. The records are the types of records specifically described by the appellant in his first request, but also including the cemetery lands for the sake of completeness.

After the City has completed these additional searches, I order the City to issue a new access decision to the appellant, outlining the results of those searches, and a decision respecting access to any records located.

Although the appellant refers to the City as having "control" over copies of records that may be in the hands of external consultants, I note that the issue of "custody or control" under section 4(1) of the *Act* is not before me and need not be determined in the circumstances of the present appeal.

FEES

General Principles

This office has the power to review an institution's fee to determine whether it complies with the fee provisions in the *Act* and Regulation 823. In conducting this review, I may uphold the fee or vary it.

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, which 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:
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> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 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 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].

Background

My initial review of the appeal files left me with some uncertainty regarding the fees charged to the appellant. Specifically, it was not clear what fees had been charged for records disclosed under the *Act*, as compared to fees assessed under City By-law #03-119 for records provided directly by City departments. In the Notice of Inquiry sent to the City, I noted that the scope of my review of the fee and fee waiver issues is limited to those fees charged under the *Act*, and I sought clarification from the City as to the specific fees applicable to the two schemes. As noted in the introductory section of this order, the City subsequently copied this office on correspondence sent to the appellant clarifying the fees charged under the separate schemes.

Representations

As part of its representations on the scope of the request, the City noted that due to the breadth of the second request, it contacted the appellant to determine if he was interested in records which appeared to be only marginally related to his area of interest. The City states that it offered the appellant the opportunity to narrow the request accordingly, but that the appellant declined to do so. As I understand it, the City's argument is that the larger fee is related, at least in part, to the appellant's unwillingness to narrow the second request.

Otherwise, the City's representations specific to the fee issue are very brief, and refer to the information provided to the appellant in various letters "regarding the amounts charged to him under both the [*Act*], and the user fees charged by the Planning & Economic Development Department and Public Works Department." The City also mentions the chart it provided to the appellant distinguishing the two separate sets of fees.

According to this chart, the fees charged to the appellant under the *Act* are as follows:

- Search Time
  11.5966 hours @$30.00 per hour = $347.90

- Reproduction
  933 pages @$0.20 per page = $186.60

- Record Preparation (Severing)
  80 pages @2 minutes per page
  @ $7.50 per 15 minutes = $ 80.00

Total $614.50

As part of its submissions on the issue of fee waiver, the City notes that it "absorb[ed] the costs of mailing two sets of records in the amounts of $11.93 and $13.10 to the Appellant…"

The appellant did not provide submissions directly related to the fees, or categories of fees, charged to him under the *Act*. However, during mediation, the appellant stated the following in an email to the mediator:

> As for the fees issue, I will be relying upon the section regarding financial hardship as well as the inherent jurisdiction of the adjudicator in relation to the assessment of costs. You will note that these costs were incurred because of the unreasonable position taken by the City in the first and related FOI request.

In addition, as I understand the appellant's other arguments, his concern about fees is based on his belief that the first request should have produced different results and that had it done so, the

entire process would have cost far less as there would have been no need to make a second request.

Analysis and Findings

The issue before me is whether the City's $614.50 fee is reasonable and is calculated in accordance with the *Act*. I will not be reviewing the $97.50 charged to the appellant by City departments for access to publicly available records through the "regularized system of access."

I have already made the finding that the City's searches were inadequate to the extent that relevant external consultants were not asked to search for copies of the City's own "misplaced" records responsive to the first request. However, I have also found that the scope of the appellant's second request is broader than that of his first and, based on the evidence before me, I find that the records disclosed to the appellant under the *Act* were almost exclusively those that were responsive to the second request. In my view, the City must be permitted to recoup its costs for locating and preparing those records for the appellant, in circumstances where the appellant declined to narrow his second request.

Based on my review of the fees charged by the City pursuant to section 45(1) of the *Act*, and the totality of the evidence, I find that the City's fees for photocopying, searching, and preparing (severing) the records for disclosure are reasonable under sections 6.1, 6.3 and 6.4 of Regulation 823, respectively. I will uphold the fees charged by the City under the *Act*.

I will now consider whether a fee waiver is warranted in the circumstances of this appeal.

FEE WAIVER

General principles

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

> 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 standard of review applicable to an institution's decision under this section 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, or part of it, to be waived [Order MO-1243].

Previous orders have determined that the person requesting a fee waiver (in this case the appellant) bears the onus of establishing the basis for the fee waiver under section 45(4) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances [Orders M-429, M-598 and M-914].

Background

The City advised the appellant about the possibility of seeking a fee waiver in the final decision letter issued to him in Appeal MA07-369. The appellant responded to the City by seeking a fee waiver on the basis that the second request (leading to Appeal MA07-369), and the resulting processing fees, was necessary only because the City's search for records responsive to the request in Appeal MA07-127 had been inadequate.

At some point during the mediation stage of the appeal process, the appellant suggested that fee waiver should be granted on the basis of financial hardship, which falls under section 45(4)(b). Upon receipt of the initial Notice of Inquiry referring to the financial hardship grounds for waiver, the City contacted this office to advise that it had first learned of this particular claim through the inquiry documentation. In the Notice, I had provided the following foundation for the City's representations on this issue:

> The City should note that I will seek representations in reply on the issue of fee waiver once the appellant has provided representations on "financial hardship" at the second Notice of Inquiry stage. However, in the meantime, the City should consider the issue and explain the basis for denying the waiver initially. This will provide the appellant with a basis for response.

Concurrent with providing representations on the issue of fee waiver, below, the City sought verification from the appellant of the basis of his financial hardship claim. In the City's subsequent letter, referred to previously in this order, the City informed the appellant that because no income or expense verification had been received, it could not make a decision as to his eligibility for waiver under section 45(4)(b). As I understand it, the City is expressly reserving its decision on the issue pending verification.

At that time, I advised the parties that, as an Adjudicator, I am not in a position to make such a determination regarding the granting of a fee waiver in the first instance. A decision to grant a fee waiver must be made by the institution, and my role is limited under the *Act* to the review of such a decision through an appeal to this office. Accordingly, my decision on the issue of fee waiver is limited to a review of the City's decision to deny the appellant's initial fee waiver claim that it would be fair and equitable to waive the fees associated with the second request because that request was necessitated by the City's failure to respond adequately to his first request.

Representations

As outlined under the fee section, the appellant had advised the mediator that he would be "relying upon the section regarding financial hardship as well as the inherent jurisdiction of the adjudicator in relation to the assessment of costs." In the letter written to the City requesting a fee waiver, the appellant stated:

> [The first request] was completely fruitless in that virtually all of the documents requested could not be located. The Initial FOI request was very narrow in scope and involved minimal processing time.
>
> In making the Current FOI Request, it was my expectation that the misplaced documents requested in the Initial FOI Request would be located. This appears to be the case as I note from your letters… that additional boxes were located. These boxes were not located or searched during the Initial FOI Request.

> To summarize, the only reason for the Current FOI Request and thus the processing fees incurred, is that an incomplete search was conducted during the processing of the Initial FOI Request.

The City's representations on the fee waiver acknowledge that the appellant's basis for requesting a waiver was that responsive records to his second request should have been identified in his first request. The City submits that it advised the appellant that his claim for fee waiver did not meet the criterion and that, in any event, the scope of his second request was broader than the scope of his first request. As I understand it, the City is arguing that the records the appellant feels he should not have to pay for are mainly records that would not have been identified as responsive to the first request, and were only responsive to the second request.

The City also submits that while it attempted to work with the appellant to narrow the scope of the request, the appellant was unwilling to work with the City or to clarify or narrow the request, "which required extensive searches and time consuming reviews of records." In addition, the City adds that although the appellant is now requesting a fee waiver based on "financial hardship"

> [he] has not discharged the burden of establishing financial hardship as he has not provided the City with any evidence of his financial status.

Analysis and Findings

On a plain reading of the provisions applicable to fee waiver, there is no provision for fee waiver on the basis of dissatisfaction with the adequacy of an institution's search in response to a request, notwithstanding a finding that such a search was not adequate. Accordingly, I find that the appellant's claim for a fee waiver does not fit within any of the grounds listed in section 45(4) of the *Act*, or "any other matter prescribed" in section 8 of Regulation 823, and that it cannot, therefore, be established. It should be noted, moreover, that although the appellant has suggested that I may exercise my "inherent jurisdiction … in relation to the assessment of costs," this does not extend to an authority to expand upon the existing grounds for fee waiver, which were established by the Legislature under the *Act*.

I reiterate that the issue of whether the appellant might satisfy the onus of establishing financial hardship for the purposes of section 45(4)(b) is not before me in this appeal, and it is incumbent on the appellant to provide evidence on that point should he wish to have the City make a decision in that regard.

Having determined that the appellant has not established the basis for a fee waiver under the criteria listed in subsection (4), it is not necessary for me to consider the second part of the test for fee waiver, which is whether it would be fair and equitable to waive the fee.

Accordingly, I find that a basis for fee waiver has not been established, and I uphold the City's decision.

ORDER:

1. I order the City to conduct further searches for the records responsive to the appellant's two requests, by making inquiries with the relevant consultants, using my findings in this order as a guide.

2. I order the City to issue a new access decision to the appellant, including a fee decision, within 45 days of this order, and to provide this office with a copy of the new decision letter issued to the appellant.

3. I uphold the City's fees.

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

Original signed by: January 19, 2009
Daphne Loukidelis
Adjudicator