

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3793

Appeal MA18-527

The City of Windsor

June 25, 2019

Summary: The appellant submitted a request to the City of Windsor (the city) under *the Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to specific parks. The city issued an interim decision with a fee estimate, and the appellant narrowed the request. In response, the city issued an interim decision with a revised fee estimate. Subsequently, the appellant requested a fee waiver on the basis that dissemination of the records will benefit public health or safety under section 45(4)(c) of the *Act*. The city denied the fee waiver. In this order, the adjudicator upholds the city's decision to deny a fee waiver, and dismisses the appeal.

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

OVERVIEW:

[1] The appellant submitted a request to the City of Windsor (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Any and all documents, records, correspondence within the control of the City of Windsor from 2012 to today, regarding Little River Corridor, Black Oak Heritage Park, Ojibway Shores, the Ojibway Prairie Complex as a whole, including:

- any reference to cyclists, public access, park closures, trail closures, trail demolition, complaints, public safety, species at risk, environmental impacts or assessments;
- correspondence to, from the Windsor Port Authority; and
- the sale, transfer, or rezoning of lands.

[2] The city issued an interim access decision containing a fee estimate of \$34,167.10 based on 747.75 hours of search time, 279.93 hours of preparation time and the cost of photocopying approximately 16,796 pages of records. The city advised that some of the responsive records would require third party notification and severance. The city requested a deposit of \$17,083.55 in order to proceed with the processing of the request.

[3] The appellant then narrowed her request to the following:

Any and all documents, records, correspondence within control of the City of Windsor from July 1, 2017 to today, regarding Black Oak Heritage Park and Ojibway Shores, including:

- Any reference to cyclists, public access, park closures, trail closures, trail demolition, complaints, public safety, species at risk, environmental impacts or assessment;
- The sale, transfer, or rezoning of lands.

[4] The city responded to the narrowed request by issuing two time extension decisions, which the appellant appealed to this office. After the appellant submitted her appeal, the city issued an interim access decision on the narrowed request with a revised fee estimate of \$3,951.10. The revised fee estimate was based on 31 hours of search time and 71.93 hours of preparation time. The city advised that some of the estimated 4,316 pages of responsive records would require third party notification and severance. The city requested a deposit of \$1,975.55 in order to proceed with the processing of the request.

[5] The appellant then submitted a request for a fee waiver to the city on the basis that the information is being sought in the interest of public health or safety. The city asked the appellant for additional representations regarding how dissemination of the records would benefit public health or safety. After reviewing the appellant's additional representations, the city denied the fee waiver request, and advised that it would not change its decision with respect to the fees. The city's decision to deny the fee waiver became the sole issue on appeal.

[6] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I

decided to commence the inquiry by inviting representations from the city, initially. Representations were received from the city and shared with the appellant in accordance with this office's *Practice Direction 7: Sharing of Representations*. Although I invited the appellant to submit representations, she declined to submit any.

[7] In this order, I uphold the city's decision to deny a fee waiver, and dismiss the appeal.

DISCUSSION:

Should the fee be waived?

[8] 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. 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.

[9] The fee provisions in the *Act* establish a user-pay principle that 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 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.¹

[10] 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.² Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are:

- 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; and
- Section 45(4)(d)/ section 8 of Regulation 823: whether the institution grants access, fee of \$5 or less.

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

Representations

[12] A Notice of Inquiry (NOI) was sent to the appellant inviting representations. The appellant did not submit any representations by the deadline in the NOI, so this office contacted her to ensure that she received the NOI. The appellant confirmed that she received the NOI, and would not be submitting any representations. The appellant also confirmed that the only issue in this appeal is the city’s decision to deny a fee waiver.

[13] While the appellant did not submit any representations during the inquiry process, she submitted a letter before this appeal proceeded to adjudication, arguing that the dissemination of the records will benefit public health or safety per section 45(4)(c) of the *Act*. This office and the city both received a copy of this letter, and the city responded to this letter in its representations.

[14] The city argues that while the appellant is basing her fee waiver request on public health or safety, the link between the records and any benefit to public health or safety is weak and tenuous at best. The city acknowledges that some of the records sought may have a connection to public health or safety. However, the city argues that the majority of the records either do not have anything to do with public health or safety, or have a tenuous or speculative connection.

[15] The city submits that it worked with the appellant to narrow the request, which

¹ Order PO-2726.

² See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

resulted in a significant reduction of the fee from the initial request. However, the city submits that the records sought by the appellant cover a wide range, and would require many hours of manual searching and vetting. The city further submits that the appellant has not advanced a compromise solution. Therefore, the city argues that based on these circumstances, it would not be fair and equitable to waive the fee, because a fee waiver would shift an unreasonable burden of the cost to the city.

Analysis and findings

[16] After reviewing the evidence before me, I uphold the city's decision to deny a fee waiver. While the appellant submits that the dissemination of the records will benefit public health or safety, she has not provided any evidence to demonstrate there is a connection between the disclosure of the records and a public health or safety issue.³ In the absence of specific representations making this connection from the appellant, the city's position that the majority of the records do not have a public health or safety connection goes unrefuted. Furthermore, the appellant has not argued that the other factors in section 45(4) apply, and I find that none apply in the circumstances.

[17] I have also considered whether it would be fair and equitable in the circumstances to grant a fee waiver. I find that it would not. As stated above, the *Act* establishes a user-pay principle. This principle 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. The fees outlined in the *Act* 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.⁴ The appellant has not provided a persuasive argument as to why it would be fair and equitable for the city to grant a fee waiver.

[18] In considering whether it would be fair and equitable to grant a fee waiver, I also took into consideration that the city worked with the appellant to narrow the scope of her request in order to reduce the fee. The fee estimate was reduced from \$34,167.10 for her initial request to \$3,951.10 for her narrowed request. I also considered that the city estimated that there are 4,316 pages of records responsive to the appellant's narrowed request. I accept the city's position that the narrowed request remains broad and that processing the request could reasonably be expected to require many hours of manual searching, vetting, third party notification and severance. I conclude that granting a fee waiver would shift an unreasonable burden of the cost to the city. Accordingly, I find that it would not be fair and equitable to waive the fee in the circumstances of this appeal.

³ Orders MO-1336, MO-2071, PO2592 and PO-2726.

⁴ Order PO-2726.

ORDER:

I uphold the city's decision to deny a fee waiver, and dismiss the appeal.

Original Signed by: _____

June 25, 2019 _____

Anna Truong
Adjudicator