

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2653

Appeals MA09-285 and MA09-319

City of Kawartha Lakes

September 22, 2011

Summary: The appellants received two fee estimates in response to their two requests for records maintained by various city employees pertaining to a specific landfill. The appellants also requested a waiver of the fees. In this order, the fee estimates were upheld in part under section 45(1) and the fees were not waived under sections 45(4)(b) and (c).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1) and 45(4)

Orders and Investigation Reports Considered: Orders P-4, PO-1909 and PO-2574

OVERVIEW:

[1] The City of Kawartha Lakes (the city) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the Act). The first request was for:

...access to the records of the former County of Victoria staff pertaining to the Fenelon Landfill [the landfill], located at [address] in the former Township of Fenelon within the City of Kawartha Lakes, and the former County of Victoria, namely:

1. [name], Manager Waste Management, former County of Victoria;
2. [name], Waste Management, former County of Victoria;

3. [name], County Engineer and Road Superintendent, former County of Victoria; and
4. [name], Waste Management Engineer, Supervisor, and Coordinator, former County of Victoria.

[2] On July 21, 2009, the city issued an interim decision and fee estimate on the first request, as follows:

... Based upon a review of a representative sample of the paper records for the County of Victoria obtained from the City of Kawartha Lakes Records Centre, I estimate there are approximately 5100 pages of records responsive to your request and the total fees to process your request will be approximately \$2,310.00. Email records of the staff from the former County of Victoria do not exist.

The fee estimate is broken down as follows:

Search time (33 hours @ \$30.00 per hour) =	\$ 990.00
Preparation (10 hours @ \$30.00 per hour) =	\$ 300.00
(approximately 6 percent of the records will have severances – possible 306 pages @ 2 minutes per page = 10 hours)	
Photocopying (5,100 pages @ \$0.20) =	<u>\$1,020.00</u>
Total	\$2,310.00

Based on a search of the representative sample, the following types of records were identified as responsive to your request:

- Landfill Update Reports
- Waste Management Committee Agendas
- Waste Management Committee Minutes
- Staff Reports
- Memorandums between Staff
- Fenelon Landfill
- Household Hazardous Waste
- Home Composting Program

As we have not yet completed the search and reviewed all of the records in detail, no final decision has been made regarding access. Third party notification may be required since some of the requested records may relate to other individuals and/or third parties.

Based on the review of the representative sample, I estimate that partial access to the records will be granted. Specifically, the exemptions in sections 7, 10, 12 and 14 may apply to some of the responsive records...

[3] The second request was for:

... access to the records of the City of Kawartha Lakes staff pertaining to the Fenelon Landfill, located at [address] in the former Township of Fenelon within the City of Kawartha Lakes, and the former County of Victoria, namely:

1. [name], Waste Management Operations Supervisor, Supervisor of Solid Waste Operations, and Manager of Solid Waste Services, City of Kawartha Lakes;
2. [name], Manager of Solid Waste Services, City of Kawartha Lakes;
3. [name], Manager of Environmental Services, City of Kawartha Lakes;
4. [name], Environmental Services Technician, City of Kawartha Lakes;
5. [name], Manager of Environmental Services, City of Kawartha Lakes;
6. [name], Supervisor of Waste Management and Waste Management Technician, City of Kawartha Lakes;
7. [name], Director of Engineering and Public Works, City of Kawartha Lakes; and
8. [name], Regulatory Compliance Officer, City of Kawartha Lakes.

[4] On August 18, 2009, the city issued an interim decision and fee estimate on the second request, as follows:

...Based on our review of a representative sample of the records for the City of Kawartha Lakes, I estimate there are approximately 9,400 pages of records responsive to your request and the total fees to process your request will be approximately \$12,179.00.

The fee estimate is broken down as follows:

Search time (324.5 hours @ \$30.00 per hour) =	\$ 9735.00
Preparation (18.8 hours @ \$30.00) =	\$ 564.00
(approximately 6 percent of the records will have severances – possible 564 pages @ 2 minutes per page = 18.8 hours)	
Photocopying (9,400 pages @ \$0.20) =	\$ <u>1,880.00</u>
Total	\$ 12,179.00

Based on a search of the representative sample, the following types of records were identified as responsive to your request:

- MOE correspondence

- Consultant correspondence
- Staff inspections
- Lab analysis
- Adopt-a-Road notices
- Contractor correspondence
- Landfill complaints
- Photographs

As we have not yet completed the search and reviewed all of the records in detail, no final decision has been made regarding access. Third party notification may be required since some of the requested records may relate to other individuals and/or third parties.

Based on the review of the representative sample, I estimate that partial access to the records will be granted. Specifically, the exemptions in sections 7, 10, 12 and 14 may apply to some of the responsive records...

[5] For each request, the city requested a deposit of 50 percent of the estimated fee in order to proceed with processing of the request.

[6] Upon receipt of the city's fee estimates, the requesters submitted requests to the city for a waiver of the fees, in their entirety, based upon financial hardship and public health and safety.

[7] The city subsequently issued decision letters denying both requests for a fee waiver.

[8] The requesters (now the appellants) appealed the city's fee estimate and fee waiver decisions.

[9] As mediation did not resolve the issues in these appeals, the files were transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. Representations were sought and received from both the city and the appellants and shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*.

[10] In this order, I have partly upheld the city's fee estimates and I have not waived the fees.

ISSUES:

A. Should the city's fee estimates be upheld?

B. If so, should the fees be waived?

DISCUSSION:

A. FEE ESTIMATES

[11] I will first determine whether the fee estimates of \$2,310.00 and \$12,179.00 should be upheld.

General principles

[12] An institution must advise the requester of the applicable fee where the fee is \$25 or less.

[13] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate [Section 45(3)].

[14] 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 [Order MO-1699].

[15] 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.¹

[16] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

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

[18] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[19] 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,

¹ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699

- (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.

[20] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

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 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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. 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.
4. 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.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[21] The city submits that both requests:

...involve records from the former Township of Fenelon, the former County of Victoria and the current City of Kawartha Lakes. While the requestor specified certain staff people, the records of these municipalities are not filed in accordance with who dealt with the record. Unfortunately, some of the staff people identified are no longer employed by the municipality to allow us to seek clarification on how they filed their respective records. The records requested are in two locations, the Records Centre and the Public Works Building...

As outlined within the fee estimate of [the] Records Clerk, she has outlined the breakdown of costs and the work involved to complete the request. [The Records Clerk] has considerable background knowledge of the municipality as she worked for a former municipality prior to amalgamation. She has been working in the records centre for seven

years and has an intimate knowledge of the database used to find the records stored within the records centre.

[The Records Clerk] provided the estimate by determining:

- the number of boxes of records relating to this request;
- a box was taken and reviewed in detail as outlined in her notation attached;
- ... the search time by ...various public works staff for the records currently housed within the Public Works Building.

This particular landfill has been in existence for many years and it was the subject of a legal issue many years ago. This issue means that records must be examined very carefully to ensure that the municipality protects its' right to refuse disclosure of solicitor-client documents.

This request is very large and would take up a considerable amount of staff time as the actions required are all manual and little electronic assistance is available. This would cause a major disruption in the work required to be completed at the records centre and in the Public Works area.

[22] In response, the appellants submit that the city's representations concerning its fee estimates fail to justify what they feel are excessive search times and exorbitant fees to search for and produce the requested documents. Concerning request #2, they state that:

It is noteworthy that the city has provided a step-by-step outline of the process involved in searching for records at the Records Centre, but neglected to provide a similar breakdown of the process involved in the search for records at the Solid Waste Office.

Considering that the majority of the search time (estimated at 292 hours), resulting in fees of \$8,760.00, are for records located at the Solid Waste Office, the city's failure to particularize the search methods and costs associated with the various steps of same is inexcusable.

Order MO-1699 and section 45(1) of [MFIPPA] require that fee estimates be derived from the work required to produce a representative sample of the documents requested by the requesters. Although some fees, such as the time to search for, reproduce, and prepare the record comply with section 45(1) of the *Act*, almost \$9,000.00 in fees do not comply with the

requirements for fee estimates and thus ought not be imposed on the appellants.

[23] In reply, the city submits that receiving the information electronically will probably increase the cost as the material would have to be copied, reviewed for severance, recopied, scanned and then transferred into the electronic document. According to the city, the search time would be the same as well as the review time.

[24] Concerning the \$12,179 fee, the city submits that it has provided the search time, preparation time and copying costs related to the process involved in searching for records at the Solid Waste Office. It refers to a fee estimate memorandum from its Records Clerk that predates the decision letter, which reads:

Records at Solid Waste Office

Search Time:	
Paper Records	83 hrs
E-mails	24 hrs
Sampling Log Books	75 hrs
Day Timers, notes etc.	<u>110 hrs</u>
Total Hours	292 hrs

Preparation Time
(6% of 6,000 pages =360 pages
@ 2 minutes per page = 12 hours) 12 hrs

6,000 pages @ \$0.20 per page = \$1,200.00

[25] In surreply, the appellants submit that this information was received approximately 15 months following the city's delivery of its fee estimates and should be disallowed. They state further that:

...\$.20 per page is the maximum amount that should be charged ...for photocopying, inclusive of both the labour and material costs associated with the photocopying (e.g., paper, toner, etc.)... [Order 184]

Accordingly, any costs associated with staff being taken away from their regular work to photocopy the records and/or scan them is not properly chargeable to the [appellants].

Analysis/Findings

Request #1

[26] The first request relates to access to records maintained by four current and former employees. The total fee estimate for this request was \$2,310 for approximately 5100 pages of records.

[27] The fee estimate is broken down as follows:

Search time (33 hours @ \$30.00 per hour) = (23 hours @ \$30.00/hour by the Records Clerk and 10 hours @ \$30.00/hour as stated in the "NOTE" below)	\$ 990.00
Preparation (10 hours @ \$30.00 per hour) = (approximately 6 percent of the records will have severances – possible 306 pages @ 2 minutes per page = 10 hours)	\$ 300.00
Photocopying (5,100 pages @ \$0.20) =	<u>\$1,020.00</u>
Total	\$2,310.00

[28] The city provided additional detail regarding the 23 hours of search time by the Records Clerk in a detailed memorandum written prior to the fee estimate decision, which breaks down the fee as follows:

Searching the data base for "Landfill" and "Fenelon" for the period of 1990 to December 31, 2000 records. (51 boxes responsive to search)	2.5 hours
<u>Pulling boxes off shelves</u> , removing responsive files, <u>completing sign out sheets and packaging files for shipping to Solid Waste Services</u> (in the sample box there were 1,242 pages of which 742 pages ... were responsive to the search words) (emphasis added)	20.5 hrs

[29] The city provided additional detail regarding the 10 hours search time by another city employee in a detailed memorandum written prior to the fee estimate decision, stating as follows:

Note: Someone will have to review the boxes of records ...to ascertain if the records are responsive to the request as [the Records Clerk] has just determined that the files contain records that relate to "landfill" or

"Fenelon landfill". She would remove the files from the 51 boxes at the Records Centre and re-box them for delivery to the appropriate office. I have estimated 10 hours of time for someone to review the 5,100 pages of records received from the Records Centre to find just the records responsive to the request, namely "correspondence (including e-mails) and reports pertaining to the history of administration and environment aspects of the Fenelon Landfill" (emphasis added).

[30] In Order P-4, former Commissioner Sidney B. Linden considered whether specific fees for preparing a record were proper, finding that:

While the major component of the estimated fee represents costs of locating the record for disclosure under subsection 57(1)(a) [section 57 of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent to section 45 of the *Act*] in calculating preparation costs under subsection 57(1)(b), the institution did not make a distinction between the time involved in actually making severances within the records, and time spent reviewing records to decide whether or not an exemption applied. The fee estimate for preparation included costs associated with both decision making and severing, and I feel this is an improper interpretation of subsection 57(1)(b).

In my view, the time involved in making a decision as to the application of an exemption should not be included when calculating fees related to preparation of a record for disclosure. Nor is it proper to include time spent for such activities as packaging records for shipment, transporting records to the mailroom or arranging for courier service... [emphasis added].

[31] In Order PO-2574, Adjudicator Frank DeVries addressing a similar issue, found that:

Although I accept the University's position that preparation time is not restricted to the time spent severing a record (see Order MO-1083), I do not uphold the University's additional preparation costs

A number of the specific tasks the University argues ought to be included in the additional preparation costs relate more directly to re-filing and re-storing the University's files after responsive records have been reviewed or copied. For example, the actions of "noting the file to identify removed records to ensure that records are returned intact" and "removing tape from records and putting them back to the files, binders and boxes where they originated" are actions taken to re-store files, and in my view section 57(1)(b) does not make provision for charging a fee for the time taken to

re-store files to their original state. Furthermore, time spent "retrieving records from bound files" and "removing staples and paperclips" are, in my view, similar to the types of actions required in photocopying records, and in my view are not time spent "preparing a record for disclosure" for the purpose of section 57(1)(b) of the Act (see Order P-184). Finally, with respect to the time spent "bundling copies of records for disclosure", previous orders have confirmed that time spent "packaging records for shipment" is not included in section 57(1)(b) (see Order P-4) [emphasis added].

Accordingly, I will not allow the University to charge for the additional preparation time it has estimated, as the activities which the University identifies do not, in my view, fall within the ambit of the actions contemplated by the words "prepare a record for disclosure" in section 57(1)(b).

[32] Following the reasoning in Orders P-4 and PO-2574, I conclude that fees related to pulling boxes off shelves, completing sign out sheets and packaging files for shipping are not costs associated with preparing a record for disclosure under section 45(1)(b). The Notice of Inquiry sent to the city set out a list of previous orders of this office, including Orders P-4 and PO-2574. In the Notice of Inquiry, the city was advised that section 45(1)(b) does not include time for:

- deciding whether or not to claim an exemption [Order P-4, M-376, P-1536]
- identifying records requiring severing [MO-1380]
- identifying and preparing records requiring third party notice [MO-1380]
- removing paper clips, tape and staples and packaging records for shipment [Order PO-2574]
- transporting records to the mailroom or arranging for courier service [Order P-4]
- assembling information and proofing data [Order M-1083]
- photocopying [Orders P-184 and P-890]
- preparing an index of records or a decision letter [P-741, P-1536]
- re-filing and re-storing records to their original state after they have been reviewed and copied [PO-2574]

[33] Accordingly, I am disallowing the city's fees related to pulling boxes off shelves, completing sign out sheets and packaging files for shipping. I am making this finding even though the city has characterized these actions as part of its search fee under section 45(1)(a). However, in my view, the fee for these actions ought to be characterized as part of the institution's preparation fee under section 45(1)(b) and do not qualify under that section.

[34] The fee for pulling boxes off shelves, completing sign out sheets and packaging files for shipping makes up part of the 20.5 hours of search time charged by the city. The only part of this 20.5 hour fee that is proper is the time spent actually retrieving the responsive files. In Order MO-1421, Adjudicator Laurel Copley allowed the TTC to charge a fee for retrieving files. She stated:

Once the closed file numbers were determined the TTC indicates that it was then necessary to conduct a manual search through the file storage boxes in order to locate the relevant closed files. The TTC states that it maintains lists of all of its storage box files and which closed files are contained in each box. In order to retrieve the appropriate closed files, the TTC indicates that it needed to match each closed file number with a storage box number. According to the TTC, it took staff one hour to match the closed file number to storage box number at a cost of \$60 (\$7.50 for each 15 minutes).

Finally, the TTC indicates that once it determined which storage boxes contained the closed files, they were retrieved from storage and a manual search was conducted through each box to locate, first the appropriate closed file and then to locate the specific records requested by the appellant. The TTC indicates that its search resulted in the location of 87 closed files, housed in 53 different storage boxes. The TTC notes that as most of the files concerned litigation matters, each file usually contained hundreds of pages, and that it was necessary to search through all of these pages in order to locate the relevant pleadings. The TTC states that it took staff 6.5 hours to conduct this final search at a rate of \$7.50 for each 15 minutes for a total of \$195.

[35] The city has not broken down the 20.5 hours of search time that is comprised of pulling boxes off shelves, removing responsive files, completing sign out sheets and packaging files for shipping. The city was asked in the Notice of Inquiry to describe the actions required to prepare the records for disclosure and the time involved in each action. The city did not particularize the time involved for each of the actions of pulling boxes off shelves, removing responsive files, completing sign out sheets and packaging files for shipping.

[36] As I am only allowing the portion of the time that concerns retrieving the responsive files, I am estimating this time to be 40 percent of the 20.5 hours or 8.2 hours.

[37] Similarly, with respect to the 10 hours of additional search time referred to in the "NOTE" above, the city has included time for re-box the files for returning to the appropriate office. Following the analysis set out above in Orders P-4 and PO-2574, this fee for reboxing is also improper. I would estimate the time to rebox 51 boxes at 2 hours. I am, accordingly, disallowing the fee charged for this work.

[38] The appellants are willing to accept the records in electronic format. The records are located in 51 boxes. Not all of the records in each box may be responsive. Some of the records also require severing. I accept the city's submission that photocopying of the records would still be required before the records could be severed and scanned electronically. Therefore, the appellants' proposal would not result in a reduced cost to them.

[39] Therefore, concerning request #1, the fee that I am allowing is set out as follows:

Search time (18.7 hours @ \$30.00 per hour) = (2.5 and 8.2 hours @ \$30.00/hour by the Records Clerk and 8 hours @ \$30.00/hour by another employee)	\$ 561.00
Preparation (10 hours @ \$30.00 per hour) = (approximately 6 percent of the records will have severances – possible 306 pages @ 2 minutes per page = 10 hours)	\$ 300.00
Photocopying (5,100 pages @ \$0.20) =	<u>\$1,020.00</u>
Total fee for request #1	<u>\$1,881.00</u>

Request #2

[40] The second request was for access to records maintained by eight current and former employees pertaining to the Fenelon Landfill. The total fee estimate for this request was \$12,179 for approximately 9400 pages of records.

The fee estimate is broken down as follows:

Search time (324.5 hours @ \$30.00 per hour) = 23 hours @ \$30.00/hour for records at the <u>Record Centre</u> and 292 hours @ \$30.00/hour for records at the <u>Solid Waste Centre</u>	\$9735.00
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Paper Records	83 hrs
E-mails	24 hrs
Sampling Log Books	75 hrs
Day Timers, notes etc.	<u>110 hrs</u>
	292 hrs

and

10 hours @ \$30.00/hour as stated in the "NOTE" below)

Preparation (18.8 hours @ \$30.00) =

\$ 564.00

approximately 6 percent of the records will have severances – 195 of 3400 pages at the Records Centre
360 of 6,000 pages at the Solid Waste Office
@ 2 minutes per page = 18.8 hours)

Photocopying (9,400 pages @ \$0.20) =

\$ 1,880.00

Total

\$12,179.00

[41] The city provided additional detail regarding the 23 hours search time for the 3400 pages of records at the Records Centre in a detailed memorandum written prior to the fee estimate decision that stated as follows:

Searching the data base for responsive records for the period of 2001 to 2004 (34 boxes responsive to search)

2.5 hrs

Pulling boxes off shelves, removing responsive files, completing signout sheets and packaging files for shipping to Solid Waste Services or Clerks Office (in the sample box there were 1,400 pages of which 195 pages (7 inches of files) were responsive to the search words)
(emphasis added)

20 hrs

[42] This memorandum also included the following concerning 10 hours of the search time.

Note: Someone will have to review the boxes of records ...to ascertain if the records are responsive to the request as [the Records Clerk] has just determined that the files contain records that relate to "landfill" or "Fenelon landfill". She would remove the files from the 34 boxes at the Records Centre and re-box them for delivery to the appropriate office. I have estimated 10 hours of time for someone to review the 3,400 pages

of records received from the Records Centre to find just the records responsive to the request, namely "correspondence (including e-mails) and reports pertaining to the history of administration and environment aspects of the Fenelon Landfill".

[43] The memorandum did not include any additional details as to how the 292 hours were spent searching for records at the Solid Waste Office.

[44] For the same reasoning as in my discussion of request #1 above, I am only allowing recovery of the search time fees relating to file retrieval and not the search time fees for pulling boxes off shelves, completing sign out sheets and packaging files for shipping.

[45] Similarly, with respect to the 10 hours of additional search time referred to in the "NOTE" above, the city has included time for re-box the files for returning to the appropriate office. Following the analysis set out above in Orders P-4 and PO-2574 and my decision concerning this fee for request #1, I am disallowing the fee for reboxing the files prior to their return. There were 51 boxes of records at the Records Centre in request #1, whereas there are 34 boxes of records at the Records Centre in request #2.

[46] In request #1, I estimated the time to rebox 51 boxes at 2 hours. In request #2, I would estimate the time to rebox 34 boxes at 1.5 hours. In request #1, I estimated the time for 5100 pages to review the records at 8 hours. Similarly, I would estimate the time to review the records responsive to request #2 to be 6 hours.

[47] In request #1, the city allocated 33 hours of search time for 5,100 pages of responsive records. I allowed 18.7 hours of this search time.

[48] For the records at the Records Centre in request#2, the city allocated 33 hours of search time for 3,400 pages of responsive records. Following the analysis for request #1, I would proportionally allow 12.5 hours of this search time for the same reasons as set out above for request #1. As stated above, I disallow charging a fee for search time for the time required to pull boxes off shelves, complete sign out sheets and package files for shipping.

[49] With respect to the 292 hours of search time to locate records stored at the Solid Waste Office, the city has allocated 292 hours as search time to obtain 6,000 pages of responsive records.

[50] Other than listing the types of records that will be searched and the amount of hours that it will take to search these records, the city has not provided any other details as to why it would take 292 hours to search for an estimated 6,000 pages of responsive records.

[51] In the Notice of Inquiry sent to the city, the city was asked:

How are the requested records kept and maintained?

What actions are necessary to locate the requested records? What is the estimated or actual amount of time involved in each action?

[52] The city did not specifically respond to these questions for the records located at the Solid Waste Office. In request #1, I allowed the city 18.7 hours to search for 5100 pages of responsive records. Based upon my reasoning set out above for the search time for request #1, I will proportionally allow the city 22 hours of search time at \$30.00 per hour to search for 6,000 pages of responsive records at the Solid Waste Office.

[53] Therefore, concerning request #2, the fee that I am allowing is set out as follows:

Documents stored at the Records Centre

Search time

(2.5 and 12.5 hours @ \$30.00/hour by the Records Clerk
and 6 hours @ \$30.00/hour by another employee) = \$ 630.00

Preparation (6.8 hours @ \$30.00 per hour) = \$ 204.00

Photocopying (5,100 pages @ \$0.20) = \$ 680.00

Total fee for records at Records Centre \$1,514.00

Documents stored at the Solid Waste Office

Search time

(22 hours @ \$30.00/hour) = \$ 660.00

Preparation (12 hours @ \$30.00 per hour) = \$ 360.00

Photocopying (6,000 pages @ \$0.20) = \$ 1,200.00

Total fee for records at Solid Waste Office \$ 2,220.00

Total fee for request #2 (\$1,514.00 and \$2,220.00) = **\$3,734.00**

[54] As the appellants have sought a fee waiver, I will also determine whether the total fee of \$3,734.00 for request #2 should be waived under section 45(4) of the *Act*.

[55] Accordingly, the total fee estimate for both requests is **\$4,615.00**, which is comprised of the sum of \$1,881.00 for request #1 and the sum of \$3,734.00 for request #2. I will now consider whether those fees should be waived.

B. FEE WAIVER

General principles

[56] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellants rely on sections 45(4)(b) and (c). Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee.

[57] 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,

(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;

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.

[58] The fee provisions in the *Act* establish a user-pay principle which 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 8 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

[59] 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.²

[60] 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)(b): financial hardship

[61] The appellants submit that the payment of the fee would cause them financial hardship, as they are a retired couple with very low income and savings. They provided details with respect to their finances in their confidential representations. They state that the responsive records will explain the nature and extent of the contamination of their property by the landfill that is the subject of the records. The contamination of the lands surrounding the landfill affects not only the health and well-being of the appellants, but the health and well-being of their family, their animals, the environment, and the health and safety of their neighbours and fellow community members living in the area surrounding the landfill.

[62] The city submits that the fees should not be waived and that the financial burden should not be transferred to all taxpayers of the city since the appellants have clearly indicated their desire to sell the property for their own financial gain. The city states that there has never been any proven contamination of the appellants' property caused by the landfill site and the city has never admitted to any contamination by the landfill. The city disputes that the landfill has contaminated the appellants' property.

[63] In surreply, the appellants submit that their intention when purchasing their property was to retire there. However, the existence of contaminants on the land, which they argue pose a real threat to their health and safety, may render this plan impossible. The purpose of the two requests is to determine the nature and extent of the contamination to their property, as well as the source of the contamination.

[64] The appellants submit that disclosure of the records will allow them to fully appreciate the situation in which they find themselves and consider the options available to them in a fully informed manner. Although it may ultimately be determined that the sale of their property is the best or only option, the appellants state that the intention of this sale would not be to maximize their financial gain but, rather, to obtain the means necessary for them to relocate to land free from contamination where their retirement plans may be realized.

² Orders M-914, P-474, P-1393, and PO-1953-F

Analysis/Findings re: financial hardship

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

[66] For section 45(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.³

[67] Based upon my review of the appellants' representations and supporting documents, I find that based on the appellants' limited income and the amount of the fee that payment of the fee of \$3,734.00 would cause them financial hardship. I will consider below whether it is fair and equitable to waive this fee.

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

[68] 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 record⁴

[69] The appellants submit that their requests for information arose out of the disclosure by the city of the existence of various contaminants on their property and their desire to understand the cause and extent of this contamination. They also wanted to ascertain the city's recommendations to deal with this contamination that was caused by leachate emanating from the landfill. They state that the information

³ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393

⁴ Orders P-2, P-474, PO-1953-F, PO-1962

that the city has included in its annual reports is ambiguous. Thus in order that they, and other potentially affected members of their community, can fully understand the extent of the contamination, the appellants need to review the underlying notes, records, test results, etc. which relate to the ongoing operations of the landfill.

[70] The appellants provided a March 2000 Hydrogeology Study which they claim depicts a leachate plume migrating from the landfill, and discharging through another property and onto the north-west corner of their property, stopping at a creek. They state that in 2002, the city purchased two neighbouring properties, due to the presence of high concentrations of leachate migrating south and south-east from the landfill. The first property was located directly north of the appellants' property, and the second was located directly west of their property. Presently, according to the Fenelon Landfill 2009 Status Report, the city is in discussions to obtain the groundwater rights for a property due east of the landfill.

[71] Through the documents and records that are the subject of these appeals, the appellants state that they are trying to better understand the harmful effects of the leachate migration and discharge, which the city has advised is affecting the water quality on their property.

[72] The appellants submit that disclosure of the records will contribute in a meaningful way to the public's understanding of the status and effects of the leachate plume emanating from the landfill. As well, they argue that the records will assist in the public's understanding of the landfill's potential non-compliance with environmental standards regarding discharges of pollutants into water from a landfill, as well as the city's recommendations for dealing with it.

[73] The appellants are concerned with the extent to which their neighbours and other community members may be similarly adversely affected by the landfill. They state that they will disseminate the information in the records to all affected parties. Further, if a discrepancy is found between the documents available to the public and the documents that are the subject of these appeals, the appellants will bring this to the attention of city officials.

[74] In reply, the city states that it had sent a letter to the appellants in 2008. This letter did not say that leachate is emanating from the landfill, but rather advised that the levels of certain tests on the appellants' property exceeded provincial Water Quality Objectives, which could occur whether or not it was adjacent to a landfill. The city also states that it makes every effort possible to be compliant with the environmental standards. The city states that it works closely with the Ministry of Environment (MOE) to ensure that any direction provided by the MOE is addressed diligently. The city also states that the annual reports are public documents and contain the relevant information and, therefore, the information sought by the appellants is purely for their own benefit and not the benefit of the public.

[75] In surreply, the appellants state that the city's characterization of the nature of the requests as primarily for public documents is misleading. Although the publicly available annual reports fall within the scope of these requests, more important to the appellants is the receipt of copies of the various notes, test results, records, correspondence, documents, etc., which underlie the statements contained in the annual reports and the conclusions drawn therein.

Analysis/Findings re: public health or safety

[76] The focus of section 45(4)(c) is "public health or safety". It is not sufficient that there be only 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.⁵

[77] Based upon my review of the parties' representations, I agree with the appellants that dissemination of the records will benefit public health or safety. In their initial representations, the appellants indicated that their property was not contaminated when they purchased it, even though it was situated near the landfill.

[78] The appellants provided a copy of the 2008 letter from the city referred to above. This letter was from the city's Supervisor of Solid Waste Operations, Public Works Department and advised them that surface water samples taken from the appellants' property contained Toluene and Iron in concentrations that exceeded the Provincial Water Quality Objectives. The letter further stated that:

The results also indicate the presence of Ethylbenzene and Xylenes, which although below the PWQOs, suggest the presence of petroleum products. Toluene, Ethylbenzene and Xylenes were also present in your surface water sample taken upgradient, at [specified location], north of your driveway.

[79] The appellants maintain that the likely source of this contamination is the city owned and operated landfill that is the subject of the records. They have become increasingly concerned that leachate emanating from the landfill, which flows southeast across the "buffer zone" and into the Attenuation Zone, is now continuing further southeast and onto their property. As the Attenuation Zone is directly adjacent to the appellants' property, they believe that they are at risk due to the contamination of their groundwater, which is also their drinking water. They are also concerned about the effects this contamination will have on the quality, health and wellbeing of the flora and fauna on their property and the other properties in close proximity to the landfill.

⁵ Orders MO-1336, MO-2071, PO-2592 and PO-2726

[80] I agree with the appellants that disclosure of the records will assist both themselves and other individuals to understand the nature and scope of toxic materials emanating from the landfill. I also agree with the appellants that the city's annual reports, excerpts of which were provided by the appellants in their initial representations, do not contain the detailed information sought by the appellants as to the nature and extent of the chemicals leaching from the landfill.

[81] As stated above, based on a search of a representative sample for each of the two requests, the following types of records were identified as responsive:

- MOE correspondence
- Consultant correspondence
- Staff inspections
- Lab analysis
- Adopt-a-Road notices
- Contractor correspondence
- Landfill complaints
- Photographs
- Landfill Update Reports
- Waste Management Committee Agendas
- Waste Management Committee Minutes
- Staff Reports
- Memorandums between Staff
- Fenelon Landfill
- Household Hazardous Waste
- Home Composting Program

[82] In my view, the subject matter of the records, the extent of the chemical contamination from the Fenelon Landfill, is a matter of public rather than private interest, and relates directly to public health and safety (see also Order PO-2514). As stated by Adjudicator Donald Hale in Order PO-1909:

...issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety...

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.

[83] Dissemination of the records would yield a public benefit by disclosing a public health and safety concern. Based upon the contents of the appellants' extensive representations, I also find that the appellants will disseminate the contents of the records.

[84] Having found that dissemination of the records will benefit public health and safety, I will now consider whether it is fair and equitable to waive the fee.

Part 2: fair and equitable

[85] 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.⁶

[86] The city submits that there should be no fee waiver as the cost of such waiver would have to be borne by the balance of the taxpayers of the city when the requester has indicated his desire to sell the property adjacent to the landfill.

⁶ Orders M-166, M-408 and PO-1953-F

[87] The appellants submit that:

- (i) following the denial of a fee waiver by the city, [the appellants] and the city worked together in an attempt to reduce the costs associated with their requests;
- (ii) at [the appellants'] request, the city provided excerpted documents as well as shorter documents in an attempt to determine the relevancy of these voluminous documents;
- (iii) the city charged [the appellants] for all documents provided to them for the purposes of narrowing the scope of [the appellants'] requests;
- (iv) [the appellants] sought to narrow the scope of their requests by requesting page counts and reproduction fee estimates of ten documents – fee estimates were never provided by the city;
- (v) while the records requested are voluminous, [the appellants] have worked diligently to narrow the scope of their requests through the actions set out above;
- (vi) [the appellants] have also advanced compromised solutions, through their request to receive documents electronically, thereby reducing the photocopying costs; and
- (vii) the waiver of the fees would not shift an unreasonable burden of the cost from the appellants to the institution.

[88] In reply, the city submits that it has worked with the appellants on numerous occasions to try to explain the volume of records that would have to be processed in order to satisfy their very broad request. In the subsequent meetings, every attempt was to provide them with up-to-date information that provides them with current information on the issues that they are most concerned about rather than very old data that may have changed over the years. The city states that:

The costs outlined in the fee estimate are all real costs. Staff will have to search out the records, staff will have to review and prepare the records and staff will have to photocopy the records and or scan them. Staff will be taken away from their regular work to complete this, including any future meetings with the [appellants] until the request has been completed.

While there is a claim that the information sought directly relates to the public health and safety, it should be clarified that the Ministry of the Environment has determined that the testing and annual reporting of this landfill site is sufficient on an annual basis and provides the information to the public required to ensure public health concerns are addressed. This additional information is purely for the use of the [appellants] in their efforts to sell their property, property they purchased knowing there was a landfill site in its present location. Any resident within the city has the right to approach the city to sell their land.

[89] The city also states that with respect to paragraph (iv) above, that it provided the appellants with a decision letter concerning the fees for the ten documents sought by the appellants.

[90] In surreply, the appellants submit that it is erroneous to state that they wish "to sell their property for their own financial gain." They state that their intention when purchasing their property was to retire there. However, the existence of contaminants poses a real threat to their health and safety, and may render it impossible for them to do so. The purpose of the requests is to, *inter alia*, determine the nature and extent of the contamination to their property, as well as the source of the contamination. Only then will they be able to fully appreciate the situation in which they find themselves and consider the ensuing options available to them in a fully informed manner. Although it may ultimately be determined that the sale of their property is the best or only option, the intention of this sale would not be to maximize their financial gain but, rather, to obtain the means necessary for them to relocate to land free from contamination where their retirement dreams may be realized.

[91] The appellants also submit that, as they are claiming that they would suffer financial hardship if required to pay the fees, that the city's submissions concerning the financial burden to its taxpayers and the low-income bracket of its residents, is not relevant to a determination of the fee waiver issue.

Analysis/Findings re: fair and equitable

[92] I have considered the parties' representations and the factors set out above. I note that the city has tried to work constructively with the appellants to narrow and/or clarify the requests. None of the responsive records have been provided to the appellants free of charge, however.

[93] The appellants have put forth a number of proposals to the city to try to reduce the costs and narrow the scope of the requests. These proposals included seeking to obtain the records in electronic format, seeking to have a table of contents provided for certain voluminous records and trying to narrow the dates of the responsive records after reviewing the table of contents of certain reports.

[94] The original total fee estimate for both requests was \$14,489.00. The total fee estimate for both requests that I have allowed, as set out above, is \$4,615.00. This fee estimate includes the cost of photocopies for both requests, totalling \$1,880.00. Therefore, the total search and preparation fee for both requests is \$2,735.00, comprised of \$1,871.00 for search fees and \$864.00 for preparation fees.

[95] The search fee for both requests of \$1,871.00 entails searching 85 boxes of records at the Records Centre and also conducting a search for records at the Solid Waste Office. The remaining fees represent the actual costs incurred by the city to photocopy the records and to sever the records. The two requests involve a very large number of records. I find that waiver of the fees would shift an unreasonable burden of the cost from the appellants to the city.⁷ In making this determination, I have considered the appellants' financial information set out in their confidential representations.

[96] Accordingly, I find that it would not be fair and equitable to waive the total fee estimate for both requests of \$4,615.00 and I dismiss this part of the appeal.

ORDER:

1. I am reducing the search fee estimates for both requests to a total of \$1,871.00.
2. I uphold the city's fee estimates for preparation fees for both requests of \$864.00 and for photocopy costs for both requests of \$1,880.00.
3. I uphold the decision of the city to not grant a fee waiver to the appellants.

Original Signed by: _____
Diane Smith
Adjudicator

_____ September 22, 2011

⁷ Orders M-166, M-408 and PO-1953-F