

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3502

Appeals MA16-20, MA16-22, MA16-24

City of Vaughan

September 27, 2017

**Summary:** The City of Vaughan received a request under the *Municipal Freedom of Information and Protection of Privacy j* for access to information relating to plans for two identified subdivisions. As the request generated a significant number of responsive records, the city issued an interim access decision with fee estimate of \$6,550.00. The appellant applied for a fee waiver, which was denied by the city. In this order, the adjudicator upholds the city's fee estimate in part, disallowing the portions of the fee where a dollar amount was not given. The adjudicator also upholds the city's decision not to grant the fee waiver.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1) and (4), Regulation 823, sections 6, 7(1) and 8.

**Orders Considered:** Orders MO-2530 and MO-3340.

**Cases Considered:** *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056 (CanLII).

### OVERVIEW:

[1] The City of Vaughan (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information generated between 2007 and 2015 about two identified subdivisions. The request identified approximately a dozen individuals, including various city employees and other individuals who may have created responsive records in their communications with more than 30 other identified individuals. The requester specified that she sought access to all related documents including planning and zoning information, text

messages, emails, agreements, and permits.

[2] In a follow-up request, the requester added names to the previously submitted list of individuals who may have responsive records. The city created three separate request files addressing different portions of the request.

[3] Although the city treated the appellant's request as three separate requests, as portions of some of the records in the requests overlap, the city issued one interim access decision and one fee estimate broken down into smaller fee estimates. The smaller fee estimates detailed searches conducted in specific departments or searches conducted for records specifically held by some of the individuals identified in the request as possibly being in possession of responsive records. The city provided a "Fee estimate summary" in chart form to help explain the breakdown of the fee.

[4] As the request was particularly large in scope, the city explained that it limited the fee estimate to records that were readily available from 2013 to 2015, as the fee for records within this time period already amounted to several thousands of dollars. It also explained that the fee estimate for the full request would be significantly larger as records from 2007 to 2012 are considered archived material that are held offsite and would involve additional time to locate. Additionally, the city did not provide a fee estimate for searching for records belonging to several identified engineers and some of the other individuals identified by the appellant as it advised that it had not yet received information about these searches. Finally, the city advised that pursuant to section 7(1) of Regulation 823, it required a deposit of 50% of its fee estimate of \$6,555.00 before it would continue to process the request.

[5] The city advised that partial access would be granted to the responsive records as the mandatory personal privacy exemption at section 14(1) and the discretionary exemption for solicitor-client privileged information at section 19 would likely apply to portions of them. Additionally, the city advised that some responsive records may already be publically available.

[6] On receipt of the city's interim access decision and fee estimate, the requester applied to the city for a fee waiver. The city denied her fee waiver request.

[7] The requester, now the appellant, appealed the decision to this office. Although the city processed the request as three separate files, because it issued a single fee estimate decision I will be addressing all three files together in this order.

[8] During mediation, the appellant confirmed that she is appealing the city's fee estimate, as well as the city's decision to deny her request for a fee waiver. She takes the position that a fee waiver should be granted because she is a student and to pay the fee will cause her severe financial hardship. She also submits that she will disseminate the records to the public which would benefit public health and safety as the information relates to contaminated soil which she submits has caused residents in the area to suffer ill health.

[9] In the alternative, the appellant submits that the records should be readily available and the city should be able to locate them with minimal search time and minimal costs.

[10] The city maintains its position that its fee estimate is reasonable and also that the appellant does not meet the criteria for a fee waiver.

[11] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeals process for an adjudicator to conduct an inquiry. During the course of my inquiry into this appeal, I sought and received representations from both parties. The city's representations were shared with the appellant in accordance with this office's *Practice Direction 7*. I decided it was not necessary to share the appellant's representations with the city.

[12] As indicated above, in its fee estimate the city clearly states that due to the large scope of the request the fee estimate reflects only calculations done for records that are considered readily available as they are held onsite. It states that such records originate primarily from 2013 to 2015. The city further specifies that its estimate does not include archived material that is held offsite, which would take additional processing time to locate. The appellant did not indicate that she wished to appeal this aspect of the city's decision. Accordingly, my review of the city's fee estimate decision is limited to the information for which it was provided, that is, the readily available information originating from 2013 to 2015.

[13] In this order I uphold the city's fee estimate in part, finding that it cannot charge a fee for searching, copying and/or preparing the responsive records for disclosure where an estimate in a dollar amount was not given. Also in this order, I uphold the city's decision not to grant a fee waiver.

## **ISSUES:**

- A. Should the city's fee estimate be upheld?
- B. Should the city's fee be waived?

## **DISCUSSION:**

### **A. Should the city's fee estimate be upheld?**

[14] 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 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.

[15] More specific provisions regarding fees are found in sections 6, 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.

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.

***Fee Estimate***

[16] An institution must advise the requester of the applicable fee where the fee is \$25 or less. Where the fee exceeds \$25, an institution must provide the requester with a fee estimate [Section 45(3)]. Where the fee is \$100 or more, the fee estimate must 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.<sup>1</sup>

[17] 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.<sup>2</sup> The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.<sup>3</sup>

[18] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.<sup>4</sup> 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.

***Representations***

[19] At issue in this appeal is the city’s fee estimate of \$6,555.00. As noted above, although the appellant submitted one request, that request was quite large and the city divided it into three files but issued a global fee estimate. In its fee estimate, the city provided a number of smaller fee estimates, breaking down the amounts to be charged for the search, preparation (redactions), and photocopying of the responsive records, as they relate to the different components of the request.

<b>Planning Department – named individual (emails only)</b>	
<b>Search:</b> 70 hours (4200 minutes) @7.50/15min	\$2,100.00
<b>Copies:</b>	\$80.00

<sup>1</sup> Order MO-1699.

<sup>2</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>3</sup> Order MO-1520-I.

<sup>4</sup> Orders P-81 and MO-1614.

Approx. 400 pages @ 0.20/page	
<b>Redactions*:</b>  Estimated to be 5% of copies \$7.50/15min (1 min per page) 400 pages: approx..20 pages  *Estimated redactions to be made under sections 12 and 14(1)	\$15.00
<b>Named individual (Planning) Total:</b>	<b>\$2,195.00</b>

<b>Planning Department – named individual 2</b>	
<b>Search:</b>  140 minutes @7.50/15 min	\$70.00
<b>Copies:</b>  Approx. 9500 pages @0.20/page	\$1,900.00
<b>Redactions*:</b>  @\$7.50/15min  TBD  *Estimated redactions to be made under sections 12 and 14(1).	TBD
<b>Named individual 2 (Planning) Total:</b>	<b>\$1,970.00</b>

<b>Building Standards</b>	
<b>Search:</b>  1 week (35 Hours) 2100 minutes @7.50/15min	\$1,050.00
<b>Copies:</b>  Approx. 300 pages @0.20/page	\$60.00
<b>Redactions*:</b>	TBD

TBD \$7.50/15min (1 min per page) *Estimated redactions to be made under sections 12 and 14(1)	
<b>Building Standards Estimate Total:</b>	<b>\$1,110.00</b>

<b>Engineering (named individual):</b>	
<b>Search:</b> 60 min @7.50/15min	\$30.00
<b>Copies:</b> Approx. 500 @0.20/page	\$130.00
<b>Redactions*:</b> TBD \$7.50/15min (1 min per page) *Estimated redactions to be made under sections 12 and 14(1).	TBD
<b>Engineering Estimate Total:</b>	<b>\$130.00</b>

[20] In addition to preparing fee estimates for the searches conducted in the above-noted departments, the city also prepared fee estimate charts for responsive records held by the other individuals identified by the appellant as possibly holding records responsive to her request. For records held by some of those individuals, the city provided fee estimates listing dollar amounts for search and photocopying charges but indicated that the charges for redactions would be "TBD" or to be determined. For records held by the remainder of the individuals named in the request, the city did not provide fee estimates but simply stated that all charges, search, preparation and photocopying charges, would be "TBD" or "To Be Determined."

[21] At the end of its fee estimate, the city set out a global fee estimate for the charges that it had calculated to the date of the estimate, as follows:

<b><u>ACCESS REQUEST 2015-112 &amp; 115 ESTIMATE TOTAL:</u></b>	<b>\$6,555.00</b>
<b>Deposit Required (50%)</b>	<b>\$3,277.00</b>

[22] The city takes the position that its fee estimate is fair and should be upheld. It provided representations detailing how it arrived at the fee estimate for each fee component.

[23] The city submits that once it received the request it sought the advice of subject experts in each of the identified departments (Development Planning, Development Engineering and Infrastructure Planning, By-Law and Compliance, Building Standards, Office of the City Clerk), as well as some of the individuals identified in the request, to determine how much responsive material potentially existed.

[24] The city submits that to prepare an estimate for the requester, the relevant departments were asked to compile an accurate sample of responsive records and provide an estimate of "readily available" and "easily producible" material, meaning not in offsite storage or needing to be restored electronically. The city submits that this material was generally from between 2013 and 2015 and is what the fee estimate is based on.

*Search: 45(1)(a)*

[25] To determine the search fees allowed under section 45(1)(a), the city submits that each identified department typically began searching for responsive records electronically by municipal address but advised that some departments have more complex filing structures. For example, the city explained that for the Development Planning Department following an initial property address search, it was then matched up to a zoning file number or subdivision number to locate responsive records.

[26] The city submits that the departments estimated their search time to the closest quarter hour and indicates the steps taken in order to respond to the request, such as searching for physical paper files, and conducting email searches.

[27] The city also states that its Access and Privacy section did not receive responses from some of the departments or individuals by the deadline, but that as this was only the estimate stage the city decided that it had enough information from other departments to determine that a fee estimate would be necessary.

*Preparation: section 45(1)(b)*

[28] With respect to preparation charges allowable under section 45(1)(b), in some portions of the fee estimate the city provides an estimate of the preparation charges while in other portions the city indicates that preparation charges are "TBD" or "To Be Determined." The city submits that where an estimate was not given for preparing the records it was because as at the time the fee estimate decision was issued, the city did not have hard copies of the records and therefore could not provide an estimate.

[29] The city submits that to prepare the records for disclosure the responsive files would have to be identified and retrieved, copies would have to be made of originals and electronic records would have to be printed. Then, the city submits the records would be provided to the Access and Privacy section for analysis.

[30] The city submits that initial discussions determined that the mandatory personal privacy exemption at section 14(1) might apply, as well as the discretionary exemption



for solicitor-client privileged information at section 19 as litigation has been commenced against the city by the owner of the property. The city submits that the records containing information qualifying for these, or other exemptions, would carry additional costs as this office has generally accepted two minutes per page as adequate processing time for redactions made.

*Copies: section 45(1)(c)*

[31] With respect to charges incurred under section 45(1)(c), the city submits that upon receipt of the deposit, the city is prepared to provide the appellant with hard copies of the responsive records, including printouts of electronic files. The city submits that they will charge a fee of \$0.20 per page as per the amount set out under Regulation 823. It submits that it will not be necessary for it to develop a program or other method to produce the responsive records. The city also submits that if there are any additional costs to retrieve archived records from the storage facility, it will absorb those costs and not charge the appellant.

[32] The city also submits that while it is possible for the final product to be scanned to CD for a charge of \$10/CD, "if the amount of materials is excessive the city may explore adding a charge for scanning" as was upheld in Orders MO-2530 and MO-3340.

[33] The appellant submits that had she, and members of her community, been kept advised of the reports, documentation and background information on the land on which they live, her request would not be as large as it is.

### ***Analysis and finding***

[34] As noted above, the purpose of a fee estimate decision is to give the requester sufficient information to make an informed decision as to whether or not to pay the fee and pursue access. The city submits that these estimates generally encompass records from between 2013 and 2015 and they are based on an "accurate sample of responsive records" that are "readily available" and "easily producible."

[35] In determining whether the city's estimate is reasonable, I will consider the different components of the city's fee estimate separately, and then the fee estimate as a whole.

*Search: section 45(1)(a)*

[36] With respect to its estimated search time justifying its charges under section 45(1)(a), the city estimates varying amounts of time required to search for responsive records held by the specified city departments or by the individuals named in the request. In its representations, the city provides additional detail about the efforts undertaken to search for responsive records.

[37] With respect to its estimated search time for records held by the Planning Department, the city estimates respectively, that 70 hours of search time was required

to locate records belonging to one individual generating over 400 pages of records and 140 hours of search time was required to locate records belonging to the other individual, generating approximately 9500 pages of records. It submits that knowledgeable employees began searching for responsive records by electronically searching by municipal address, zoning file number or subdivision number.

[38] With respect to its estimated search time for records in the Building Standards Department, the city estimates that 35 hours of search time is required to locate responsive records, generating approximately 300 pages of records. It submits that a knowledgeable employee searched for responsive records by searching by municipal address.

[39] With respect to records held by a named individual in the Engineering Department, the city estimates that it would require 60 minutes of search time by a knowledgeable employee to locate approximately 500 pages of responsive records.

[40] In my view, the city has provided sufficient evidence to support its estimate of the fees that it expects to charge with respect to the time required to search for records responsive to the request located in the Building Standards and Planning departments as well as records held by the named individual in the Engineering Department and I will uphold them.

[41] The remaining fee estimates relate to the dozen individuals identified by the appellant in her request as possibly having created responsive records in their communications with dozens of other identified individuals. These fee estimates can be divided into two categories. The first category includes those for which the city has provided dollar amounts for the estimated search charges. For these fee estimates the city has indicated the estimated hours of search time and an approximate number of pages of responsive records that would be generated by those searches. In my view, in light of the fact that the searches would necessarily have involved reviewing communications between the more than 25 individuals named in the request and the fact that over 1000 pages of records were generated by these searches, I accept that the city has provided sufficient evidence to support a conclusion that search fees in these fee estimates are reasonable.

[42] For the second category of fee estimates which address responsive records generated by some of the other individuals named in the appellant's request, the city hasn't provided any estimate of search time at all. It also has not provided a dollar amount of the estimated fees that it anticipates charging for its search time. It has simply listed that its fees for search (as well as for preparing the records for disclosure and for photocopying) are "TBD" or "To Be Determined". In my view, in not providing the appellant with any estimate of the possible search fees to be charged for these portions of the request, the city has not discharged its responsibilities under the *Act* as it has not provided the appellant with sufficient information to make an informed decision on whether or not to pay the fee and pursue access. Accordingly, I do not uphold the city's fee estimates where search charges are indicated as "TBD" or "To Be Determined" and I will not allow it to charge for searching for records relating to those

individuals.

[43] I acknowledge that the search time and corresponding search fees estimated by the city are quite significant. However, the request at issue in this appeal is one which generates a significant number of responsive records and its processing requires a considerable amount of work undertaken by a number of different staff in a number of different departments. Previous orders have stated that where a request is broad and involves records that are likely to be dispersed through an institution, high search and preparation fees may apply.<sup>5</sup> These orders have found that, in that regard, it is the breadth or scope of the request rather than the method of calculation that results in the significant fee estimate. In the circumstances of this appeal, I find that it is the breadth or scope of the request that results in the large fee estimate and that the method of calculation employed by the city is reasonable.

[44] In sum, where the city has provided a dollar amount for the search fee I uphold it and permit the city to charge the appellant these fees for its search for records responsive to her request. However, I do not uphold the portions of the city's fee estimate where it is indicated that search fees are "TBD" or "To Be Determined" and find it is not entitled to charge search fees under section 45(1)(a) for the processing of those portions of the request.

*Preparation: section 45(1)(b)*

[45] The city indicates that some of the responsive records might require severances under the personal privacy exemption at section 14(1) and the solicitor-client privilege exemption under section 12(1). However, it has provided a fee estimate to prepare the records for disclosure only in relation to 400 pages of emails held by a named individual in the planning department. Specifically, the city estimates that 5% of those records would require severances and indicates that it would apply a standard of one minute per page to redact those records at \$7.50 per 15 minutes. As this preparation fee estimate is below the generally accepted standard of two minutes per page to make redactions, I uphold it.

[46] With respect to the remaining fee estimates for responsive records held by different individuals or in different departments, the city has not provided an estimate or indicated the percentage of responsive records that might require severances. However, for all of the fee estimates it indicates that it would apply a standard of one minute per page to make redactions at \$7.50 per 15 minutes. As indicated above, this is below the generally accepted standard of two minutes per page to make redactions.

[47] In my view, by providing the appellant with a fee estimate indicating that preparation fees are "TBD" or "To Be Determined" the city has not met its requirements under the *Act*. The city has merely reiterated the statutorily prescribed fee formula that it will apply for preparing the records for disclosure. Without any indication of what percentage of pages of responsive records might require severances, I do not accept

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<sup>5</sup> Orders PO-3375, PO-3379 and PO-3716.

that the appellant has been provided with sufficient information to have been placed in a position to make an informed decision on whether or not to pay the fee and pursue access which, as stated above, is the very purpose of a fee estimate.<sup>6</sup>

[48] Accordingly, I do not uphold the portions of the city's fee estimate where it is indicated that preparation fees are "TBD" or "To Be Determined" and find that it is not entitled to charge preparation fees under section 45(1)(b) for the processing of those portions of the request.

*Copies: section 45(1)(c)*

[49] The city submits that it is prepared to provide the appellant with hard copies of the responsive records at the fee of \$0.20 per page as per the amount set out under Regulation 823. Although as previously mentioned, the city's fee estimate only addresses a portion of the records that might be responsive to the request, the city has provided an estimate of the number of pages of responsive records that would need to be copied from two named individuals in the Planning Department, the Building Standards Department, a named individual in the Engineering Department, the emails and records of several named individuals. The city is entitled to charge this amount for making copies and I uphold it.

[50] However, for similar reasons as those outlined above in my discussions on the search and preparation fees set out by the city in its fee estimate, I do not uphold the portions of the city's fee estimate where it is indicated that photocopying fees are "TBD" or "To Be Determined" and find that it is not entitled to charge photocopying fees under section 45(1)(b) for the processing of those portions of the request.

[51] The city submits that while it would be prepared to scan the responsive records to CD for a charge of \$10 per CD as set out in section 6.2 of Regulation 823, given the significant number of records, it would charge "preparation fees" under section 45(1)(b) for the scanning of the records onto CD.

[52] In Order MO-2530, Adjudicator Laurel Cropley found that although Regulation 823 does not specifically refer to scanning paper records in order to provide the information on CD, scanning can be considered as an activity that falls under section 6(4) of Regulation 823 which sets out the fees "for preparing a record for disclosure", given that scanning is a necessary component of producing paper records in an electronic format. This reasoning with respect to scanning was subsequently followed by Adjudicator Gillian Shaw in Order MO-3340. I agree with this approach and should the appellant choose to receive the records on CD, the city is entitled to charge a fee for scanning as set out in those orders.

#### Fee estimate finding

[53] As noted above, a fee estimate is to be based on either the actual work done by

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<sup>6</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

the institution to respond to the request, or a review of a representative sample of the records. In the circumstances of this appeal, I accept that the portions of the city's fee estimates, where dollar amounts are provided, are based on a review of a representative sample of the records and are reasonable estimates of the amounts to be charged for the processing of those portions of the appellant's request.

[54] However, as I have noted several times above, in my view, by providing the appellant with fee estimates indicating that some or all of the fees are "to be determined" the city has not discharged its obligations under the *Act*. Without any indication of what charges might amount to for the processing of these portions of her request, I do not accept that the appellant has been provided with sufficient information to have been placed in a position to make an informed decision on whether or not to pay the fee and pursue access which, as stated above, is the very purpose of a fee estimate.

[55] Nevertheless, I find that having disallowed the city to charge fees for the portions of the fee estimate where they have indicated the fee or fees are "TBD" or "to be determined," the remaining portions of its fee estimates with respect to these departments provide the appellant with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access to those records.

[56] Accordingly, I uphold the city's fee estimate in part. I uphold the city's fee estimates for searching, copying and preparing records for disclosure where a dollar amount is given. However, I do not uphold the portions of the city's fee estimate where it has simply indicated that fee are "to be determined" and find that the city is not entitled to charge fees for the processing of these portions of the request.

### **B. Should the city's fee be waived?**

[57] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. The portions of section 45(4) that are relevant to this appeal are sections 45(4)(b) and (c). Those sections 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;

...

[58] Section 8 of Regulation 823 states:

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.

[59] 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.<sup>7</sup>

[60] 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.<sup>8</sup>

[61] The institution or this office may decide that only a portion of the fee should be waived.<sup>9</sup>

### ***Fair and equitable***

[62] For a fee waiver to be granted under section 45(4), the test is whether any waiver would be "fair and equitable" in the circumstances<sup>10</sup>. Factors that must be considered in deciding whether it would be fair and equitable to waive the fees under sections 45(4) (b) and (c) are:

#### *Section 45(4)(b): financial hardship*

[63] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.<sup>11</sup> For section 45(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about

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<sup>7</sup> Order PO-2726.

<sup>8</sup> Orders M-914, P-474, P-1393 and PO-1953-F.

<sup>9</sup> Order MO-1243.

<sup>10</sup> *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056 (CanLII).

<sup>11</sup> Order P-1402.

income, expenses, assets and liabilities.<sup>12</sup>

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

[64] 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 records would yield a public benefit by
  - (a) disclosing a public health or safety concern, or
  - (b) contributing meaningfully to the development of understanding of an important public health or safety issue
- The probability that the requester will disseminate the contents of the record.<sup>13</sup>

*Other considerations:*

[65] For a fee waiver to be granted under section 45(4), it must be "fair and equitable" in the circumstances. In addition to the considerations listed in section 45(4), other considerations that might factor into a decision of whether or not a fee waiver is "fair and equitable" 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 provide 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 compromised solution which would reduce the costs; and

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<sup>12</sup> Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

<sup>13</sup> Orders P-2, P-474, PO-1953-F and PO-1962.

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.<sup>14</sup>

***Representations:***

*Fee waiver on the basis of financial hardship*

[66] The city submits that the appellant has failed to provide sufficient evidence to support her claim of financial hardship. It submits that she has not provided any evidence regarding her financial situation, including information about her income, expenses, assets and liabilities. The city also submits that in her request for a fee waiver she did not suggest that finances were an obstacle in obtaining access. The city further submits that the appellant stated verbally that costs were not an issue.

[67] The appellant submits that as a university student she does not have the financial flexibility to pay the significant fees for her requests for access to information that she submits "should have been communicated to us over the course of years for free." She states that the information that she has requested will be shared publicly with other members of her community "as no one is in the financial position to be paying \$21,000 plus for information that we the public should have had years ago." The appellant submits that as the city has failed to proactively inform her and other residents with respect to the information that she seeks, it has put itself in the position of having to respond to an access request of this scope, involving archived materials. She submits that in the circumstances, she should not bear the burden of "outrageous search costs."

*Fee waiver on basis of public health or safety*

[68] The city submits that the appellant has failed to provide sufficient evidence to support her claim that the requested records are related to a public health and safety issue. Specifically, the city submits that section 45(4)(c) requires that the requester establish whether the records at issue are part of a public safety issue and that previous orders have established that this means making a direct connection between the records to specific public health or safety issues.<sup>15</sup> The city submits that the appellant failed to make such direct connections between the subject matter of the records and any identified public health and safety issue.

[69] The city clarifies that it believes that the appellant has failed to adequately support her claim that the records at issue relate directly to a public health or safety issue, or that the dissemination of the requested records would yield a public benefit by disclosing a public health or safety concern.

[70] The city submits that it is of the view that the subject matter of this request

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[1] <sup>14</sup> Orders M-166, M-408 and PO-1953-F.

<sup>15</sup> See, for example, Order MO-2215.



remains a matter of private interest rather than public. It submits that although the requester has expressed concern that the use of the site by the developer as a "landfill" has impacted her health as well as that of her neighbours, she is the only one who has requested this information to date and therefore, there does not appear to be widespread interest in this issue.

[71] The appellant submits that the land upon which the development is built is contaminated and the residents, including herself, only learned of this two years ago. She submits that the remediation of the land "is still not completed and without proper documentation [the] residents do not know how to govern [themselves] accordingly."

[72] The appellant submits that she has a report from 1999 that states there were high levels of explosives in this land and that when she moved there in 1997 she was never told this information. She submits that as a result of the city's failure to inform the residents of the contamination they should be absorbing the cost of her request for information.

*Other considerations:*

[73] The city submits that it made several attempts to constructively work with the appellant throughout the process, informing her of the issues associated with searching, retrieving and producing the significant amount of records that would fall within the scope of the request. It submits that the appellant refused to adjust or narrow the scope of her request.

[74] The city also advises that it was sensitive to the fact that the *Act's* "user-pay-principle" is founded on the premise that requesters should be expected to carry a portion of the costs of processing requests and is supported by the fact that the fees referred to in section 45(1) are mandatory unless the requester can present a persuasive argument that a fee waiver is justified.

[75] The city submits that the appellant has requested a large number of records that would require staff with specialized knowledge to identify, locate and then reproduce substantial amounts of records that in many cases encompass several departments and subjects going back to 1988. It submits that it is not unreasonable to assume that searches for these kinds of records would take numerous hours and incur significant costs to reproduce. The city also submits that the processing of the appellant's expansive requests will have a genuine operational impact on the institution.

[76] Finally, the city submits that, given the scope of the request, the significant costs and the potential for operational impact to process the request, in its current form, would shift an unreasonable burden from the requester to the institution. It submits that it would have to divert time and staff away from other required tasks, in order to complete this request.

[77] In her representations, the appellant submits that the city has never tried to work with her on the request despite her efforts to communicate with them through

over 700 emails with questions and inquires about the records she seeks through her request.

[78] The appellant takes the position that the fees should be waived in their entirety. She submits that had the city not been negligent in keeping herself and her community properly informed, it would not have to respond to such a large request. She submits that the “outrageous search costs” should not “fall on [her] shoulders” simply because the city “failed to follow proper protocol over the years with [her] community.”

[79] The appellant also submits that the city has not provided her with any records in the past that “even remotely helps [her] or [her] community understand about the matters at hand.”

***Analysis and finding:***

[80] In *Mann v. Ontario (Ministry of the Environment)*<sup>16</sup> the Divisional Court indicated that the considerations in section 45(4) must each be considered, however, if only one applies, or even if none of the considerations in section 45(4) applies, a fee waiver may still be granted if it is deemed to be fair and equitable to do so. The Divisional Court considered section 57(4) of the *Freedom of Information and Protection of Privacy Act* which is the provincial equivalent of section 45(4) of the *Act*. Specifically, in *Mann v. Ontario* the Court stated:

As is apparent from the plain wording of the subsection, waiver of “all or part” of an amount required to be paid is mandatory, if the head determines, in his or her opinion, that it is fair and equitable to do so, after considering the factors outlined in the subsection.

I do not agree with the respondents that the subsection involves a two-part test, although I accept that one could approach the analysis in two stages. **There is only one requirement in the subsection for waiver of all or any part of a fee and that is whether, in the opinion of the head, it is fair and equitable to do so. The head is guided in that determination by the factors set out in the subsection, but it remains the fact that the sole test is whether any waiver would be fair and equitable.** [emphasis added]

*Listed consideration: financial hardship*

[81] I agree with the city that the appellant has not established grounds for waiving the fee in whole or in part on the basis of financial hardship. Generally orders issued by this office have required that the appellant provide substantive evidence to support a claim of financial hardship, including, as noted above, information about income, expenses, assets and liabilities.<sup>17</sup> While providing this evidence is not intended to be an

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<sup>16</sup> Cited above.

<sup>17</sup> Orders M-914, P-591, P-700, P-1142, P-1365, PO-3191 and P-1393.

onerous task, some form of proof is required.<sup>18</sup>

[82] Although I acknowledge that the appellant has indicated that she is a student without the means to pay for this request, without further evidence, I find that this consideration does not apply. The appellant had a number of opportunities to provide this evidence, first to the city when requesting the fee waiver on this basis, and subsequently, to this office during the appeal process and she did not do so.

[83] Accordingly, I find that the consideration of financial hardship set out in section 45(4)(b) has not been established as a consideration in support of a determination that a fee waiver is fair and equitable in the circumstances of this appeal.

*Listed consideration: public health or safety*

[84] I also find that the appellant has failed to provide sufficient evidence to support a claim for a fee waiver on the basis of public health or safety.

[85] The appellant seeks access to a considerable amount of diverse records relating to a particular housing development. Although the appellant submits that the subject matter of the records relates to a public health or safety concern I have not been provided with any substantive evidence to support her claim. She states that she, and members of her community, have been exposed to high levels of contamination and also that she has a report that states that there were high levels of explosives in the land. However, in the absence of further specific evidence supporting this position, I do not accept that there is a direct connection between the information contained in the records responsive to the request and this public health concern that the appellant states exists.

[86] Additionally, I have not been provided with sufficient evidence to support a conclusion that there exists a public, rather than private interest in the subject matter of the records to which the appellant seeks access. Although the appellant submits that the community in which she lives has an interest in such information, there is no information before me to support this claim.

[87] Moreover, even if I were provided with evidence of the claims that the appellant makes in her representations, I would also require evidence to support a conclusion that the dissemination of the information in the records that she seeks (which include zoning agreements, permits and approvals for the specific subdivision in which she lives) would yield a public benefit by disclosing a public health or safety concern or contribute meaningfully to the development or understanding of an important public health or safety issue.

[88] Accordingly, I find that I have not been provided with sufficient evidence to conclude that the consideration of public health or safety set out in section 45(4)(c) has been established as relevant to the determination whether a fee waiver is fair and

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<sup>18</sup> Order PO-3743.

equitable in the circumstances of this appeal.

*Other considerations:*

[89] An important factor in determining whether the waiver of a fee would be “fair and equitable” is whether waiver would shift an unreasonable burden on the cost of processing the request from the appellant to the city. I am mindful of the legislature’s intention to include a user-pay principle in the *Act*. As noted above, this user-pay principle 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) are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it fair and equitable to grant it.<sup>19</sup>

[90] In the circumstances of this appeal, the request is considerable in scope. As highlighted by the city, it requires the city to review records that span many years over numerous departments. In my view, the city has already invested a considerable amount of time into the processing of this request in its attempt to identify and locate the responsive records. Even if I were to accept that the fee, which I acknowledge is quite large, would cause the appellant financial hardship, I am not convinced that it would be fair and equitable to waive it in this appeal.

[91] As noted by the city, the fee is significant because the appellant seeks access to a tremendous number of records and it would be unfair to shift an unreasonable burden of the cost to the city, particularly when the appellant has not narrowed the scope of her request in any manner.<sup>20</sup>

[92] As a result, I do not accept that I have been presented with any relevant considerations that support a conclusion that a fee waiver is justified in the circumstances. Considering all of the information that I have before me, I find that to grant a fee waiver would shift an unreasonable burden of the cost of processing the request from the appellant to the city. Therefore, I find that it would not be fair and equitable to grant one.

Summary fee waiver conclusion

[93] After reviewing the representations, I have found that I have not been provided with sufficient evidence to support a conclusion that it would be fair and equitable to consider a fee waiver on the basis of either financial hardship or public health or safety. I have also found, based on other considerations identified above, that I have not been provided with sufficient evidence that would justify deviating from the user-pay principle set out in the *Act*. Accordingly, I do not accept that, in the circumstances of

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<sup>19</sup> Order PO-2726.

<sup>20</sup> It should be noted that it is not within my jurisdiction to determine whether the city owed the appellant and her community any duty with respect to information about the land on which their community is built, nor is such determination relevant to my determination of whether or not a fee waiver is fair and equitable in the circumstances.

this appeal, it would be fair and equitable to grant the appellant a fee waiver and I uphold the city's decision to deny her fee waiver request.

**ORDER:**

1. I uphold the city's fee estimate for searching, copying and preparing records for disclosure where a dollar amount is provided.
2. I do not uphold the city's fee estimate for the portions where it has indicated that such fees are "to be determined" and I do not allow it to charge fee for those portions.
3. I uphold the city's decision to deny the appellant's fee waiver request.

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

September 27, 2017 \_\_\_\_\_