

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3858

Appeal MA18-00748

Town of South Bruce Peninsula

November 4, 2019

Summary: The appellant made a request under the *Act* to the town for records relating to the piping plover habitat in Sauble Beach. The appellant made a continuing access request that was later divided into three separate requests. Appeal MA18-00748 relates to the appellant's appeal of the town's fee estimate and denial of fee waiver request relating to one of the requests. In this order, the adjudicator upholds the town's fee estimate (with the exception of photocopy costs) but grants a 25% fee waiver to the appellant.

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), and Regulation 823, sections 6, 7 and 8.

Orders and Investigation Reports Considered: Order MO-1380.

Cases Considered: *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056 (CanLII).

OVERVIEW:

[1] On April 17, 2018, the appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of South Bruce Peninsula (the town) for records relating to the piping plover habitat in Sauble Beach. The appellant stated that it sought records for the period beginning February 1, 2018 and continuing for two years. The city received the appellant's request on April 20, 2018 and the first period of the request was therefore February 1 to April 20, 2018. The town identified this period as request 2018-1.

[2] On May 22, 2018, the appellant narrowed the request to the time period of

February 1 to November 1, 2018. According to the appellant, it and the town agreed on the following continuing access schedule:

Date of Request	Period of Consideration
July 3, 2018	April 21 to July 2, 2018
September 4, 2018	July 3 to September 3, 2018
November 2, 2018	September 4 to November 1, 2018

[3] The appellant also clarified the request to include the following:

Copies of all emails between [the mayor] and [the town's] staff and/or contractors regarding raking, tilling, grading, grooming, the use of heavy equipment, or any other activities resulting in the removal, alteration, damage or destruction of vegetation, sand or debris, along Sauble Beach.

Copies of all draft press releases relating to piping plover habitat on Sauble Beach and emails from [the mayor] related to edits to those press releases.

Copies of all emails, correspondence, meeting notes (excluding publically available council meeting minutes and notes) in relation to meetings or discussions between the Town and the Ontario Ministry of Natural Resources and Forestry about raking, tilling, grading, grooming, the use of heavy equipment, or any other activities resulting in the removal, alteration, damage or destruction of vegetation, sand or debris, along Sauble Beach in or near piping plover habitat.

Please exclude emails regarding placement of signs, emptying garbage cans, cleaning washrooms, paid parking machine maintenance, flags, set up for and clean up after events. I do not require any documents from members of the public.

[4] The town located records responsive to the request 2018-1 (i.e. February 1 to April 20, 2018) and issued a final access and fee decision to the appellant. The town's decision 2018-1 resulted in the related Appeal MA17-478. I will not consider the town's access and fee decision relating to the first period of the request in this order.

[5] The town then issued an interim access and fee decision regarding records from April 21 to July 2, 2018. The town identified this decision number as 2018-3. The town provided the appellant with a fee estimate of \$450. The town based this estimate on the search and preparation time for the records subject to its 2018-1 decision.

[6] The appellant appealed the town's fee estimate in decision 2018-3 and requested

a fee waiver, resulting in the opening of this appeal, Appeal MA18-00478.

[7] During mediation, the town advised the mediator that it believed the appellant had abandoned the 2018-3 request because it did not pay the \$5 initial processing fee. Upon review of the file, it appears the appellant attempted to rectify this issue by sending a \$5 cheque to the town. However, the town sent the cheque back to the appellant and took the position that the request for records relating to 2018-3 was abandoned.

[8] In any case, the town advised the mediator that it based its estimate on the work required to locate and prepare the records that were subject to its earlier 2018-1 decision. The town also advised the mediator that it denied the appellant's fee waiver request.

[9] The appellant confirmed its interest in appealing the town's fee estimate and denial of its fee waiver request.

[10] Mediation did not resolve the issues under appeal and the file was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I began my inquiry by inviting the town to submit representations in response to a Notice of Inquiry, which outlines the facts and issues under appeal. In my Notice of Inquiry, I provided the town with an opportunity to comment on its position that the appellant had abandoned its request for the period between April 21 to July 2, 2018. The town submitted representations on the issues of fee and fee waiver. However, the town did not address whether it continues to believe that the appellant abandoned its request. Given these circumstances, I proceeded with my inquiry with the understanding that the appellant did not abandon its request.

[11] I then sought and received representations from the appellant in response to a Notice of Inquiry and the town's representation, which I shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. Subsequently, I sought and received representations in reply from the town and further sur-reply representations from the appellant.

[12] In the discussion that follows, I uphold the town's fee estimate (with the exception of its estimated photocopy fee) but grant a 25% fee waiver to the appellant.

ISSUES:

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

DISCUSSION:

Issue A: Should the fee estimate be upheld?

[13] The fee at issue is \$450 for search and preparation time. For the reasons that follow, I uphold it. However, I find the town is not entitled to charge the appellant for photocopies of the records.

General Principles

[14] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.¹ 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 contents of the records.²

[15] The purpose of the 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.³

[16] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.⁴

[17] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁵

[18] 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.

[19] Section 45(1) of the *Act* requires an institution to charge fees for requests under the *Act*. This section states,

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;

¹ Section 45(3) of the *Act*.

² Order MO-1699.

³ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁴ Order MO-1520-I.

⁵ Orders P-81 and MO-1614.

(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.

[20] More specific provisions regarding fees are found in section 6 of Regulation 823. This section states,

6. The following are the fees that shall be charged for the purposes of section 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 manually preparing a record for disclosure, including severing a part of a 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.

Parties' Representations

[21] The town submits that the fee estimate was based on the actual time spent responding to request 2018-1, which included encompassed a similar period of time and the same search criteria as the request at issue in this appeal. The town submits that the request requires all staff and council representatives to search for responsive records. The town estimated a total of 13 hours of search time for all employees and council members to search all their records in both paper and electronic format, calculated on the search time taken in response to request 2018-1.

[22] The town submits that its Clerk calculated the fee estimate and is familiar with the type of records responsive to the request because she conducted the search for the same types of records in response to request 2018-1. The Clerk submits that she is in charge of records management with the town and is familiar with the types of records

held by the town and the amount of time it would take to search for records. The Clerk also submits that she is aware of the potential number of responsive records, given the request.

[23] With regard to the search, the town states that the responsive records are maintained in both paper and electronic format. The town submits that each employee and member of council would be required to conduct a physical search of the paper records held within their work areas. The town estimates that each of these individuals would take approximately 20 minutes to search their paper records. The town submits that each employee and member of council would also search his or her electronic records, including email. The town submits that these individuals would conduct the search by inputting keywords into their computer search engine and review all documents that meet the criteria. In the case of email records, the town notes that some searches will not capture all of the responsive records. Given these circumstances, the town estimates each employee and member of council will take approximately 20-50 minutes to conduct their computer searches for responsive records.

[24] The town submits that each record must be printed to be reviewed and severed, where necessary, before disclosure. The town submits that the IPC has determined that preparation includes the time for a person running reports from a computer. The town states that the responsive records must be printed and given to the Head for determination of release. The town submits that each staff and council member will be required to physically print the responsive records, which will take approximately 10-15 minutes per person. The town acknowledges that it may not disclose any of the records to the appellant, but submits that there is a possibility that some records may be released in part. With an estimated 76 responsive records comprising 255 pages,⁶ the town submits the preparation time could be 8.5 hours, when it calculates 2 minutes per page for severing the records. However, in the circumstances, the town submits it has estimated 2 hours of preparation for the records.

[25] The town submits that it will charge a fee of \$0.20 per page for photocopying if records are disclosed to the appellant. The town notes that the appellant requested that the documents be sent to them electronically to reduce costs, but the town has decided to send photocopies rather than scanning and emailing.

[26] The town submits that it did not include any shipping or other costs in its fee estimate.

[27] In response, the appellant submits that the town's fee estimate is unreasonable. The appellant submits that its request involves a request for electronic records and

⁶ This number is based on the number of records located in response to request 2018-1.

covers a relatively short and recent timeframe (i.e., between April 21 and July 2, 2018). The appellant submits that the request was made on July 3, 2018, so it is reasonable to expect that such recent records would be readily accessible. The appellant states the town estimated 13 hours of search time, which includes 20 minutes of physical search time and 20-50 minutes of electronic search time, and 2 hours of preparation time. However, the appellant submits that the town did not provide any additional evidence or explanation to further substantiate its fee estimate. Specifically, the appellant submits that the town failed to indicate the proportion of physical records and electronic records and identify the number of individuals involved in the search. The appellant submits that this information is necessary and "crucial" to the determination of the reasonableness of the town's fee estimate.

[28] The appellant submits that its request is narrow in nature. However, the town states that it requested all staff and council representatives to search for responsive records. The appellant submits it is unclear why all town staff would have to search for responsive records, which are "largely limited to emails concerning a specific issue." Given the narrow subject matter of the request, the appellant submits that it is "highly unlikely that all town staff would be privy to the subject matter of the request and be in possession of relevant records." The appellant submits that, by conducting such a broad search, the town has incurred unnecessary search time in response to the request. The appellant submits that it should not have to bear "the costs of the town's inefficiency and failure to identify relevant individuals before conducting a search." In the absence of evidence from the town justifying the need to require all staff and council representatives to conduct a search for records, the appellant submits that it was not necessary.

[29] In addition, the appellant submits that it is unclear which responsive records are kept in paper format. The appellant submits that the related 2018-1 decision suggests that there are no paper records; rather, the majority of the records are email records. The appellant submits that this is consistent with the nature of its request, which largely relates to emails and correspondence. Given these circumstances, the appellant submits that a physical search for records should not be necessary. Even if a search of physical records is necessary, the appellant submits that the estimated 20 minute per employee is excessive given the nature of the request.

[30] The appellant submits that the town failed to discharge its burden in establishing the reasonableness of its estimate because it did not provide evidence or information to support its claim for search. The appellant submits that any search fees for physical searches should not be allowed.

[31] The appellant also submits that the estimated 13 hour search time for electronic records is unreasonable. The appellant claims that a search using relevant keywords should quickly reveal whether there are records responsive to the request. The appellant submits it is unclear why an "email by email" search is necessary in the circumstances. The appellant submits that, in the absence of further information from

the town, the IPC should “assume that such a search was only necessary because ... the searches were conducted by individuals unfamiliar with the subject matter of the records or who lacked a detailed knowledge of the institution’s records management system.” The appellant submits that section 17(1) of the *Act* requires that an “experienced employee” conduct the search. In this case, the appellant alleges that the inability to identify responsive records stems from the inexperience of town staff in conducting the search. Given these circumstances, the appellant submits that the fees resulting from the town’s inexperience should be borne by the town.

[32] With regard the preparation time, the appellant submits that the fee charged by the town is not recoverable. The appellant takes the position that the town’s explanation of the preparation fee estimate does not relate to time for running reports from a computer. Instead, the appellant submits that the town’s claim for preparation time relates to time spent reviewing the records for release, which is not time for which fees may be charged.

[33] In its reply representations, the town submits that it prepared its fee estimate in accordance with the guidance documents provided by the IPC. The town submits it was not aware that it had to provide the exact number of the employees performing the search. The town further clarifies that it only requested that the employees and members of council who could have potentially created or have knowledge of the records to perform a search for responsive records. The town states that it did not include employees that would not have access to or created responsive records.

[34] The town submits that it provided a fee estimate to the appellant based on the previous request. The town submits that it did not perform the entire search. As such, it cannot provide the exact amount of time each individual would spend on the searches. In addition, the town submits that it cannot confirm that there will only be 76⁷ responsive records, as there were in file 2018-1. The town states that it provided the appellant with its best estimate as required by the *Act*.

[35] The town also submits that, contrary to the appellant’s position, its search time for records does not reflect only the time taken to locate records responsive to the request. With regard to the keyword search for responsive records, the town submits that, if no responsive records are located, it will continue to search for other electronic records. The town notes that not every record is stored or named under the same keyword. Therefore, in order to fulfil its requirements under the *Act*, the town searches with the keyword and other parameters, such as date.

[36] The town also takes issue with the appellant’s suggestion that the town staff conducting the searches are not knowledgeable. The town states that it has both paper

⁷ Identified in error as 79 records in the town’s reply representations.

and electronic records and it tasks an employee with a search based on the information sought and the location that responsive records would be located. The town submits it is likely that some employees would spend a shorter time searching as they would have fewer records, while others would locate a large volume of records. Accordingly, the town submits that it provided an average estimate for search time in its fee estimate. The town asserts that its staff are knowledgeable of the records responsive to the request and are aware of the appropriate places to search for records.

[37] The town states that the appellant did not ask for only email records. Furthermore, the town states that there are situations where printing emails and placing them in a paper file has resulted in a shorter search time and has preserved records that may be destroyed inadvertently as a result of a system crash or hack.

[38] The town submits that it has a file listing of its records and there are a limited number of locations to be searched given the subject matter of the request. The town submits that it interpreted the appellant's request in a manner that would not require the town to search every paper record or file. The town interpreted the appellant's request as including any employee who could have corresponded with the mayor regarding the piping plover matter. Therefore, of the over 100 municipal employees, the town asked 17 town employees and five members of council to search their records. The town submits that the estimate includes the time for these individuals to seek responsive records. The town submits that the appellant is not aware of the organizational structure of the town and the individuals that would have access to responsive records.

[39] The town submits that printing records can be construed as "running reports from a computer." The town submits that the records identified must be printed or "run" from the computer. The town submits it is not reasonable for the Head to attend each computer location to determine if the records can be redacted and disclosed. As such, the records are printed and provided to the Head for their review. The town submits that the *Act* provides that costs may be charged for computer and other costs related to locating, retrieving, processing and copying a record.

[40] In its sur-reply representations, the appellant submits that the town did not provide sufficient detail regarding its search method in response to this particular request.

Analysis and Findings

[41] Section 45(3) of the *Act* provides the following guidelines regarding the provision of a fee estimate:

The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over \$25.

[42] The town's fee estimate of \$450 is divided into 13 hours of search time (totalling \$390) and 2 hours of preparation time (totalling \$60).

[43] Based on my review of the town's representations and fee estimate, I am prepared to uphold its fee estimate. In reviewing the town's fee estimate, I am required to ensure that the estimated amounts are reasonable in the circumstances and that they were calculated in accordance with the *Act* and Regulation 823. The burden of establishing the reasonableness of the estimate rests with the town.⁸ To meet this burden, the town was required to provide an adequate explanation of how the fee estimate was calculated as well as sufficiently detailed evidence to support the estimate.

Section 45(1)(a) – search time

[44] The town based its 13 hours of search time on the search time responding to the 2018-1 request. The town advised that it based its estimate on the actual search time responding to the 2018-1 request because the period for this search is nearly identical to that in the 2018-1 request and the subject matter is the same. Given these circumstances, I find that it is reasonable that the town based its estimated search time and fee on the actual time spent responding to an earlier request from the appellant containing the same search parameters and nearly identical period of time.

[45] Based on my review of the parties' representations, I find the town has provided sufficient evidence to support the estimate of 13 hours of search time. The town identified the locations where responsive records could reasonably be expected to be located and the number of staff members and members of council that would be asked to locate responsive records. While the appellant raised a number of concerns regarding the town's estimated search time and fee, I find that the town provided a sufficient explanation in response to the appellant's concerns in its reply representations.

[46] Therefore, I uphold the city's estimated 13 hour search time. However, should the actual search time be less than the 13 hours anticipated by the fee estimate, the town should adjust its final fee accordingly. Given the experience of the town in processing a substantially similar request (i.e., 2018-1), the town may be more efficient and require less time to complete the searches in response to this request, thereby reducing the final search time.

Section 45(1)(b) – preparation time

[47] Section 45(1)(b) includes time for severing a record.⁹ Generally, the IPC has

⁸ Order 86.

⁹ Order P-4.

accepted that it takes two minutes to sever a page that requires multiple severances.¹⁰

[48] The town based its estimated preparation time on the 255 pages located in response to request 2018-1. With an accepted time of two minutes per page, the estimated preparation time would be 8.5 hours. However, the town reduced its preparation time to two hours in anticipation that a number of records will not be disclosed to the appellant. Based on my review of the town's representations, I uphold its estimated two hour preparation time.

[49] I note that the town submits in its representations that the printing of records can be construed as "running reports from a computer." The town submits that the records identified by staff or members of council must be printed or "run" from the computer so that the Head can review them for redaction. While the town's two hour preparation fee appears to only reflect preparation of records for disclosure, I find that printing the records for the Head's review cannot be considered "running reports from a computer." In Order MO-1380, the adjudicator examined section 45(1)(b) and found,

"Preparing the record for disclosure" under subsection 45(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the *Act* (Orders 4, M-376 and P-1536). In my view, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are also not allowable under the *Act*. These activities are part of an institution's general responsibilities under the *Act* and are not specifically contemplated by the words "preparing a record for disclosure" under section 45(1)(b) (see order P-1536).

Based on my review of the town's representations, it appears the town is arguing that printing records for the Head's review should be considered to be part of "preparing the record for disclosure." I disagree. Adopting the language in Order MO-1380, I find that printing the records for the Head's review is more properly considered to be part of the town's general responsibilities under the *Act* during its retrieving and reviewing of records. Therefore, I find that the printing of possibly responsive records for the Head's review is not recoverable under section 45(1)(b) of the *Act*. Should the town decide to charge the appellant a fee for a CD-ROM or USB that would contain an electronic version of the records, it may avail itself of section 6 of Regulation 460.

[50] In addition, I confirm that section 45(1)(b) does not include the time for deciding

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

whether or not to claim an exemption¹¹ or to identify the records requiring severing.¹²

[51] Therefore, I uphold the town's estimated two hours of preparation time to sever and prepare the records for disclosure. However, should the actual preparation time be less than the two hours anticipated by the fee estimate, the town should adjust its final fee accordingly. To be clear, if the town decides to not disclose *any* records to the appellant, it is not permitted to charge preparation fees for records because it will not be severing or preparing records for disclosure.¹³

Section 45(1)(c) – copying the records

[52] In its representations, the town submits that it will charge a fee of \$0.20 per page for photocopying if it discloses records to the appellant. The \$0.20 per page rate is charged in accordance with section 6 of Regulation 823.

[53] However, the appellant has indicated that it would like to received the records in electronic format. In its representations, the town states that it has decided to send photocopies rather than scanning and emailing. The town did not provide any explanation regarding this decision nor did it provide an estimate of the number of pages that will be copied.

[54] Based on my review of the request and the parties' representations, it appears that a large number of the records will be in electronic format and easily transferrable onto a CD-ROM or USB. In the absence of further details from the town on the reasons why it refuses to provide the appellant with the records in an electronic format, I find the town is not entitled to charge the appellant for photocopying fees. However, it is open to the town to charge the appellant \$10 for a CD-ROM or USB that will contain the electronic versions of the records, per section 6.2 of Regulation 823.

[55] In conclusion, I find that the town's evidence supports its fee estimate for responding to the appellant's request. Accordingly, I find that the town's fee estimate of \$450 is reasonable and I uphold it. However, I find the town is not permitted to charge the appellant photocopying fees.

Issue B: Should the fee be waived?

[56] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. This section states,

¹¹ Orders P-4, M-376 and P-1536.

¹² Order MO-1380.

¹³ Order M-562.

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.

[57] 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 or the *Act* requires the institution to waive the fees.¹⁴

[58] 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.¹⁵

[59] The institution or the IPC may decide that only a portion of the fee should be waived.¹⁶

Fair and equitable

[60] 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.¹⁷ Factors that must be considered in deciding whether it would be fair and equitable to waive fees include:

¹⁴ Order PO-2726.

¹⁵ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁶ Order MO-1243.

¹⁷ *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056 (CanLII).

- Whether the actual cost varies from the amount of the fee, and if so, to what extent;¹⁸
- Financial hardship of the appellant;¹⁹
- Public health or safety;²⁰ and
- Other relevant factors.

The appellant has asked that its appeal on the fee waiver decision be based on general *fair and equitable* considerations. In any case, I have considered all of the relevant facts and circumstances before me in deciding whether a fee waiver would be fair and equitable in the circumstances.

[61] Based on my review of the circumstances of this appeal, section 45(4)(a) is not relevant in this appeal because the town has not made submissions on the actual cost it will incur in responding to the appellant's request.

[62] For the financial hardship factor to apply, the appellant must provide some evidence regarding its financial situation, including information about income, expenses, assets and liabilities.²¹ The appellant did not claim this factor and there is no information before me regarding its financial situation. Therefore, I find this is not a relevant factor in this case.

[63] In determining whether dissemination of a record will benefit public health or safety under section 45(4)(c), it is helpful to consider the following factors:

- 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) contribute meaningfully to the development of understanding of a important public health or safety issue;
- The probability that the requester will disseminate the contents of the record.²²

¹⁸ Section 45(4)(a) of the *Act*.

¹⁹ Section 45(4)(b) of the *Act*.

²⁰ Section 45(4)(c) of the *Act*.

²¹ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

²² Orders P-2, P-474, PO-1953-F and PO-1962.

While the subject matter of the request (i.e. the piping plover habitat in Sauble Beach) suggests that the responsive records may relate to a matter concerning public health or safety, the appellant did not provide any representations on this factor. In the absence of any evidence on this factor, I find that it does not apply in this appeal.

[64] In addition to the considerations listed in section 45(4), other considerations that might factor into a decision of whether or not a fee waiver is *fair and equitable* 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 compromised solution which would reduced the costs; and
- Whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.²³

[65] The appellant takes the position that it would be fair and equitable to grant a fee waiver in the circumstances of this appeal. The appellant refers to *Mann v. Ontario (Ministry of the Environment)*,²⁴ in which the Divisional Court held,

There is only one requirement in the subsection for waiver of all or any part of a fee and that is whether, in the opinion of the head, it is fair and equitable to do so. The head is guided in that determination by the factors set out in the subsection, but it remains the fact that the sole test is whether any waiver would be fair and equitable.

The appellant submits that it would be fair and equitable to grant the fee waiver in the circumstances given the manner in which the town responded to the appellant's request. The appellant submits that it filed this appeal because the town failed to provide it with a proper fee estimate decision.

²³ Orders M-166, M-408 and PO-1953-F.

²⁴ 2017 ONSC 1056.

[66] The appellant submits that while the town refers to the 2018-1 request as a basis for its fee estimate, the town did not provide a breakdown of the fees charged for 2018-1. As such, the appellant did not know what the basis was for the town's fee estimate for 2018-1. The appellant also notes that the town's fee estimate for 2018-1 did not identify the potential exemptions that may be applicable to the records responsive to that request and did not raise the possibility that no records would be disclosed. The appellant concedes that the town did clarify the potential exemptions that may be applicable to the records responsive to the appellant's request later, but it did not expressly state there was a possibility that no records will be disclosed. The appellant submits that it is still unclear whether any records will be disclosed to it. Given these circumstances, the appellant submits that it would be consistent with the spirit of section 8 of Regulation 823 for the fees to be waived, if no records are disclosed.

[67] The appellant also takes the position that it should not be required to pay a deposit for the fees if there is a possibility that no records will be disclosed. The appellant submits that section 8 of Regulation 823 expressly requires a head to consider whether the requester will be provided access to responsive records in deciding whether to waive all or part of a payment.

[68] On top of the deficiency of its fee estimate, the appellant submits that the town's conduct in unilaterally abandoning the request and the appellant's subsequent continuing access request also weighs in favour of establishing that it is fair and equitable to waive the fees. In its September 6, 2018 letter, the town advised the appellant that it considered request 2018-3 to be abandoned because it did not receive the appellant's \$5 initial processing fee or deposit within 30 days of the July 6, 2018 fee estimate letter. However, the appellant submits that it had already appealed the fee estimate for 2018-3, which confirms that the request had not been abandoned.

[69] In addition, the appellant submits that the town unilaterally abandoned the appellant's continuing access request because it did not receive the deposit for the 2018-3 search. The appellant submits that the town made this decision in advance of the appellant's communication of its intention to abandon the continuing access request to the town.

[70] The appellant submits that the manner in which the town responded to its request is obstructive and careless. As a result of the town's conduct, the appellant submits that it is discouraged from pursuing further access. Further, the appellant submits it has had to expend additional costs and effort in filing this appeal to clarify matters that should have been addressed in the town's initial response. The appellant therefore submits that the manner in which the town has conducted itself makes it fair and equitable to waive the fees.

[71] The appellant submits that the fee waiver would not shift an unreasonable burden of the cost from the appellant to the town. The appellant submits that its request is narrow and relates largely to electronic records.

[72] The town submits that it would not be fair and equitable to waive the estimated fees in this case. The town submits that it is a relatively small operation and that not all the fees estimated will necessarily be charged. The town submits that a great deal of work is required by its staff and council members in responding to the appellant's request and it would not be reasonable to expect that the town should cover all of the costs when the appellant has been notified that it may not receive access to the responsive records.

[73] With regard to the issue of whether the appellant abandoned its request, the town submits that it had mistakenly believed that the appellant had done so. However, when the appellant confirmed this was not the case, the town submits that it ensured that it provided a fee estimate in accordance with best practices. The town acknowledges that it may deny the appellant complete access to the records, but cannot confirm this will be the case without completing the search and review of the records. The town submits it was not acting in bad faith during the request process and in calculating its fee estimate.

[74] As noted by the appellant above, in *Mann v. Ontario (Ministry of the Environment)*,²⁵ the Divisional Court indicated that the considerations in section 45(4) must each be considered. However, if only one applies or even if none of the considerations in section 45(4) applies, a fee waiver may still be granted if it is deemed fair and equitable to do so. I have found that none of the listed considerations in sections 45(4)(a), (b) or (c) apply to the circumstances of this appeal.

[75] With regard to the unlisted considerations and section 8 of Regulation 823, an important factor in determining whether the waiver of a fee would be *fair and equitable* is whether the waiver would shift an unreasonable burden of the cost of processing the request from the appellant to the town. I am mindful of the legislature's intention to include a user-pay principle in the *Act*. As noted above, this user-pay principle is founded on the premise that the appellant 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) 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.²⁶

[76] In the circumstances of this appeal, I find that the town's mistaken position that the appellant had abandoned its requests resulted in unnecessary confusion and delay in the process. During mediation, the town took the position that the appellant abandoned request 2018-3 because it did not pay the initial \$5 processing fee. Even when the appellant attempted to rectify the issue by sending a \$5 cheque to the town,

²⁵ *Ibid.*

²⁶ Order PO-2726.

the town sent the cheque back to the appellant and took the position that the request relating to 2018-3 had been abandoned, even though the appellant had already appealed the town's decision. The confusion that the town's position caused is a factor that weighs in favour of granting a fee waiver, at least in part. While the issue has now been resolved, the town's position was not reasonable and likely resulted in some delay in the discussions during mediation.

[77] However, I find that the town proactively estimated a lower preparation fee in anticipation that many of the responsive records will not be disclosed to the appellant. The town has also now provided more details regarding the individuals that will be conducting the search, the locations that will be searched, and based its fee estimate on the actual work done processing the appellant's related request for substantially similar information. I also recognize that the town is not a large and sophisticated municipality and endeavoured to prepare a fee estimate that meets the requirements set out by section 45 of the *Act* and Regulation 823. Given these circumstances, it is reasonable to believe that granting a full fee waiver would shift an unreasonable burden of the cost from the appellant to the town, and in turn, to local taxpayers.

[78] I acknowledge that the appellant may not obtain access to any records responsive to this request. I have considered this possible outcome as per section 8 of Regulation 823. However, given the circumstances outlined above, I find that it is reasonable to believe that granting a full fee waiver to the appellant would shift an unreasonable burden of the cost from the appellant to the town.

[79] Balancing the considerations for and against a fee waiver relevant in this appeal, I find that it would be fair and equitable to grant a 25% fee waiver to the appellant. Accordingly, the allowable fee is \$337.50. Per section 7(1) of Regulation 823, the appellant is required to pay a deposit of 50%, or \$168.75, before the town is required to process request 2018-3. If the town's final fee is less than the anticipated \$450, the town is required to waive 25% of the final fee in accordance with this order.

ORDER:

I uphold the town's fee estimate for search and preparation time, but find that the town is not permitted to charge the appellant photocopy fees. In addition, I waive 25% of the fee estimate such that the new estimated fee is \$337.50. If the town's final fee is less than the anticipated \$450, I order the town to waive 25% of the final fee.

Original Signed by: _____
Justine Wai
Adjudicator

_____ November 4, 2019