

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3787

Appeal MA18-00716

Nottawasaga Valley Conservation Authority

June 12, 2019

**Summary:** The appellant filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Nottawasaga Valley Conservation Authority (NVCA). His original request was “to see” any and all information related to him, his wife, and his property. After communicating with the appellant, the NVCA determined that he sought a specified permit. Accordingly, the NVCA issued a fee estimate to the appellant. He believed it excessive, and asked to see the entire file. The NVCA issued a revised access decision in response to the revised scope of the request, but waived any additional fees associated with the additional records being sought. The appellant appealed the NVCA’s decision. Through mediation, he reverted to the original scope of his request (that is, “any and all” information related to him, his wife, and his property) and asked the NVCA for a fee waiver. In response, the NVCA issued another revised fee estimate, again waiving any additional fees associated with pursuing the wider scope of responsive records. The NVCA also denied his request for a fee waiver. In this order, the adjudicator slightly reduces the fee estimate, upholds the NVCA’s decision to deny a fee waiver, and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 45(1) and (4), Regulation 823, sections 6, 6.1, 7(1) and 8.

**Order Considered:** Order PO-3002.

### OVERVIEW:

[1] The Nottawasaga Valley Conservation Authority (the NVCA) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

I would like to see any and all information related to me personally or related to my property. Any permits issued by NVCA or any other institution/person related to my property, namely [specified address]. Any and all information any files held by NVCA, related to me [named requester] or my wife [named individual]. And in general all the information held by NVCA.

[2] In response to the request, the NVCA issued a fee estimate of \$80.60, after having clarified with the requester that what he was seeking was a permit related to his property. The NVCA requested a payment \$75.60 (after the subtraction of the \$5.00 fee paid)<sup>1</sup> and advised that the responsive record would be disclosed on receipt of payment.

[3] The requester and the NVCA then exchanged emails, and through that correspondence, he advised the NVCA that he wanted to see the entire file, not just a permit. The NVCA then issued a revised fee estimate. The revised estimate deducted the photocopying charge, given the request to "see" the records, and waived any additional costs associated with the expanded scope of the request. Since additional fees were waived, the outstanding amount was still \$75.00. The NVCA requested this and advised that it would disclose the responsive records (subject to any severances required) on receipt of payment.

[4] The requester (now the appellant) appealed the NVCA's decision to this office.

[5] During mediation, the following transpired:

- the appellant asked for further details of how the fee estimate was calculated;
- the appellant reverted to the scope of his original request (any and all information related to him, his wife, and his property), which led to the NVCA issuing a third fee estimate and interim access decision, waiving any additional fees associated with providing access to the expanded scope of records (about 500 pages);<sup>2</sup>
- the NVCA clarified the anticipated basis of withholding information: the personal privacy exemptions at sections 14 and 38(b), and not sections 4(2) and 17(1)(a) of the *Act* as identified in the third fee estimate;
- the appellant requested a fee waiver from the NVCA, which was denied.

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<sup>1</sup> The *Act* and Regulation do not require that the \$5.00 application fee be deducted from the fee estimate for responding to a request. Nevertheless, I will not interfere with the NVCA's decision to do so.

<sup>2</sup> I note that Section 45(1)(b) does not include time for deciding whether or not to claim an exemption (Orders P-4, M-376 and P-1536), identifying records requiring severing (Order MO-1380), or identifying and preparing records requiring third party notice (Order MO-1380).

[6] When no further mediation was possible, the file moved to adjudication on the issues of fee estimate and fee waiver.

[7] I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the NVCA. The NVCA provided written representations in response. These representations were shared with the appellant, on consent. Several additional rounds of representations were exchanged between the parties, due to the appellant's request for certain forms of documentation.

[8] For the reasons that follow, I uphold the NVCA's fee estimate, in part, and its decision to not grant a fee waiver.

## **ISSUES:**

- A. Should the NVCA's fee estimate be upheld?
- B. Should the NVCA's fee be waived?

## **DISCUSSION:**

### **Issue A: Should the NVCA's fee estimate be upheld?**

[9] For the reasons that follow, I uphold the institution's fee estimate, in part.

[10] In this case, the fee estimate provided to the appellant is \$80.00.

[11] Since the fee estimate exceeds \$25, the NVCA had to provide the appellant with a fee estimate,<sup>3</sup> and did so. 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. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.

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

[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.

[14] Section 45(1) requires an institution to charge fees for requests under the *Act*. The relevant portions of that section say:

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<sup>3</sup> Section 45(3) of the *Act*.

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; [and]

. . . .

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

[15] More specific provisions regarding fees are found in sections 6, 6.1,<sup>4</sup> 7 and 9 of Regulation 823.

[16] The relevant parts of section 6 of Regulation 823 say:

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.

. . . .

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.

. . . .

### ***Calculation of fee estimate***

#### *Basis of fee estimate*

[17] The fee estimate at issue is \$80.00, as follows:

Administration fee	\$ 5.00
Search time (2.5 hours at \$30/hour)	\$75.00

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<sup>4</sup> In this case, the NVCA and the appellant have both submitted, and I accept, that the responsive record to which the fee estimate relates (a permit) does not contain the personal information of the appellant. Therefore, section 6.1 of Regulation 823 is not relevant in this appeal.

Preparation time (# of hours at \$30/hour)	waived
Photocopying (# of pages at \$0.20/page)	<u>waived</u>
	TOTAL: \$80.00
	Paid: <u>\$ 5.00</u> <sup>5</sup>
	Balance remaining: \$75.00

[18] As noted above, the NVCA waived any additional fees to prepare the other responsive records for viewing, over and above the fees relating to the permit alone.<sup>6</sup>

#### Administration fee

[19] The NVCA charged the appellant a \$5.00 administration fee, but adopting the reasoning of previous IPC decisions, I disallow this portion of the fee estimate. I find that an "administration fee" does not constitute "any other costs incurred in responding to a request for access to a record" under section 45(1)(e) of the *Act* because it is not clear that this fee reflects an actual "cost incurred" by the institution.

[20] In Order PO-3002, the IPC held that in a disclosure under the *Act*, an administration fee must be disallowed because it is not contemplated under the *Act* or *Regulations*. In that order, this office also stated that if an institution would like to set up a system of alternate access, it may be possible to charge an administrative fee, but under such a system, other fees contemplated by the *Act* would not be permissible because this would not constitute a disclosure under the *Act*.<sup>7</sup>

#### Manual search fee

[21] Because the appellant changed the scope of what he was seeking in the course of his dealings with the NVCA, the NVCA had to issue multiple fee estimates to reflect that. The fee estimate at issue (the third one) identifies the estimated manual search time as 2.5 hours. The first two fee estimates for the NVCA's manual search fee charged the appellant \$15.00, reflecting a half-hour search time, separate from what was identified as two hours of "preparation time" to "extract" responsive information.

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<sup>5</sup> As mentioned, the *Act* and Regulation do not require this to be deducted, but I will not interfere with the decision to do so.

<sup>6</sup> If any of those records include the appellant's personal information, under Regulation 823, section 6.1, the fees that an institution can charge under section 45(1)(a) do not include fees for manually searching a record for the requester's personal information. I make no findings about the propriety of the waived fees, as the details pertaining to the additional records to which they relate are not before me.

<sup>7</sup> Order PO-3002 citing, as an example, the decision concerning an alternate scheme for access to accident reconstruction reports prepared by the Niagara Regional Police in Order MO-1573.

But, as I will explain, I find that the fee estimate at issue properly identifies the estimated manual search time as 2.5 hours.

[22] The NVCA explains that it had to search for the permit pertaining to the appellant's property (as that is what he was initially charged for, having at first narrowed the scope of his request).

[23] During mediation, the NVCA provided details of its efforts to locate the responsive record and issued another revised fee estimate (its third fee estimate in relation to the request), itemizing its manual search time as 2.5 hours. The *Act* sets the rate at \$30.00/hour, so the NVCA listed its search charge as \$75.00 (\$30.00 x 2.5).

[24] The appellant argues that it took another specified township "two minutes" to locate a comparable record. The NVCA submits, and I find, that the NVCA cannot speak to how another institution deals with requests under the *Act*. I accept that different institutions may store similar records in more than one way, and that this may affect manual search times. What I must do in this appeal is determine whether the fee estimate provided by the institution that issued the fee estimate to the appellant (the NVCA) should be upheld, not compare the storage or freedom of information procedures of different institutions.

[25] The appellant submits that an "FOI [freedom of information] search form" is necessary to clarify the time spent on searching, but I do not find that to be the case. This office does not request or require such evidence in processing appeals of this nature, as a matter of course. Moreover, the NVCA states that time spent conducting a search was tracked and used for the fee estimate letter to the appellant. The evidence before me is sufficient for me to accept and find that the NVCA asked its staff to track the time spent on searching so that it could be included in the fee estimate.

[26] The NVCA filed an "FOI search form" during the inquiry. The appellant asks that I accord it little weight. The NVCA acknowledges that the FOI search form provided to this office during the inquiry, in response to the appellant's request for it, was not completed at the time the request was made.<sup>8</sup> I observe that while the completion of such forms when a request is received may be helpful to assessing a fee estimate, it is not required under the *Act*. Nor is the provision of any affidavits from any staff asked to assist in responding to the request. Therefore, I do not accept the appellant's repeated submissions in relation to the weight to be given the FOI search form, or regarding affidavits provided during this inquiry (or not provided by one specified staff member).

[27] Nevertheless, I have also considered the NVCA's search form in coming to my decision to uphold the NVCA's fee estimate. The appellant submits, essentially, that I

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<sup>8</sup> Through this appeal, the NVCA has apparently changed its procedures to include the completion of search forms in tracking time for fees/fee estimates.

give low weight to the information in this document because he believes it must have been prepared from memory. I do not accept that position because the NVCA reasonably explained why it is not true: its staff had always been asked to keep track of time for fee estimate decisions, just not in the search form format (until this appeal). This is a reasonable explanation and I accept it. As a result, I decline to accept the appellant's view of the weight to be given this evidence.

[28] Turning to the FOI search form itself, I find that it provides evidence that favours upholding the fee estimate. The FOI search form identifies staff members conducting the search by name and title, and described the methods of search and included notes about what was found, if anything. Accompanying this information are time allotments and the initials of the staff involved. For the purpose of this appeal, I find that the following details from the FOI search form are relevant and weigh towards accepting the manual search time of 2.5 hours as reasonable:

- a wide variety of paper files (described in detail on the form) were searched;
- a specified staff member took half an hour to find a banker's box regarding the address in question and sent it to another specified staff member to search it;
- the specified staff member to whom the banker's box was sent (and/or another identified staff member) took an hour and a half to review the materials in the banker's box to determine which subdivision the subject property was in, as the site plan submission was not a survey of the subject lands but a dwelling under a construction survey for lots to the east of the property; and
- another half hour was spent on manual electronic searches: a quarter of an hour was spent by each of two specified staff members to search addresses on "UNC" and to review GIS mapping to determine property location and review the findings together.

[29] In addition, the appellant repeatedly disputed the time claimed for "extracting" information that he had not asked to be extracted, but I find that the NVCA provided persuasive evidence that what it had initially described as "preparation time" to "extract" information is actually manual search time. The NVCA explains that appropriate staff were tasked with the search for responsive information and that all files pertaining to the property in question are kept within the NVCA Administrative building. The NVCA further explains that the file for the entire subdivision fills a box and the file for the "block" containing the appellant's property is about 500 pages. The NVCA states that the appellant only received information about the final plan from the Land Registry office, but since the NVCA goes back and forth with developers for draft plan changes, it is required to keep all of those drafts. As a result, the NVCA was required to take the time to go through all of the records in a file to find the responsive

information, which includes internal and external correspondence, third party technical review studies, and permits.<sup>9</sup> I accept this explanation, and find that the steps described as “extract[ion],” were actually to manually search for the responsive record.

[30] In summary, in the circumstances of this case, I am satisfied that the manual search time has been calculated in accordance with the requirements of the *Act*, despite the confusing wording about “extracting” information found in its first two fee estimate decision letters. I find that the \$15.00 fee charged for a half-hour spent searching the NVCA’s electronic and paper files is reasonable. Having considered the NVCA’s detailed explanation of what was required to locate the responsive record in its representations, I also find that the \$60.00 fee for two hours (at \$30.00 an hour) described as needed to “extract” the information qualifies as manual time to search for the record. Accordingly, I find that manual search portion of the NVCA’s third fee estimate is reasonable, and I uphold it.

#### Preparation time and photocopies

[31] The NVCA waived fees related to preparation time and photocopies, so I will not discuss those fees further.

#### ***Fee estimate decision summary***

[32] In summary, the fee estimate at issue was for \$80.00, representing \$75.00 for the search and a \$5.00 administration fee. I have found that the NVCA is not entitled to charge a \$5.00 administration fee under the *Act*, but it is entitled to charge the appellant \$75.00 for a manual search. Therefore, I am upholding the NVCA’s search fee estimate of \$75.00.

#### **Issue B: Should the NVCA’s fee be waived?**

[33] For the reasons that follow, I uphold the NVCA’s decision not to grant a waiver of its fee.

[34] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances:

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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<sup>9</sup> A list of all the types of records identified for the appellant’s request was included in the NVCA’s third fee estimate.



(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.

[35] Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee: whether a requester is given access to a record, and whether the amount of payment would be less than \$5. Neither of these considerations apply in this appeal.

[36] The fee provisions in the *Act* establish a user-pay principle that 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.<sup>10</sup>

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

[38] In this case, the appellant asked the NVCA for a fee waiver and the NVCA denied it in full.

### ***Fair and equitable***

[39] 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. Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are found at sections 45(4)(a) to (d).

[40] The appellant's representations to this office do not directly address the factors

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<sup>10</sup> Order PO-2726.

listed at sections 45(4)(a) to (d). However, I will consider whether his representations address the underlying issues of these factors, below.

[41] The appellant argues, in part, that the fee estimate should be waived because:

- his request was misunderstood from the beginning;
- there was no reasonable effort to understand his request from the beginning; and
- the NVCA's decision letters did not comply with the provisions of the *Act* in that they did not mention the possibility of a fee waiver.

[42] On the basis of the evidence before me, I do not accept the appellant's arguments on these points.

[43] I find that the wording of the appellant's request was clear, and initially relatively broad, which led the NVCA to make contact with him to understand what he was really seeking. On the basis of those communications, the NVCA determined that what he wanted to see was actually the permit relating to his property. The NVCA appropriately issued a fee estimate on that basis.

[44] Having objected to the fee estimate provided, the appellant contacted the NVCA again. This resulted in him seeking the whole file involved. The NVCA was right to then issue a revised fee estimate.

[45] When the scope of the appellant's request changed again at mediation, a third decision letter was issued. Again, this was not a mistake on the part of NVCA.

[46] In addition, any inadequacy in the fee estimate letters on the issue of fee waiver has been remedied through the appeal process: the appellant has had an opportunity to request a fee waiver, and made such a request. I also agree with the NVCA's position that failing to mention the fee waiver option in the letters is not enough to now make a fee waiver fair and equitable in the circumstances.

[47] For these reasons, I find that the NVCA did not misunderstand the appellant's request, and made reasonable efforts to understand it from the beginning.

[48] I will now consider the factors at section 45(4) of the *Act*.

*Section 45(4)(a): actual cost in comparison to the fee*

[49] The NVCA submits that the actual cost of processing and collecting the permit does not vary from the amount of the fee estimate. Therefore, this is not a relevant factor in the circumstances.

*Section 45(4)(b): financial hardship*

[50] The fact that a fee is large does not necessarily mean that payment of the fee will cause financial hardship. The appellant disputes the basis of the \$75.00 fee estimate, but that is different from submitting evidence that he could not afford paying that sum. 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.

[51] In this case, the NVCA submits, and I find, that the appellant did not do so.

[52] Therefore, without evidence that payment of the fee will cause the appellant financial hardship, I find that this factor does not apply.

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

[53] The NVCA asserts that dissemination of the record will not benefit public health or safety. Based on the evidence before me, I find that there is insufficient evidence to conclude otherwise.

[54] 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 record would yield a public benefit by
  - disclosing a public health or safety concern, or
  - 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.<sup>11</sup>

[55] 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.

[56] Having reviewed the appellant’s representations, I am unable to find that he has

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<sup>11</sup> Orders P-2, P-474, PO-1953-F and PO-1962.

established this. Here, the record for which the fee estimate at issue relates is a permit concerning the appellant's house. This suggests a private, not a public, interest. However, the appellant argues that the "real issue is that the NVCA *did not ask the builder, [specified name], to apply for the appropriate permits* for the construction of 30 houses, one of them mine. [Emphasis in original.]" He also submits that more than 100 houses were built by another builder from the same developer that do not have permits. He repeated similar arguments in his representations, but without more sufficient evidence on this point, and the connection between a public interest (if any) and a public safety issue (if any), I find that there is insufficient evidence before me to find that the factor at section 45(4)(c) applies.

*45(4)(d): any other matter prescribed by the regulations*

[57] Neither party has raised the application of this factor, and on my review of the evidence before me, it does not apply.

*Other relevant factors*

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

[59] I find that despite some errors made in processing the appellant's request, the NVCA responded to the appellant promptly and in good faith. This office is mindful of the limited resources and experience that many smaller institutions have. I accept the NVCA's submissions that, as a relatively small institution with a small staff who do not receive a high volume of requests under the *Act*, the NVCA made some errors in processing the appellant's request – and that it took steps to improve its processes when clarifications or possible improvements were flagged by this office. As a result, I do not accept the appellant's repeated contentions without substantiating evidence that any aspect of the processing of his request was made in an effort to be deceitful or

otherwise inappropriate.

[60] Having reviewed the correspondence between the appellant and the NVCA, I find that, while the appellant initially worked constructively with the NVCA to narrow the scope of his request, his subsequent interactions with the NVCA cannot reasonably be described as constructive. Specifically, I find that the language that he used in his correspondence with the NVCA was unconstructive, and I will not repeat it in this order. I find that this cannot reasonably be described as working constructively with the NVCA to narrow the scope of his request or reach a compromise solution that would reduce costs.

[61] Finally, I find that waiving a \$75.00 fee estimate for search time would shift an unreasonable burden of the cost from the appellant to the NVCA. It is well above the \$5 mark that the *Act* identifies as a marker for fees that are too low to collect. The NVCA is entitled to charge fees in accordance with the provisions of the *Act* and the user-pay principle within the *Act*. Considering all of the factors and circumstances mentioned above, I find that in these circumstances, after the lengths that the NVCA has gone to respond to the appellant's request and the appellant's conduct towards its staff, it would be unfair to shift this burden to the NVCA, and I decline to do so.

[62] For all of these reasons, I uphold the NVCA's decision to deny a fee waiver.

**ORDER:**

I reduce the NVCA's fee estimate from \$80.00 to \$75.00 representing 2.5 hours of search time, and uphold its decision to deny a fee waiver.

Original signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

\_\_\_\_\_ June 12, 2019