

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3225

Appeal MA14-167

Regional Municipality of Durham

July 29, 2015

Summary: The Regional Municipality of Durham received a request under the *Act* for access to records relating to the waste incinerator in Clarington, Ontario during a specified time period of approximately six years.

In its interim decision, Durham advised the appellant that it would cost an estimated \$12,729.70 to process the access request. During mediation, the appellant submitted a fee waiver request to Durham on the basis that the dissemination of the public record will benefit public health and safety, as set out in section 45(4)(c) of the *Act*. Durham denied the appellant's request for a fee waiver. During the inquiry, the appellant raised the issue of whether Durham has an obligation to disclose the records under section 5(1) of the *Act*. In addition, Durham reduced its fee by 25 percent.

In this order, the adjudicator finds that she does not have the jurisdiction to make an order pursuant to section 5(1) of the *Act*. She also upholds Durham's fee estimate, in part, reducing the fee estimate for the preparation of records. Lastly, the adjudicator upholds Durham's decision to not grant the appellant's request for a fee waiver.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 5(1), 45(1) and 45(4)(c); Regulation 823 sections 6, 6.1 and 8.

Orders and Investigation Reports Considered: Order 65.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of a decision of the Regional Municipality of Durham (Durham). Durham received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the waste incinerator in Clarington, Ontario during a specified time period of approximately six years.

[2] In its interim decision, Durham advised the requester that it conducted a sample search to determine a fee estimate for responsive records. Durham advised the requester that based on the sample search, it would cost an estimated \$12,729.70 to process the access request. Included in the fee estimate was a detailed breakdown of the fee. In addition, Durham advised the requester that some records may be withheld under sections 10 (third party commercial information), 12 (solicitor-client privilege) or 14 (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed Durham's fee estimate decision to this office.

[4] During the mediation of the appeal, the appellant submitted a fee waiver request to Durham on the basis that the dissemination of the public record will benefit public health and safety, as set out in section 45(4)(c) of the *Act*. Durham denied the appellant's request for a fee waiver and maintained its position on the fee outlined in its decision.

[5] The appeal was then transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from Durham and the appellant, which were shared in accordance with this office's *Practice Direction 7*. In his representations, the appellant raised the issue of whether Durham has an obligation to disclose the records under section 5(1) of the *Act*. The adjudicator added this as an issue in the appeal and sought and received reply representations from Durham on this issue. In addition, in its representations, Durham indicated that it would reduce its fee estimate by 25 percent.

[6] The appeal was then transferred to me for final disposition. For the reasons that follow, I find that:

- I do not have the jurisdiction to make an order pursuant to section 5(1) of the *Act*;
- Durham's fee estimate should be upheld, in part; and
- The fee should not be waived.

ISSUES:

- A: Did the institution have an obligation to disclose the records under section 5(1)?
- B: Should the fee or fee estimate be upheld?
- C: Should the fee be waived?

DISCUSSION:

Issue A: Did the institution have an obligation to disclose the records under section 5(1)?

[7] The appellant has raised section 5(1) of the *Act* as an issue. Section 5(1) states:

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[8] The appellant submits that the waste incinerator that is the subject matter of the request is causing significant environmental damage to the extent that the records at issue would reveal a grave environmental, health or safety hazard to the public.¹ Consequently, the appellant argues, the records should be disclosed by Durham in compliance with section 5(1) of the *Act*.

[9] In reply, Durham submits that while the appellant's opinion may be that the waste incinerator poses an environmental, health or safety hazard, he has not identified which of the records requested would reveal a grave environmental, health or safety hazard. Durham goes on to argue that none of the specific records requested reveal any of the hazards described above.

[10] Section 5(1) is a mandatory provision which requires the head to disclose records in certain circumstances. In Order 65, former Commissioner Sidney B. Linden found that the duties and responsibilities set out in section 11(1) of the provincial *Act* (the provincial equivalent provision to section 5(1) of the municipal *Act*) belong to the head

¹ The appellant provided extensive representations on the type of environmental harm caused by the waste incinerator, which will not be reproduced in this order, but were taken into consideration.

alone. In the circumstances of this appeal, I will not review Durham's decision not to release the records under section 5(1).²

Issue B: Should the fee or fee estimate be upheld?

[11] An institution must advise the requester of the applicable fee where the fee is \$25 or less. Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.³ 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.⁴

[12] 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.⁵ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁶ In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁷

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

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

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

² See also my finding below that I do not have sufficient evidence to establish that the subject matter of the records relates directly to a health and safety issue.

³ Section 45(3).

⁴ Order MO-1699.

⁵ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁶ Order MO-1520-I.

⁷ Orders P-81 and MO-1614.

- (e) any other costs incurred in responding to a request for access to a record.

[14] More specific provisions regarding fees are found in sections 6 and 6.1 of Regulation 823. Those sections read, in part:

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.

6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.

[15] Section 45(1)(b) includes time for severing a record⁸ and for a person running reports from a computer system.⁹ Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.¹⁰

[16] Section 45(1)(b) does not include time for:

- deciding whether or not to claim an exemption;¹¹
- identifying records requiring severing;¹²

⁸ Order P-4.

⁹ Order M-1083.

¹⁰ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

¹¹ Orders P-4, M-376 and P-1536.

- identifying and preparing records requiring third party notice;¹³
- removing paper clips, tape and staples and packaging records for shipment;¹⁴
- transporting records to the mailroom or arranging for courier service;¹⁵
- assembling information and proofing data;¹⁶
- photocopying;¹⁷
- preparing an index of records or a decision letter;¹⁸ or
- re-filing and re-storing records to their original state after they have been reviewed and copied.¹⁹

[17] Section 45(1)(c) includes the cost of photocopies or computer printouts and/or CD-ROMs.

[18] Durham submits that the fee estimate should be upheld. It states that it provided a letter to the appellant, setting out the breakdown of the fee. This breakdown, it advises, includes estimates of staff search time in each of the departments holding records, record preparation time (which includes an approximation of records that may have severances) and copying charges. The estimate also includes a general description of the type of records that may be responsive to the request. Durham identified approximately nine thousand pages of records as being responsive to the request.

[19] Because of the breadth and scope of the appellant's five-page request for records, Durham states that it conducted a representative sample search for records from all departments covering a one-year period. Durham submits that the one-year period was sufficient to provide it with an approximate number of responsive records, and to create an appropriate estimation of the search and preparation required. Durham also states that it sent an internal memorandum to each department, asking them to record the search time, the type of records located, the percentage of those

¹² Order MO-1380.

¹³ Order MO-1380.

¹⁴ Order PO-2574.

¹⁵ Order P-4.

¹⁶ Order M-1083.

¹⁷ Orders P-184 and P-890.

¹⁸ Orders P-741 and P-1536.

¹⁹ Order PO-2574.

records that will likely be severed, and an indication of the exemption(s) to be applied. Durham goes on to state that it provided each department with guidance to ensure that the types of activities that have been held by this office not to be included in "search and preparation" time were not included in the fee estimate.

[20] With respect to its approach to the search for responsive records, Durham states:

In this case, the individuals in each department were looking for documents containing terms/details as outlined in the Appellant's 5 pages of requests. That meant they were obligated to go through every document in their Energy from Waste files to search for references to any of those requests. In some instances it would be searching for correspondence to/from specific individuals and in other instances it was searching for specific contracts, reports or invoices. The Region's files are not sorted, nor filed in such a fashion as to have a producible document that would have a listing of that information. As the Region is not obligated to create records in response to a request, it meant the Region had to go through entire files to find any responsive records . . .

[21] Durham goes on to submit that it appropriately captured the costs involved, as follows:

- search and records preparation, respectively – 7.50 for each 15 minutes;
- severing records – 2 minutes per page, which is included in the records preparation time;
- photocopying – 20 cents per page;
- copying of discs – 10.00 per disc; and
- invoice for courier costs to ship records to Durham for processing – \$200.00.

[22] The fee estimate letter, which will not be re-produced in this order, sets out the search time, record preparation time, number of pages, percentage of pages to be severed, copying charges and courier charges for each of Durham's departments involved in searching for responsive records.

[23] Lastly, Durham advises that it is willing to reduce the fee estimate by 25 percent to \$9,500.00 because one department completed locating responsive records for the entire time period in the request due to a smaller number of records in its possession.

[24] The appellant's representations do not address the dollar amount of each of the components of the fee estimate.

[25] Based on my review of Durham's representations and in the absence of any evidence to the contrary, I find that the search time it estimates to locate responsive records is reasonable. In making my decision, I took into consideration the expansive breadth and scope of the appellant's request, which was not narrowed by him at any point in the appeals process. Given that the search parameters identified in the request were clearly identified, Durham conducted a search for samples of responsive records. I am satisfied that Durham's estimate in regard to its search for responsive records is reasonable and that it can charge the appellant \$30.00 per hour, as prescribed by Regulation 823, section 6.3. I also note that Durham has reduced its fee estimate by 25 percent, as one of the departments that conducted a search located all of its responsive records for the time period set out in the request.

[26] With respect to Durham's estimate to prepare responsive records, this office has accepted that it takes two minutes to sever a page that requires multiple severances.²⁰ I find that the ministry's baseline charge for its preparation time is reasonable and in accordance with the \$30.00 per hour preparation time prescribed by Regulation 823, section 6. However, I also find that Durham's fee estimate with respect to the number of pages it would be preparing/severing for disclosure is unduly high. Durham states in its fee estimate letter to the appellant that approximately:

- five percent of 1084 pages from its Works Department may have severances or possibly be withheld;
- 80 percent of 2520 pages from its Legal Services Department will be withheld;
- one percent of 4500 pages from its Finance Department will have severances; and
- it is expected that most, if not all of the records from the Corporate Services Department will be disclosed in full.

[27] However, also set out in its fee estimate, Durham charges two minutes per page for all of the records from its Works, Legal Services and Finance Department. In other words, it charges for 2 minutes per page (or \$30.00 per hour) of severing for each of the 1084, 2520 and 4500 pages in the three departments, despite its statement that only certain percentages of those pages would be severed. Durham's estimated fee for the preparation of records is \$8,100.00.

[28] Consequently, given that Durham also states that it will only be severing a certain percentage of the total number of pages, I find that it has over-estimated the time that will be needed to sever pages of records.²¹ Based on the percentages provided by Durham, I find that the number of pages requiring severing is 2115, which is broken down as follows:

²⁰ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

²¹ See Orders MO-2733 and PO-3152.

- 54 pages from the Works Department;²²
- 2016 pages from the Legal Services Department;²³ and
- 45 pages from the Finance Department.²⁴

[29] The time taken to sever 2115 pages is 4230 minutes, or 70.5 hours. The baseline fee to prepare records for disclosure is \$30.00 per hour. Therefore, I find that the appropriate fee to be charged for preparing records for disclosure is \$2,115.00.

[30] Section 45(1)(c) includes the cost of photocopies. Durham identifies approximately 9000 pages of records which would have to be photocopied. Durham's estimated photocopy charge is in accordance with the \$0.20 per page fee prescribed by Regulation 823, section 6.1. Given that Durham's photocopy charge is based on the prescribed fee, I find that it is reasonable.

[31] Durham's fee estimate includes a \$200.00 shipping charge to deliver records to it. To calculate this fee, Durham obtained a quote from the courier company it uses. I find that this charge is reasonable.

[32] Having regard to the above, I find that Durham's estimated fee representing its search time in addition to its photocopying and shipping charges is reasonable. Conversely, I find that the fee estimate for the time spent preparing records is unreasonable and for the reasons described above, I have reduced that component of the fee estimate to \$2,115.00.

[33] As the appellant has requested a fee waiver, I will now determine whether Durham's fee should be waived, in whole or in part.

Issue C: Should the fee be waived?

[34] 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);

²² Representing five percent of 1084 pages.

²³ Representing 80 percent of 2520 pages.

²⁴ Representing one percent of 4500 pages.

- (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.

[35] 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.²⁵

[36] 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.²⁶ The institution or this office may decide that only a portion of the fee should be waived.²⁷

Part 1: basis for fee waiver

[37] Durham submits that a fee waiver should apply only where there is an actual connection between the records and a public health and safety issue. In this case, Durham argues, it has considered the request for a fee waiver and has determined that there is no public health or safety concern applicable to or raised by the records requested by the appellant.

²⁵ Order PO-2726.

²⁶ Orders M-914, P-474, P-1393 and PO-1953-F.

²⁷ Order MO-1243.

[38] The appellant provided extensive representations, most of which will not be re-produced in this order, as they are confidential. However, I did take them into consideration in determining the disposition of the appeal. The appellant's position is that the fees associated with the request should be waived because exposure to the waste incinerator's emissions pose a grave environmental, health or safety hazard to the public, and that the records will provide direct and indirect evidence to explain how the incinerator was "created and approved."

[39] Previous decisions from this office identified four factors which may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c). If the factors are met, then part 1 of the two-part test has been met to establish the basis for a fee waiver. The four factors are:

- 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.²⁸

[40] The focus of section 45(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 safety issue.²⁹

[41] I am satisfied that the subject matter of some of the records described in the request relating to the waste incinerator project, concern a community of residents and thus is a matter of public rather than private interest. However, I also find based on the appellant's representations and the broad scope and nature of his request that I do not have sufficient evidence before me that the subject matter of the records relates directly to a public health or safety issue. The appellant's request is for contracts,

²⁸ Orders P-2, P-474, PO-1953-F and PO-1962.

²⁹ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

Oaths of Office, voting records, expenses, authorizations, gasoline tax financing correspondence, records relating to sporting events, business trips and political party sponsored events, an employment contract, and a construction status report, among other correspondence regarding the waste incinerator project. While the appellant sets out his concerns in his representations about the environmental hazards of waste incinerator projects generally, he has not provided sufficient evidence to demonstrate that the records he has specifically requested, although they may be of public interest, relate directly to a public health or safety issue.

[42] Consequently, I find that part one of the two-part test in section 45(4)(c) has not been met and I uphold Durham's decision to deny the appellant's fee waiver request.

ORDER:

1. I uphold Durham's fee estimate, in part. The fee estimate for the preparation of records for disclosure is reduced to \$2,115.00.
2. I uphold Durham's decision to not grant the appellant's fee waiver request.

Original Signed By:
Cathy Hamilton
Adjudicator

July 29, 2015