

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-3501

Appeal MA16-21

City of Vaughan

September 27, 2017

**Summary:** The City of Vaughan received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to information relating to plans for an identified subdivision. As the request generated a significant number of responsive records, the city issued an interim access decision with fee estimate of \$10,000.00. 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 related to plans for a specific subdivision, including zoning agreements, permits and emails for the 1988 and 1994 approvals and information relating to when the subdivision was built in 1994. The request identified by name, the city planner, and a number of other city employees who might be in possession of responsive records.

[2] The city issued an interim access decision with a fee estimate. The city provided

a "Fee Estimate Summary" in chart form outlining the specifics of the fee estimate which was one fee broken down into smaller fee estimates for different components of the request. The city explained that it was providing a fee estimate rather than a final fee as the search for all responsive records had not yet been completed.

[3] 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 estimate for records within this time period already amounted to \$10,000.00. 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 held by the engineering department 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 \$10,000.00 before it would continue to process the request.

[4] The city advised that partial access would be granted to the responsive records as the mandatory personal privacy exemption at section 14(1) of the *Act* and the discretionary exemption for solicitor-client privileged information at section 19 would likely apply to portions of them. Additionally, the city advised that certain types of records would likely be excluded from the *Act* and that other records may already be publicly available.

[5] 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.

[6] The requester, now the appellant, appealed the city's decision to this office.

[7] 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.

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

[9] 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.

[10] 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.

[11] 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.

[12] 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 provided. 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 fee be waived?

## **DISCUSSION:**

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

[13] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[14] 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***

[15] 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>

[16] 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>

[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.<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***

[18] At issue in this appeal is the city's fee estimate of \$10,300.00. In its fee estimate decision, the city provided a breakdown of the amounts charged for search, preparation (redactions), and photocopying of the various different components of the request:

|  |                   |
|--|-------------------|
| <b>Building Standards:</b>   |                   |
| <b>Search:</b><br>70 hours (4200 minutes) @7.50/15min  | \$2,100.00        |
| <b>Copies:</b><br>Note: over 100 individual lots 1 file per lot = approx. 100 files<br><br>(Note: this amount can be reduced; e.g. 27 lots abutting Block 120 only)<br><br>Approx. 200 pages per file @0.20/page | \$4,000.00        |
| <b>Redactions:</b><br><br>TBD<br><br>@7.50/15min<br><br>*estimated redactions to be made under sections 12 and 14(1).  | TBD               |
| <b>Building Standards Total (based on</b>  | <b>\$6,100.00</b> |

<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.

|                   |  |
|-------------------|--|
| <b>100 lots):</b> |  |
|-------------------|--|

|   |                   |
|---|-------------------|
| <b>Planning:</b>  |                   |
| <b>Search:</b><br>120 hours (7,200 min.) @7.50/15min  | \$3,600.00        |
| <b>Copies:</b><br>Approx. 3000 pages (1 banker's box)<br>@0.20/page<br><br>(Note: more boxes may be in storage)   | \$600.00          |
| <b>Redactions:</b><br>TBD<br><br>@7.50/15min<br><br>*estimated redactions to be made under sections 12 and 14(1). | TBD               |
| <b>Planning Total:</b>  | <b>\$4,200.00</b> |

[19] With respect to fees for any responsive records located in the Engineering Department, the city indicated that the fees for search, copies and redactions were "TBD" or to be determined.

[20] 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>Access request 2015-113 Estimate Total:</b> | <b>\$10,300.00</b> |
| <b>Deposit Required:</b>                       | <b>\$5,150.00</b>  |

[21] The city takes the position that its fee estimate is fair and should be upheld. It provided representations on how it arrived at the fee estimate.

[22] The city submits that once it received the request it sought the advice of subject experts in each of the identified departments (Planning, Engineering and Building Standards) to determine how much responsive material potentially existed.

[23] 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

archived or held 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: section 45(1)(a)*

[24] 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 Planning Department, following an initial property address search, it was matched up to a zoning file number or subdivision number to locate responsive records.

[25] The city submits that the departments estimated their search time to the closest quarter hour and indicated the steps taken in order to respond to the request, such as search physical paper files, or conduct email searches.

[26] The city states that its Access and Privacy section did not receive a fee estimate from the Engineering Department 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)*

[27] With respect to preparation charges allowable under section 45(1)(b), in its fee estimate decision the city indicated that these fees were "TBD" or "To Be Determined." The city submits that an estimate was not given for preparing the records 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.

[28] 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 records would be provided to the Access and Privacy section for analysis.

[29] 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 12(1) 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)*

[30] With respect to photocopying charges allowed 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.

[31] The city also submits that should the appellant wish to be provided with responsive records on CD, while it is possible for the final product to be scanned for a charge of \$10/CD, "if the amount of material is excessive the city may explore adding a charge for scanning" as was upheld in Orders MO-2530 and MO-3340.

[32] 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***

[33] 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 the estimate that it provided generally encompasses records from between 2013 and 2015 as it is based on an "accurate sample of responsive records" that are "readily available" and easily producible."

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

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

[35] In the charts that it provided with the fee estimate decision (which are reproduced above), the city provides a breakdown of the hours of search time that it estimates will be required to locate responsive records in the Building Standards and Planning departments. In its representations, the city provides additional detail about the efforts undertaken to search for responsive records.

[36] With respect to its estimated search time for records in the Building Standards Department, the city estimates that 70 hours of search time is required to locate records for over 100 individual lot files, each file containing approximately 200 pages per file. It submits that knowledgeable employees began searching for responsive records in the Building Standards Department by electronically searching by municipal address. The city also submits that those employees searched for over 100 individual lots but notes that the search fee could be reduced if the appellant narrows her request to the 27 lots that abut the relevant block that is of particular concern to her. The appellant has not expressed an interest in narrowing the scope of her request.

[37] With respect to its estimated search time for records in the Planning Department, the city estimates that 120 hours of search time is required to locate responsive records, generating one bankers box or approximately 3000 pages of records. It also



submits that the Planning Department has a complex filing system that requires an initial property address search which subsequently must be matched up to a zoning file number or subdivision number before responsive records can be identified.

[38] 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 and I will uphold them.

[39] 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.

[40] In sum, I uphold the estimated search time for responsive records located in the Building Standards and Planning departments as reasonable and permit it to charge the appellant these fees for its search with respect to the processing of her request.

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

[41] Although the city indicates that portions of the responsive records might be exempt from disclosure, it has not provided an estimate of the percentage or number of pages that will need to be severed. It indicates however, that it would apply the generally accepted standard of two minutes per page at a fee of \$7.50 per page, to sever the responsive records in preparation from disclosure.

[42] In my view, by providing the appellant with a fee estimate indicating that preparation fees are "to be determined" the city has not met its requirements under the *Act*. The city has merely reiterated the fee for preparing the records for disclosure that it is entitled to charge pursuant to section 6.4 of Regulation 823. Without any indication of what percentage of pages of responsive records might require severances, 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.<sup>6</sup>

[43] 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

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

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

entitled to charge preparation fees under section 45(1)(b) for the processing of those portions of the request.

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

[44] 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 the Building Standards Department and the Planning Department. As the city is entitled to charge \$0.20 per page for making copies, I accept that its estimate is reasonable.

[45] 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.

[46] 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 summary and finding

[47] As noted above, a fee estimate is to 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. In the circumstances of this appeal, I accept that the portions of the city's fee estimates, where dollar amounts are provided (for records located in the Building Standards and Planning departments), 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.

[48] However, as I have noted 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. This specifically applies to the portion of the fee estimate that addresses records held by the

Engineering Department where no dollar amount is given to estimate the fees that the city might charge to search, prepare or photocopy any responsive records located in that department. It also applies to the portions of the estimates that address preparation fees for records located in the Building Standards and Planning departments, where again no dollar amount is given. Without any indication of how many records in this department might be responsive to the appellant's 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 to any responsive records that might be located.

[49] Nevertheless, I find that 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.

[50] Accordingly, I uphold the city's fee estimate in part. For records located in the Building Standards and Planning departments I uphold the city's fee estimate for search and for copies, however, I find that it is not entitled to charge for preparing the records for disclosure. For records located in the Engineering Department, I do not uphold the city's fee estimate and find that it is not entitled to charge any fees for the processing of this portion of the request.

**B. Should the fee be waived?**

[51] 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;

...

[52] 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.

[53] 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>

[54] 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>

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

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

[56] 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*

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

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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.

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

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

[58] 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:*

[59] 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 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 compromised solution which would reduce the costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.<sup>14</sup>

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

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

***Representations:***

*Fee waiver on the basis of financial hardship*

[60] 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.

[61] 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*

[62] 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.

[63] 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.

[64] The city submits that it is of the view that the subject matter of this request remains a matter of private interest rather than public. It submits that although the appellant 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.

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

[65] 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."

[66] The appellant submits that she has a report that states in 1999 that there are 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:*

[67] 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.

[68] 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.

[69] 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 many years. It submits that 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.

[70] 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.

[71] 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.

[72] 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.”

[73] 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:***

[74] 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*

[75] 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. As indicated in the Notice of Inquiry that was sent to the parties during my inquiry into this appeal, 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 onerous task, some form of proof is required.<sup>18</sup>

[76] 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

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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.

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



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.

[77] 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*

[78] 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.

[79] 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.

[80] 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.

[81] 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.

[82] 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 equitable in the circumstances of this appeal.

*Other considerations:*

[83] An important factor in determining whether the waiver of a fee would be "fair and equitable" is whether the 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>

[84] 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.

[85] Although the appellant indicates that the city would not work with her, despite information provided to her about the breadth and scope of her request, she has not demonstrated any willingness to alter the scope of her request in any manner that would either help to reduce costs or reduce the burden that it will place on the city and its staff. The appellant's primary argument with respect to the considerable scope of this request is that, based on her position that the city's failure to keep her and her community informed about information relating to the land on which they live, the city should waive the fees that it is entitled to charge for the considerable amount of information she seeks in her request.

[86] 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>

[87] 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

[88] 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.

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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.

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 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 with respect to search and copying fees for records in the Building Standards and Planning department but do not allow it to charge fees for the preparation of responsive records located in those departments.
2. I do not uphold the city's fee estimate with respect to search, preparation and copying fees for records in the Engineering Department and do not allow it to charge fees for responsive records located in that department.
3. I uphold the city's decision to deny the appellant's fee waiver request.

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

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