Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3941

Appeals MA18-00735 and MA19-00249

City of Toronto

August 7, 2020

Summary: The city received two separate access requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to all inspection reports at a specified property for two specified time periods. The city granted partial access to the responsive records for both requests. The appellant then submitted fee waiver requests for both requests, which were denied. The appellant appealed the denial of a fee waiver. In this order, the adjudicator upholds the city's decision to deny the fee waiver.

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

OVERVIEW:

[1] The City of Toronto (the city) received two separate access requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information for two different time periods:

> Details of all inspections and contacts by the City of Toronto and its agencies (i.e. Municipal Licensing & Standards, Building Dept., Fire Dept. etc.) at a [specified address] and its residents.

[2] Appeal MA18-00735 deals with the time period of March 1, 2018 to May 31, 2018 while MA19-00249 deals with the time period of June 1, 2018 to January 9, 2019.

Appeal MA19-00249

[3] For Appeal MA19-00249, the city issued a decision to partially disclose the

responsive records. The city relied on the mandatory personal privacy exemption at section 14(1) of the *Act* to withhold some information from the records. The city advised the requester that the fee to copy and sever the records was $40.00.

[4] In response to the city's decision, the appellant made a written request for a fee waiver pursuant to section 45(4) of the *Act*. Subsequently, the city issued a decision refusing the request for the fee waiver, indicating that the responsive records do not qualify under the public health or safety provision of the *Act*.

Appeal MA18-00735

[5] For Appeal MA18-00735, the city issued a decision to partially disclose the responsive records. The city relied on the exemption at section 14(1) and the section 52(2.1) exclusion (ongoing prosecution) of the *Act* to withhold some information from the records. The city advised the requester that the fee to copy and sever the records was $23.00.

[6] The requester, now the appellant, appealed the city's decision in both appeals. For Appeal MA19-00249, he appealed the city's denial of the fee waiver.

[7] During mediation for Appeal MA18-00735, the appellant indicated that he was seeking access to the records denied in full pursuant to section 52(2.1). He also advised that he was seeking specific information about the ongoing prosecution related to the specified address. The appellant further advised that he was concerned about public safety related to illegal rooming houses.

[8] Subsequently, the city advised that it was no longer proceeding with the charges against the owners of the specified address and that it would issue a revised decision. In its revised decision, the city granted partial access to the remaining responsive records. The city withheld records either in whole or in part, claiming section 14(1) of the *Act*. In addition, the city advised that some information was removed on the basis that it was not responsive to the request.

[9] Upon receipt of the revised decision for Appeal MA18-00735, the appellant paid the fee to the city and subsequently received the responsive records with severances. In further discussions with the mediator, the appellant advised that he was no longer interested in pursuing access to the severed information. Subsequently, he made a written request for a fee waiver for Appeal MA18-00735 to the city. In response, the city issued a decision denying the appellant's request for a fee waiver.

[10] As further mediation was not possible, both appeals were moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[11] During the inquiry, I sought and received representations from the city and the appellant. Pursuant to section 7 of this office's *Code of Procedure and Practice Direction Number 7*, copies of the parties' representations were shared with the other party.

[12] In this order, I uphold the city's decision not to waive the fees.

DISCUSSION:

[13] As a preliminary matter, I note that the city argued that its fees should be upheld. However, I note that the appellant does not take issue with the amount of the fee calculated by the city; he asserts, rather, that the fee should be waived in both appeals.[1] As such, I will only be addressing the issue of the denial of fee waiver in this order.

[14] 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,
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> (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);
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> (b) whether the payment will cause a financial hardship for the person requesting the record;
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> (c) whether dissemination of the record will benefit public health or safety; and
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> (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.

[1] The appellant's representations and sur-reply representations do not address the issue of whether the fees should be upheld. I also note that, in the Mediator's Report, the mediator states that the only issue going to adjudication is fee waiver. Neither the city nor the appellant wrote to the mediator to correct the Mediator's Report.

[15] 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 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.[2]

[16] 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.[3]

[17] The institution or this office may decide that only a portion of the fee should be waived.[4]

Representations

[18] The city submits that granting a fee waiver would not be fair or equitable. The city submits that requiring city employees to take time away from their core functions to process these requests at no costs would shift an unreasonable burden of costs from the appellant to the city, and ultimately to the taxpayers of Toronto.

[19] The city also submits that it is not evident to it that the appellant has demonstrated there is a public health or safety concern that may be addressed by the dissemination of the information sought. It notes that the appellant argued, in an email, that a fire at the specified property would expose neighbours and their homes to unnecessary risks and possibly devalue their homes. However, the city points out, for example, that the records contain a complaint against the named property owners for overgrown grass and weeds.

[20] It submits that the fire safety issue at the specified property has been addressed by the Toronto Fire Services (TFS) and residents at the specified property were relocated on a specified date. The city states that if neighbours have concerns regarding this specified property, they can contact the city to address any by-law or fire safety issues.

[21] Finally, the city submits that the issues at the specified property do not affect the health or safety of the public at large. As such, it submits that a fee waiver based on the argument that dissemination of the records "will benefit public health and safety"

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[2] Order PO-2726.
[3] Orders M-914, P-474, P-1393 and PO-1953-F.
[4] Order MO-1243.

cannot be granted in this instance.

[22] In response, the appellant points out that the TFS installed a number of smoke detectors and carbon monoxide detectors at the specified property, besides possibly making other improvements. He states that he is interested in seeing the outcome of the TFS legal file for this specified property.

[23] The appellant also submits that the Municipal Licensing and Standards (MLS) officer inspected the specified property in 2017 but did not perceive an acute problem because they were deceived by a "bogus lease". However, he points out that the TFS immediately recognized a problem in 2018. He states that he is most interested in discovering how TFS was involved with the specified property. He points out that there were as many as 12 tenants illegally living at the specified property for an extended period of time without the city's knowledge.

[24] Finally, the appellant submits that the city recognizes that dissemination of the information will benefit the public health and safety in its representations. He points out that a potential fire at the specified property would certainly impact the public and dissemination of that information by our elected representatives and neighbours would enable others to recognize the specified property and report similar properties.

[25] In its reply representations, the city reiterates that the fire safety issue at the specified property has been addressed by the TFS. It explains that a Notice of Violation was issued on a specified date and the next day the residents of this property were relocated. The city states that as per regular TFS procedures, the named property owners would have to comply with the Notice of Violation before any resident(s) can move back into the specified property.

[26] In response, the appellant submits that he would be interested to discover when the TFS was initially alerted (and by whom) to the public and health safety issues at the specified property. He reiterates that a MLS officer investigated the specified property as early as August 2017 but did not note any violations and closed the file. The appellant points out that nine months later the TFS immediately closed down the specified property and evicted residents (who were living in the admitted rooming house). He also reiterates that it would be interesting to discover why the TFS made significant improvements to the specified property and cancelled its legal file on the residence.

[27] In addition, the appellant submits that the city failed to recognize the dangers of an illegal rooming house, its impact on the health and safety issues in the neighbourhood, and the ability of elected politicians to advise their constituents of being vigilant of what is happening in their neighbourhood by using the specified property as a classic example.

Analysis and findings

[28] 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.[5] Factors that must be considered in deciding whether it would be fair and equitable to waive the fees include:

- whether the actual cost varies from the amount of the fee, and if so, to what extent;[6]
- financial hardship of the appellant;[7]
- public health or safety;[8] and
- other relevant factors as prescribed by the regulation.

[29] As noted above, the appellant's representations rely primarily on the "public health or safety" factor at section 45(4)(c) for a fee waiver.

[30] In determining whether dissemination of a record will benefit public health or safety under section 45(4)(c) the following are relevant points to consider:

- 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 record 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[9]

[31] The focus of section 57(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know". There must be some connection between the public interest and a public health and

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[5] See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.
[6] Section 45(4)(a) of the *Act*.
[7] Section 45(4)(b) of the *Act*.
[8] Section 45(4)(c) of the *Act*.
[9] Orders P-2, P-474, PO-1953-F and PO-1962.

safety issue.[10]

[32] This office has found that dissemination of the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- expansion of a landfill site [Order PO-2514]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]

[33] Having reviewed the representations of the parties and the points identified as relevant to determine whether section 57(4)(c) applies, I find that the dissemination of the requested records will not benefit public health or safety within the meaning of that provision for the following reasons.

[34] In the current appeal, the appellant has requested access to all inspection records relating to the specified property due to his concern that the specified property may be an illegal rooming house. While I accept that on a very basic level there might be a public interest in whether this property was an illegal rooming house, I am not satisfied based on my review of the records and the appellant's representations that the records themselves relates directly to a public health or safety issue.

[35] With regards to dissemination, I am not satisfied that the appellant will disseminate the contents of the records relating to the fire safety issue.[11] His representations do not state how he would disseminate the contents of these records if he receives a fee waiver.

[36] The appellant does not raise or rely on any of the other factors in section 45(4) of the *Act*, and I find that none apply in favour of a fee waiver. For example, there is no evidence to demonstrate that paying the fees would cause the appellant financial hardship.

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[10] Orders MO-1336, MO-2071, PO-2592 and PO-2726.

[11] As noted by the city, some of the records are about overgrown grass and weeds at the specified property.

Other considerations

[37] Other relevant factors must also be considered when deciding whether or not a fee waiver is "fair and equitable," including:

- 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 compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.[12]

[38] In my view, the remainder of the appellant's representations do not provide a persuasive argument that it would be fair and equitable for the city to grant the appellant a fee waiver based on any of the considerations listed above or any other relevant consideration.

[39] In addition, I accept the city's submissions that the actual costs of employee labour invested in locating, retrieving, processing, and copying the records for both these appeals are actually higher than what the city was allowed to charge the appellant under the *Act*'s fee provisions. (As such, the city argues that the fees for the records are reasonable.) I also accept the city's submissions that a fee waiver would shift an unreasonable burden of the cost from the appellant to the city. In my view, the appellant has not provided a sufficiently persuasive explanation for why the city ought to bear the full cost of processing his requests while he should bear none. I am also not satisfied that this is an appropriate case to order a partial fee waiver.

[40] Therefore, upon review of the evidence before me, I find that it would not be fair or equitable to waive the fees for either of these appeals. For these reasons, I uphold the city's decision to deny the appellant's fee waiver requests.

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[12] Orders M-166, M-408 and PO-1953-F.

ORDER:

I uphold the city's decision to deny a fee waiver for both appeals.

Original signed by: August 7, 2020

Lan An
Adjudicator