

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3691

Appeal MA17-92

The Corporation of the City of Barrie

November 26, 2018

Summary: The appellant submitted a request to the Corporation of the City of Barrie under the *Municipal Freedom of Information and Protection of Privacy Act* for an agreement of purchase and sale related to the Allandale Station Lands in Barrie. The appellant also requested a fee waiver on the basis that dissemination of the record will benefit public health or safety under section 45(4)(c) of the *Act*. The city issued an interim decision with a fee estimate and denied the fee waiver. The appellant appealed the city's fee estimate and fee waiver decisions. The adjudicator partly upholds the city's fee estimate and upholds the city's decision to deny a 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 45(4); sections 6, 7 and 8 of Regulation 823 made under the *Act*.

Orders and Investigation Reports Considered: Orders MO-3568 and PO-3755.

OVERVIEW:

[1] This order addresses the issues raised by an interim decision issued by the Corporation of the City of Barrie (the city) in response to the following access request submitted by an individual under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

This request concerns the Allandale Station Lands, Gowan St., Allandale Waterfront GO Station, and 285 Bradford St. Barrie, Ontario.

Kindly provide a copy of the purchase and sale agreement for the sale of ACDC [Allandale Community Development Corporation] lands (ACDC lands which were part of the aforementioned lands) from ACDC to the City of Barrie in or about 2010.

This request is made on grounds of public policy and out of concern for the citizens of Barrie. The site has been noted by [a named company] to contain various contaminants. Additionally, [a named first nation] have identified the site as one of the most important historical First Nations' sites in Canada. As such, it is requested that costs for the above FOI requests be waived.

[2] The city issued an interim decision with a fee estimate of \$149.50, providing a breakdown of the fees apportioned to search, preparation and photocopying. The city denied the requested fee waiver and provided an explanation of the factors considered in doing so. The city requested a 50% deposit of \$77.75 prior to proceeding further with processing the request. The city advised the requester that although a final decision had not been made regarding access to the records, based on their "likely content," the exemptions in sections 10(1) (third party information) and 11 (economic or other interests) of the *Act* may apply.

[3] The requester (now the appellant) appealed the city's decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant explained that he should not have to pay the fee because his request concerns public health and safety and was made in the public interest for the purpose of section 45(4)(c) of *MFIPPA*. The city declined to revise its interim decision, noting that the fee estimate had already been reduced.

[4] As a mediated resolution of the appeal was not possible, it was transferred to the adjudication stage for a written inquiry. I sought representations from the city and when I received them, I shared the relevant, non-confidential portions with the appellant in accordance with the confidentiality criteria in *Practice Direction Number 7*. The appellant submitted representations.

[5] In this order, I disallow the city's "contingency" fee and 25% of its search fee estimate, but permit a fee estimate of \$100.00. I uphold the city's decision to deny a fee waiver.

ISSUES:

- A. Is the city's fee estimate of \$149.50 reasonable?
- B. Should the city's refusal to waive the fee be upheld?

DISCUSSION:**Issue A: Should the city's fee estimate of \$149.50 be upheld?**

[6] Under section 45(1) of the *Act*, institutions are required to charge fees for processing access requests. Where the fee exceeds \$25, section 45(3) requires an institution to provide the requester with a fee estimate.

[7] Where the fee is \$100 or more, the fee estimate may be based on either:

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.¹

[8] 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.² The fee estimate also assists requesters in deciding whether to narrow the scope of a request in order to reduce the fees.³

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

[10] 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.

[11] Section 45(1) of the *Act* states that:

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;

¹ Order MO-1699.

² Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

³ Order MO-1520-I.

⁴ Orders P-81 and MO-1614.

- (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.

[12] 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.

Representations

[13] The city submits that its fee estimate was based on actual work completed in response to the request, as well as consultation with individuals regarding the work that would be required to complete the response to the request, if the appellant chose to proceed with it. The city states that it did not conduct a “full search” because the appellant neither responded to the interim decision nor submitted the requested fee deposit. The city mentions several times that it “closed” the request as abandoned because of the appellant’s lack of response or payment of the fee deposit. However, since the appellant had appealed the fee estimate to this office prior to the date the fee deposit was due, the city was not in any position to close its related request file at that time.

[14] The city provides background information related to the “separate parcels of land that are colloquially referred to as the Allandale Train Station Lands.” The city states that as it advised the appellant in the interim decision, it does not own Gowan Street, but rather annexed the Village of Allandale, including that street in the 1890’s. The city owns the lands upon which the historic Allandale Station buildings are located and these are known as 285 Bradford Street. Regarding a “purchase and sale agreement for the Allandale Community Development Corporation lands,” the city submits that the lands known as the Newmarket Subdivision were sold by ACDC to Metrolinx/GO Transit in 2007 and the Allandale GO Station was built on these lands. The city also notes that ACDC was a corporation created specifically to purchase and operate the rail lines and did purchase them, along with the Station Lands, in 1998-1999. A decision was made to wind up ACDC and incorporate its assets into the city in 2009.⁵

[15] The city states that original ACDC records date back to 1998-1999 and there are many files relating to the Allandale Station Lands, but not necessarily to the request. In describing the work already completed by staff to respond to the request, the city refers to the challenge encountered in its searches due to the passage of time and the departure of key individuals who were involved in the transfer and sale of the rail lines and Station Lands. The city adds that many of the physical files related to the ACDC were created by ACDC representatives and although they were converted to the city’s coding system,⁶ that conversion was carried out by staff who were not involved with the transaction and they may not have separated agreements from general background information. These records are stored in the Inactive Records Centre.

[16] Further, the city states that the fact that there are multiple parcels of land, combined with the passage of time and departures of relevant staff, have contributed to uncertainty as to whether a separate agreement for the ACDC land transfer exists or

⁵ Evidently, the wind up of the ACDC remains pending due to litigation affecting it.

⁶ The city refers to the coding system as TOMRMS, but does not define that term.

whether it formed part of the transfer of all rail lands. A search was done of the city's "agreement index," which the city says is where an agreement related to the transfer of assets between the city and ACDC would be located, but no agreement was found. Additionally, FOI staff contacted former legal counsel for the city, who thought she recalled that the transfer of these assets was addressed as an "intercompany transfer" without the use of an agreement of purchase and sale. The city claims that it would have to conduct a full search to confirm whether such an agreement exists.

[17] To illustrate the approach taken to preparing the fee estimate, the city provided copies of the request's FOI Tracking Log and Time/Volume Estimate memo. The city distributed the latter document to the FOI Liaisons in the relevant departments, who are typically coordinators or assistants in the department with knowledge of the records and functions of the department. The memo included the nature of the request, property ownership, a map of the property location and a listing of the relevant physical files that was generated by a key word search of the document management system for physical files, the RMAIS. According to the city, eight physical files were located using the key words and, based on those listed, past experience, and consultation with other staff, the FOI Liaisons completed the Time Volume Estimate logs.

[18] In the interim decision, the city's \$149.50 fee estimate was broken down into \$139.50 for "Records Search/Consultation and Preparation Time" consisting of 4.65 hours at \$30.00 per hour plus \$10.00 for "Photocopying Fees" for 50 pages at \$0.20 per page.

[19] The city claims that the search component under section 45(1)(a) is based on staff estimates of search time that would still be required to complete a "full search," in addition to the 45-60 minutes already spent in its initial efforts to locate responsive records. Specifically, the estimate included 60 minutes for searching Legislative Services records (one database, 16 files) and 180 minutes for Legal Services (six physical files and three directories) for a total of 240 minutes.

[20] Regarding preparation charges under section 45(1)(b), the city submits that although the fee estimate refers to preparation as part of the same line item as search, it contains no estimate of "severing time." The city's fee estimate also contained no estimate of computer, shipping or "other" costs under sections 45(1)(c), (d) or (e). However, it did include a photocopying fee of \$10.00 for 50 pages (from Legal Services).

[21] The appellant's representations on the amount of the fee estimate do not directly address the issue. However, the appellant claims that he should not have to pay for a search for the requested agreement, if the city is not certain one exists.

Analysis and findings

[22] To begin, I note that in issuing an interim decision with a fee estimate, the city took the appropriate approach to a situation where it is not certain that a purchase and sale agreement fitting the description given by the appellant exists. As stated, one key purpose of a fee estimate is to give a requester sufficient information to make an informed decision about how, or even whether, to proceed with the request. In the circumstances of this appeal, it was reasonable for the city to advise the appellant of its uncertainty in this regard. It is now the appellant's decision as to whether or not he will proceed with his request, based on the fee estimate and subject to my findings, below, on its quantum.

[23] I must first address a discrepancy between the city's representations on the fee estimate and the breakdown of it in its interim decision. The city's evidence during the inquiry was that its estimate includes 240 minutes of search charged at \$30.00/hour (or \$120.00) plus 50 pages of photocopying at \$0.20/page (or \$10.00). This adds up to \$130.00. The fee estimate given in the city's interim decision was \$149.50. In a document provided with the city's representations, the explanation for the difference between the two amounts is an additional line item charge of "Contingency +15%" (or \$19.50).⁷ However, the 15% contingency is included in the interim decision in the line item identified as "Records Search/ Consultation/ Preparation Time." The city is not entitled under *MFIPPA* to reverse engineer its fee estimate to provide for such a margin. A fee estimate is already just that, an estimate of the fees an institution is required to charge under section 45(1) and Regulation 823. In the result, I disallow this \$19.50 "contingency" part of the city's search fee estimate.

[24] The fees for search are considered under section 45(1)(a) of the *Act* and section 6.3 of Regulation 823. Regarding the 240 minutes, or four hours, the city says would be required to complete a "full search," I find the limited detail provided by the city to be an obstacle to assessing its reasonableness. Some aspects of the city's evidence, such as the multiple land parcels and the age and location of ACDC records, tend to support a finding that longer search times may be required to locate the responsive record. However, there is no description of the size or nature of Legislative Services files compared to Legal Services files and, hence, no basis for me to evaluate, or distinguish between, the estimate of 60 minutes to search 16 files in Legislative Services and 180 minutes to search six files in Legal Services. The city indicates that its estimate included the search for electronic records, but it does not elaborate on the nature of the one database it would search in Legislative Services or the three directories in Legal Services, and it would not be appropriate for me to speculate about these matters. Having considered the evidence provided by the city, including with regard to the searches already conducted, I will reduce the city's search fee estimate by 25%,

⁷ Identified as Item #6, Fee/Time Estimate Tracking Document – February 3, 2017.

thereby allowing the city a fee of \$90.00 for 180 minutes of search time.

[25] Section 45(1)(c), together with section 6.1 of Regulation 823, allows the cost of photocopies at 20 cents per page. I accept the city's evidence that the purchase and sale agreement could be expected to be approximately 50 pages. Therefore, I find the city's estimated photocopying fee of \$10.00 to be reasonable, and I uphold this component of its fee estimate.

[26] The city admits that its interim decision contained no estimate of preparation (or other) costs, apart from search and photocopying. As I reiterated above, the purpose of a fee estimate is to give a requester sufficient information to make an informed decision as to whether or not to pay the fee and pursue access. Past orders have found that to give full effect to this principle, an institution may not later charge entirely new fees not specified in the fee estimate. In Order MO-3568, Adjudicator Catherine Corban stated:

The appellant is entitled to rely on this information in deciding to proceed with his request and pay the deposit. I acknowledge that a fee estimate is in fact an estimate. However, in my view, adjustments to the estimated fees should be limited in nature. While I accept that a final fee for access to the responsive records might be different from that quoted in the estimate, allowing for variances to copying charges based on the actual number of responsive records located, I do not accept that it permits the city to charge entirely new fees not specified in its fee estimate.⁸ Previous orders have found that to conclude otherwise would, "defeat the purpose of providing the appellant with a reasonable fee estimate made"⁹ and would, "compromise and undermine the underlying principles of the Act."¹⁰

[27] I find this reasoning to be persuasive, and I apply it in this appeal. The city's interim decision referred to sections 10(1) and 11 as possibly applying to the record. Notwithstanding its view that these exemptions may apply to the responsive record, the city provided no estimate of the fee associated with severing, or preparing, the record for disclosure. At this point, therefore, if the city ends up proceeding with this request and locates the responsive record, it is not allowed to charge the appellant for preparation fees under section 45(1)(b) of the *Act* to sever information from this record that it considers exempt prior to disclosure.

[28] In the result, I uphold the city's fee estimate, in part, but reduce it to \$100.00 to account for disallowing of the \$19.50 contingency fee and the 25% (or \$30.00) further reduction in its search fee described above. As before, pursuant to section 7(1) of

⁸ See, for example, Order 81 and MO-1699.

⁹ Order MO-1699.

¹⁰ Order 81.

Regulation 823, the city is entitled to request a deposit of 50%, or \$50.00, prior to proceeding with any additional work in furtherance of this request.

Issue B: Should the city's refusal to waive the fee be upheld?

[29] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with 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 6 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.¹¹ The determination of the issue is based on section 45(4) of the *Act* and section 8 of Regulation 823. Those provisions state:

45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed by the regulations.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.

2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

[30] A requester must first ask the institution for a fee waiver before this office will consider whether a fee waiver should be granted. This office may review the

¹¹ Order PO-2726.

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.¹² The institution or this office may decide that only a portion of the fee should be waived.¹³

[31] 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.¹⁴ The following factors must be considered in deciding whether it would be fair and equitable to waive the fees:

- section 45(4)(a): actual cost in comparison to the fee
- section 45(4)(b): financial hardship
- section 45(4)(c): public health or safety
- section 45(4)(d)/ section 8 of Regulation 823: whether the institution grants access, fee of \$5 or less

[32] Any other relevant factors must also be considered when deciding whether or not a fee waiver is "fair and equitable."

Representations

[33] To give context for his request for a fee waiver under section 45(4)(c) of the *Act*, the appellant provides information about the Allandale Station Lands, generally, that he believes to be relevant to the issue. He states that after the land transfer in question took place, and considerable time and resources had been spent by many different parties to fund the GO Station and to repair the historic train station located there, severe chemical contamination of the site was discovered. According to the appellant, human bones on the site have been attributed to the original Indigenous inhabitants of the area; he states that "the GO station was completed and probably built on the ... bones of the original First Nations." In this context, the appellant asserts that:

... the agreement of the purchase and sale between ACDC and the City of Barrie is just one small piece of the puzzle for the production of all documents concerning the Allandale situation, so that the public in general will know the true story of how the governing body of the City of Barrie and the Province of Ontario could commit such a horrendous error.

[34] In support of his assertion that the basis for fee waiver under section 45(4)(c) is established in this appeal, the appellant relies on Order PO-3755, a fee appeal relating

¹² Orders M-914, P-474, P-1393 and PO-1953-F.

¹³ Order MO-1243.

¹⁴ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

to the AODA Alliance. He refers to the appeal as an “application ... under this section for cost free information to be provided;” he claims that the AODA was not charged for access to documents related to the steps taken by the provincial government to comply with the *Accessibility for Ontarians with Disabilities Act*, because the adjudicator accepted that their dissemination will benefit public health or safety. The appellant appears to be suggesting that the AODA’s fee waiver request is analogous to the one he is making in the present appeal. The appellant states:

It is my submission that the above definition should include cost free information to be supplied by the appropriate government body when it comes to the manner of the governance. Without good governance, public health and safety is at risk.

[35] The appellant urges me to find that addressing the offence caused to first nation communities by the disturbing of ancient burial sites and higher cancer incidence rates in the area can be effected by providing “cost free” access to the record to inform the public of “the facts” to ensure that “better governance, public health and safety” is achieved. He provides several articles in support of this position.¹⁵

[36] The city’s interim decision explained that its fee waiver denial was based on consideration of the following factors: the scope and nature of the records sought; the information about various environmental assessments and testing that the city has publicly posted on its website with respect to the Allandale Stations Lands; the city’s submissions on the required archaeological assessment submitted to the Ministry of Tourism, Culture and Sport; and the information in the Allandale Station Site Fact Sheet, dated February 2013. The city’s interim decision denying the fee waiver quoted from the fact sheet, with references to communications with the Ministry of the Environment and Climate Change, the Ministry of Labour¹⁶ and the Simcoe Muskoka District Health Unit.

[37] The city maintains that its decision to deny the appellant’s fee waiver request should be upheld because it considered all of the factors in section 45(4) of the *Act* and found none to be applicable, meaning that it concluded that it would not be fair and equitable to waive the fee in this situation.

[38] Regarding the appellant’s claim that the public health or safety factor in section

¹⁵ These attachments are: a January 2015 memo summarizing archaeological and human burial assessments at the Allandale Station Lands; news articles about site archeological reviews (Barrie Examiner, July 2011, APTN website National News, March 2016); AODA Alliance blog post (August 2017); a UK company’s article on its “Good Governance in Health & Safety” services; a Simcoe Muskoka District Health Unit article titled “All-Cause Cancer Incidence,” to 2012; and various environmental investigation reports of the Allandale Station Lands by environmental or geological engineering consultants.

¹⁶ These provincial ministries are identified by the names in use at the time of the interim decision.

45(4)(c) applies, the city submits that the request is not being made in the public interest, but rather reflects the private interest of a party affiliated with the appellant – a party that is engaged in active litigation concerning the subject property. Further, the city argues that it is improbable that dissemination of the agreement of purchase and sale, if it exists, would disclose information highlighting a public health or safety concern or that it would contribute meaningfully to understanding such a concern. The city adds that it has consulted with relevant ministries, health authorities and consultants regarding the Allandale Station Lands and has taken “applicable and appropriate” actions accordingly.

[39] As for its consideration of the other three parts of section 45(4), the city states that since it has not yet fully completed the search, it could not do a comparison of the actual costs versus the fee under section 45(4)(a). However, the city’s view is that the estimated costs are representative of the actual costs that would be incurred in completing the request. The city submits that it also concluded that there was no evidence to support a finding that the financial hardship factor in section 45(4)(b) or the “matters prescribed” factor in section 45(4)(d) are applicable in this appeal.

Analysis and findings

[40] Having reviewed the evidence before me, I uphold the city’s decision not to grant a fee waiver. Specifically, I accept the city’s position that none of the four factors in section 45(4) of the *Act*, or any other relevant factors, weigh in favour of a finding that it would be fair and equitable to grant a fee waiver in this appeal.

[41] The appellant did not rely on any of the factors in sections 45(4)(a), (b) or (d), but the city commented on its consideration of them. On my review, I accept that none of these other considerations in section 45(4) of the *Act* apply in the circumstances. Regarding section 45(4)(a), I am satisfied that the eventual cost of processing, searching for, and/or copying the record would not vary in any significant way from the amount of the fee estimate provided for by this order. To establish the basis for fee waiver under section 45(4)(b), the appellant would have had to provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities.¹⁷ The appellant has not provided such evidence or, as stated, even suggested that paying the fee would cause him financial hardship for the purpose of section 45(4)(b). Similarly, I also find that the prescribed conditions in section 8 of Regulation 823, as specified in section 45(4)(d), do not apply to favour a fee waiver in this appeal.

[42] The focus of the appellant’s submission is that the public health or safety factor in section 45(4)(c) applies to his request. This factor requires a determination that

¹⁷ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

dissemination of the record will benefit public health or safety. There are four key factors that may be relevant in this determination under section 45(4)(c), and I will consider them in turn.

[43] First, there is consideration of whether the subject matter of the record is a matter of public rather than private interest. The responsive record, if it is determined to exist, would deal with the sale of ACDC lands to the City of Barrie. I am not satisfied by the appellant's representations that there is a public interest in this record. In Order PO-3755, which the appellant urges me to consider here, the adjudicator accepted that the subject matter of the records accorded with a genuine public interest in compliance with, and enforcement of, the *Accessibility for Ontarians with Disabilities Act, 2006* by the provincial government. This is distinct from the situation here, where there is insufficient evidence of such a public interest in the terms of the Allandale Lands transfer. Additionally, the appellant has not provided evidence to satisfy me of any meaningful affiliation between himself and the two concerns he relies on as being issues of public interest. Instead, I accept the city's evidence that the interest appears likely to be a private one.

[44] In any event, public interest in this particular context is not considered in isolation as a basis for granting a fee waiver. There must be a direct relation between the subject matter of the record and a recognized public health or safety issue.¹⁸ I have considered the second factor of whether the subject matter of the record relates directly to a public health or safety issue, and I am satisfied, without reviewing it, that it would not. Past orders have identified records that relate directly to the expansion of a landfill site¹⁹ or compliance with air and water discharge standards²⁰ as having such a direct relation. Again, the responsive record here would relate to the transfer of the Station Lands. In my view, its content would not directly relate to any public health or safety issue of the type identified by the appellant, including with respect to any purported connection between public health or safety and "good governance," which he seems to suggest would be belied by the content of the agreement.

[45] My conclusion about the lack of direct connection between the responsive record and any public health or safety issue informs my next conclusion. I find that dissemination of the record would not yield a public benefit by disclosing a public health or safety concern, or that it would contribute meaningfully to the development of understanding of an important public health or safety issue.

[46] Finally, given my conclusion that the appellant's interest is likely a private one, I am also not satisfied that he will disseminate the contents of the record.²¹ This, too,

¹⁸ Orders MO-1336, PO-2592 and PO-2726.

¹⁹ Order PO-2514.

²⁰ Order PO-1909.

²¹ Orders P-2, P-474, PO-1953-F and PO-1962.

stands in contrast to the adjudicator's finding in Order PO-3755 that the appellant, the AODA Alliance, "based on its well-documented advocacy role," would disseminate the contents of the records. This provides yet another basis for distinguishing the facts in this appeal from those before the adjudicator in that appeal, who it should be noted did not order "cost free" access to the records on this basis, contrary to the appellant's assertion in this appeal.²²

[47] I find, therefore, that the appellant has not established that the information in the record relates directly to a matter of public health or safety as contemplated by section 45(4)(c), and I find that it does not apply to justify a fee waiver.

[48] I have also considered other relevant factors in deciding whether or not a fee waiver is "fair and equitable" in the circumstances. Most persuasive of the other factors typically considered²³ is whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the city. I am mindful of the Legislature's intention to include a user-pay principle in the *Act*. The user-pay system is founded on the premise that requesters should be expected to pay the fees associated with a request unless it is fair and equitable that they not do so. As I noted above, the fees outlined 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 is fair and equitable to grant it.²⁴ The appellant has not done so. Accordingly, having considered all of these factors, and in particular, in light of my finding that the factor in section 45(4)(c) does not apply, I find that it would not be fair and equitable to waive the fee.

[49] I uphold the city's decision to deny a fee waiver.

ORDER:

1. I order a reduction of the city's fee estimate to \$100.00 from \$149.50 to reflect the disallowing of the "15% contingency" and 25% of its search fee estimate.
2. I uphold the city's decision to deny the appellant a fee waiver.

²² In Order PO-3755, the adjudicator reduced the search fee to \$750.00, but she did not order the ministry to waive this fee, because she concluded that "waiver of the \$750.00 fee is not fair and equitable in this appeal." See paragraphs 246 and 247.

²³ Orders M-166, M-408 and PO-1953-F. The other factors 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; and whether the requester has advanced a compromise solution which would reduce costs.

²⁴ Order PO-2726.

Original Signed by: _____
Daphne Loukidelis
Adjudicator

November 26, 2018 _____