

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3500

Appeal MA16-25

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 financial statements of brownfield properties in West Woodbridge. The city located records responsive to the request and granted partial access to them, charging a fee of \$39.70 for the processing of the request. The appellant paid the fee and was provided access to the portions of records not subject to exemptions under the *Act*. Subsequently, she applied for a fee waiver, which was denied by the city. The appellant appealed the city's decision to deny the fee waiver and also took the position that it had not conducted a reasonable search. In this order, the adjudicator upholds the city's search as reasonable. The adjudicator also upholds the city's decision to deny the appellant a fee waiver.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 17, 45(1) and (4), Regulation 823, sections 6 and 8.

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 the financial statements of all brownfield properties in West Woodbridge.

[2] After clarifying the request with the requester, the city issued an access decision granting partial access to the records. In its decision, the city detailed the request and responsive records as follows:

Page No.	Description	Disclosure
N/A	Any financial invoices/printouts related to all brownfields in West Woodbridge (vacant or unused sites with potential for redevelopment). Specifically, at the sites of [identified address], and a [Named Company 1] [Named Development].	<i>No records found</i>
N/A	List of all grants and/or loans given to the city from the provincial and federal governments, from January 2007 to November 2015 related to redevelopments of brownfields in this area	<i>No records found</i>
1-7 8-11	List of all payment made from the city to the following: [Numbered Company 1], [Numbered Company 2] [Numbered Company 3], [Named Company 2] in relation to [identified address], [Named Company 1] [Named Development], January 2007 to November 2015: Payments made to [Numbered company 1], October 11, 2011 Payments to [Numbered Company 1], October 21, 2014	Partial access granted - pages 6&7 redacted as non- responsive Partial access granted - page 11 redacted under section 14 (personal information of third party)

[3] The access decision included a breakdown of the fee to process the request advising that the total fees for search, preparation and copies came to \$39.70. The requester paid the fee and was provided access to the records. She subsequently applied for a fee waiver. The city issued a decision denying the fee waiver indicating that she had already paid the fee for the records associated with this particular request and had not established that a fee waiver was warranted in the circumstances.

[4] The requester, now the appellant, appealed the city's decision on access, and its decision to deny the fee waiver.

[5] During mediation, the appellant advised that she was of the view that additional records ought to exist. The appellant contends that the city has had extensive dealings with the brownfield properties identified in the request and believes that the city's involvement would have generated many additional records. With respect to the records that were located, the appellant confirmed that she is not seeking access to the

information that was withheld as non-responsive or under the mandatory personal privacy exemption at section 14(1) of the *Act*.

[6] Finally, the appellant confirmed that she is appealing the city's decision to deny a fee waiver for this request. Although she has already paid the fee, she requests that it be refunded. She contends that the amount paid will cause her severe financial hardship as she is a student with no source of income and advises that she intends to disclose the records to the public as the land upon which her subdivision was built was contaminated and has resulted in its residents suffering ill health.

[7] The city takes the position that a thorough search was conducted and no additional responsive records exist. With respect to the fee waiver, the city maintains its position that the fee is accurate and the appellant does not meet the requisite criteria for a fee waiver.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought representations from both parties. The non-confidential portions of the city's representations were severed in accordance with the confidentiality set out in this office's *Practice Direction 7* and shared with the appellant. I determined it was not necessary to share the appellant's representations with the city.

[9] In this order I uphold the city's search for responsive records as reasonable. I also uphold the city's decision to deny the appellant a fee waiver.

RECORDS:

[10] The responsive records consist of various financial documents related to all brownfields in West Woodbridge, including some specifically named locations, and any documents revealing any grants or loans given to the city by the provincial or federal governments related to redevelopments of brownfields in West Woodbridge. The disclosure of these records is not at issue. The city takes the position that no additional records exist.

ISSUES:

- A. Did the city conduct a reasonable search for responsive records?
- B. Should the fee be waived?

DISCUSSION:

A. Did the city conduct a reasonable search for responsive records?

[11] The city submits that it conducted a reasonable search for and has located all

records responsive to the request. The appellant takes the position that additional responsive records should exist. Where a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[12] The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[13] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁴

Representations

[14] In its representations, the city submits that the request was received as part of a package of other similar requests. It submits that it contacted the appellant for clarification as it was unclear as to what she meant by "financial statements" and what specific documents she was seeking (invoices, cheques etc.). The city submits that the Access and Privacy Officer summarized the request in her own words, describing what specific types of records she believed the appellant was seeking access to and provided it to the appellant. The city submits that the appellant confirmed that the interpretation of the request, as well as the date range, was correct.

[15] The city submits that subsequently, it contacted the Financial Services Department, providing it with the exact wording of the request as clarified and then confirmed by the appellant. The Financial Services Department conducted searches for responsive records and indicated none were located for items 1 and 2 of the request but that responsive records were located for item 3. It submits that copies of the records that were located were then provided to the Access and Privacy Office.

[16] In support of its position that it conducted a reasonable search for records responsive to the request, the city provided affidavits sworn by the city's Senior Financial Analyst, its Senior Manager, Corporate Financial Planning and Analysis, and its Manager of Property Tax and Assessment. These affidavits describe the actions taken by these individuals to search for records responsive to this request.

[17] In her sworn affidavit, the Senior Financial Analyst submits that in response to the request she ran the "supplier payment inquiry in [internal electronic system] to search for the listed vendors in [item 3]." She submits that from the list of vendors only

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Order MO-2246.

the supplier vendor was located. No records were found for the other vendors identified in the request. She submits that she informed the Accounts Payable Supervisor to request retrieval of the 2011 and 2014 cheque voucher records identified in the report from off-site storage and she obtained copies of them. She submits that no records were found with respect to 2012 and 2013.

[18] The Senior Manager, Corporate Financial Planning and Analysis, submits in her affidavit that she was asked by the Financial Services Department to search for records relating to item 2 of the access request. She submits that she reviewed the grant files and did not locate any responsive records relating to any grants or loans from the provincial or federal governments related to brownfield redevelopment within the requested timeframe.

[19] The Manager of Property Tax and Assessment also swore an affidavit regarding her search for responsive records. She submits that "queries were run within the [internal electronic tax system] to search for any property tax refunds during the specific timeframe." She submits that no records pertaining to the named companies were located except for one refund that was found in relation to the identified address under one of the named companies. She submits that "this was completed as a result of a Post-Roll Amended Notice received by our office from the Municipal Property Assessment Corporation."

[20] With respect to the affidavits provided by the city, the appellant submits that if the three individuals who provided affidavits were the ones that conducted the search for responsive records, the city's Freedom of Information Coordinator should have directed her to those individuals so that she could have made her request clearer by speaking directly with them. She also submits that she has never heard of the three individuals who provided affidavits.

[21] She also submits that the numbered companies listed in the clarified request should all have history attached to them as the builder used one numbered company when building phase 1 of the development and then switched over to another numbered company when building phase 2 in order to keep both phases separate from one another. She submits that as a result, she does not believe the city's submission that no items were found.

[22] The appellant also submits that with respect to another developer named in the request, [Named Company 1], given that they just finished the development of townhomes at a specified location there should be records relating to that development. As a result, she submits that she does not believe the city's submission that no items were found.

[23] Specifically, addressing the search itself, the appellant takes the position that the city did not conduct a reasonable search for all listed parties. She submits that after the initial clarification, the city did not seek further clarification of her request, particularly when there were no responsive records. She submits that the city did not take efforts to properly clarify her request as she did not speak to the heads of the departments to

provide them with clarification. She submits that she sent over 15 emails to which she did not receive a response.

[24] She also submits that although three employees provided affidavits, it does not prove that they actually conducted the activities they listed and she does not believe that they did.

Analysis and finding

[25] Having carefully reviewed the evidence before me, I am satisfied that the search conducted by the city for records responsive to the appellant's request was reasonable and is in compliance with its obligations under the *Act*.

[26] As previously explained, a reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends reasonable effort to locate records that are reasonably related to the request. In the circumstances of this appeal, I find that the city has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records within its custody or under its control. I acknowledge that the searches were directed and conducted by experienced employees, knowledgeable in the subject matter and that consultations were made to confirm the accuracy of the findings. I accept that the effort that the three city employees expended to locate responsive records was reasonable and in accordance with the city's obligations under the *Act*.

[27] As set out above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, she must still provide a reasonable basis for concluding such records exist. While I acknowledge that the appellant is of the belief that additional responsive records relating to items 1 and 2 of her request should exist, in my view, she has not provided me with sufficient evidence to support why such records might exist. She has not explained how the builder of the development "switching over" to a different numbered company when building different phases of the development demonstrates that financial records should exist. She also does not explain why the fact that another developer just finished a development means that the city should have records of the type sought by her request relating to those companies. I do not accept that I have been provided with sufficient evidence to establish a reasonable basis for reaching such conclusion.

[28] Furthermore, even if additional records exist, I reiterate the principle outlined above that the *Act* does not require the city to prove with absolute certainty that further records do not exist. Rather, the city's obligation under the *Act* is to demonstrate that it has made a reasonable effort to identify and locate responsive records. In the circumstances of this appeal, I accept that it has done so.

[29] I also acknowledge that the appellant believes that the city should have undertaken more work to clarify her request, specifically by contacting her further and by having her speak directly to some of the individuals who conducted searches. I have reviewed the clarified request, reproduced above in the overview, which the city

confirmed with the appellant prior to conducting searches for responsive records. From my review, I accept that the clarified request is sufficiently clear with respect to its description of the types of records sought by the appellant that the city would have determined that it was not necessary to clarify the request further, either before or after searching for responsive records. Moreover, despite the appellant's claims, she has not provided me with any representations to suggest that the request, as clarified, should be interpreted in any different manner.

[30] In conclusion, I am of the view that in the circumstances of this appeal the city has discharged its onus and has provided sufficient evidence to support its position that it has made a reasonable effort to identify and to locate records responsive to the request. On that basis, I uphold the city's search.

B. Should the fee be waived?

[31] 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;

...

[32] 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.

[33] 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.⁵

[34] 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.⁶

[35] The institution or this office may decide that only a portion of the fee should be waived.⁷

Fair and equitable

[36] For a fee waiver to be granted under section 45(4), the test is whether any waiver would be "fair and equitable" in the circumstances⁸. 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

[37] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.⁹ 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.¹⁰

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

[38] 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

⁵ Order PO-2726.

⁶ Orders M-914, P-474, P-1393 and PO-1953-F.

⁷ Order MO-1243.

⁸ *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056 (CanLII).

⁹ Order P-1402.

¹⁰ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

(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.¹¹

Other considerations

[39] 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.¹²

Representations

Fee waiver on the basis of financial hardship

[40] The city submits that the appellant has failed to provide sufficient evidence to support her claim of financial hardship. It submits that she submitted a request for a waiver of the fee through a brief email statement which did not suggest that finances were an issue or that the fees were an obstacle in obtaining access. The city further submits that in her email requesting a fee waiver the requester did not provide details about her financial situation, nor did she identify herself as a student with limited income. The city submits that it had no way of gauging the financial impact on the

¹¹ Orders P-2, P-474, PO-1953-F and PO-1962.

¹² Orders M-166, M-408 and PO-1953-F.

requester based on this email alone.

[41] The appellant submits that she did not receive a fee estimate for this request. She submits that as a student she "does not have the financial flexibility to be paying these outrageous fees for these FOI's regarding information that should have been communicated [to her and her community] over the course of years, for free." She submits that the city knows that she is a university student. She also submits that during mediation, she clearly provided the mediator with her financial position which he was to bring to the city when trying to mediate the issue so she believes the city is also aware of her financial position. The appellant also submits that she was not aware that when she submitted an access request she had to divulge her personal financial situation to the city.

[42] The appellant submits that on one request the city charged \$95.40 to retrieve records but that in other requests they are trying to inflate the costs to \$21,000.00. She submits that the city knows that "no average person of family could pay these types of fees."

[43] Finally, the appellant submits that the city is aware of an article that was written by her Member of Parliament, without her knowledge, about her and her family and that as they are aware of the article and they are aware that she is a student.

Fee waiver on the basis of public health or safety

[44] The city submits that it was only during mediation that the appellant advised that she believes the records should be released as they involve a public health or safety issue. The city submits that its decision to deny a fee waiver request based on public health and safety concerns was based on the appellant's failure to make a direct connection between the subject matter of the records and any identified public health and safety issues or that the dissemination of records would yield a public benefit by disclosing a public health or safety concern.

[45] 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.

[46] 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."

[47] The appellant submits that she has a report from 1999 which states 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.

[48] The appellant submits that the records at issue relate to the health and safety of her community and the city is well aware of this fact. In her representations she has included copies of the text of two emails sent to the city indicating health and safety concerns relating to the development to which the request relates. The concerns she raises in those emails include that the property was an illegal "dump site," that city has neither commissioned testing of the soil in phase 1 of the development, nor helped the community to petition the Ministry of the Environment to commission such testing, and that the city has not commissioned air quality testing

[49] She also submits that she is not submitting the requests solely on her own accord but that she is acting on behalf of other residents of the development. To support her position, she has enclosed several emails from individuals that she identifies as "residents" and submits that these emails demonstrate that she is acting in their collective public interest rather than her own private interest.

Other considerations

[50] The city submits that it has completed the work on this request and the requester was appropriately notified in its access decision of the fee of \$39.70, calculated under section 45(1) of the *Act*. The city submits that upon payment of the fee, the responsive records were disclosed to the appellant, with minimal redactions. The city submits that the appellant chose to pay the fee prior to requesting a fee waiver and, at the time of payment gave no indication that she disagreed with them.

[51] 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.

[52] The appellant takes the position that the \$39.70 should be waived in its 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."

Analysis and finding:

[53] In *Mann v. Ontario (Ministry of the Environment)*¹³ 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

¹³ Cited above.

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

[54] 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.¹⁴ While providing this evidence is not intended to be an onerous task, some form of proof is required.¹⁵

[55] Although I acknowledge that the appellant has indicated that she is a student without the means to pay the fee of \$39.70 for the processing of 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.

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

Listed consideration: public health or safety

[57] 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.

[58] The appellant seeks access to records relating to a particular housing

¹⁴ Orders M-914, P-591, P-700, P-1142, P-1365, PO-3191 and P-1393.

¹⁵ Order PO-3743.

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. She has concerns about soil contamination as well about air quality. However, in the absence of further specific evidence supporting her position regarding these health or safety concerns, I do not accept that there is a direct connection between the information contained in the financial records that she seeks through this the request and any public health concern that the appellant submits exists.

[59] 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 responsive to this request, financial records, 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. I have no evidence before me in this request.

[60] 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

[61] 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.¹⁶

[62] In the circumstances of this appeal, the fee of \$39.70 is not significant and the appellant has not established that it would cause her either financial hardship or would benefit health and safety. Accordingly, I am not convinced that it would be fair and equitable to waive it in this appeal.

ORDER:

1. I uphold the city's search for responsive records.

¹⁶ Order PO-2726.

2. I uphold the city's decision to deny the appellant's fee waiver request.

Original Signed by: _____
Catherine Corban
Adjudicator

September 27, 2017 _____