Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1962

Appeals PA-000281-2 and PA-010126-1

Ministry of Community and Social Services

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BACKGROUND:

This order disposes of appeals PA-000281-2 and PA-010126-1, since both of them stem from similar requests for information made by the same requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the same institution, the Ministry of Community and Social Services (the Ministry).

The Ministry provided the following explanation of the records in these two appeals, which is useful for the discussion that follows.

> The ministry provides services and supports to an estimated 48,000 people of all ages who have a developmental disability and their families. People receive services primarily through a network of approximately 400 community-based, board operated, non-profit transfer payment agencies. Services and supports are provided to meet the individual needs of people with developmental disabilities and their families to allow them to live, work and participate in a wide range of activities within the community, thereby improving the quality of their lives.
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> …
>
> Community agencies receive funding to deliver specific services or combination of services that include safeguarding the health, safety and welfare of the clients. The service provider is accountable to the ministry and must demonstrate that their service delivery is consistent with relevant legislation, regulations and/or ministry policy.
>
> Accountability is achieved through ministry management tools designed to examine an agency's ability to deliver effective programs and supports to clients, as well as manage its financial and human resources. Serious Occurrence Reporting, along with service contracts, annual compliance checklists, financial and policy audits, and operational reviews, is a component of the accountability relationship between a community agency and the ministry…
>
> Serious Occurrence Reporting provides the ministry and, more importantly, the service provider with an effective means of monitoring the appropriateness and quality of their service delivery. This monitoring includes provision for the ongoing review of service provider practices, procedures, and training needs.
>
> The ministry requires that all providers of service who deliver any direct service to:
>
> - children under the *Child and Family Services Act* (CFSA);
> - children under the *Day Nurseries Act* (DNA);
> - adults with a developmental disability under the *Homes for Retarded Persons Act* (HRPA) or the *Developmental Services Act* (DSA); and
> - violence against women programs under the *MCSS* Act;
>
> report all serious occurrences. For adults and children with a developmental disability this means that a community agency providing supports and services

> such as – residential care, day care, day treatment, counselling, respite care, etc., are required to complete and submit to the ministry a Serious Occurrence Report.
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> …
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> The Ministry's SOR process, in place since 1993, requires that community agencies make verbal and written reports, within certain timeframes. Immediately, the service provider is to call, as required, medical services, the police, coroner, and/or children's aid society. The parent/guardian/advocate as well as the ministry are to be notified within 24 hours. The verbal report is followed by a written report detailing the circumstances of the event and the actions taken by the service provider.
>
> During the time period set out in the Appellant's access request, SORs were categorized into 10 kinds of occurrences. It is the numerical roll-up of these SORs that comprise the Annual Summaries provided to the Appellant and are the subject of this response. In July 2000, the categories were collapsed from 10 categories to seven, providing greater clarity for the service provider when completing a report.

NATURE OF THE APPEAL:

As stated above, two types of records are created through the community agency program run by the Ministry: serious occurrence reports (SORs) and annual summaries.

Appeal #1 (PA-000281-2)

The Ministry received a request from a member of the media under the *Act* for copies of the annual summaries for the years of 1997, 1998 and 1999. The request specifically excluded any personal information of individuals contained in the records.

The Ministry located 213 responsive records, and granted full access to 198 of them and partial access to the other 15 records, relying on the exemption in section 21 of the *Act* (invasion of privacy) as the basis for denying access. The Ministry also requested payment of $1,000.40 in fees for processing the request.

The requester, now the appellant, appealed the Ministry's access and fee decisions.

During mediation, the appellant withdrew his request for the remaining 15 records and also accepted the manner in which the Ministry had calculated the fees. He paid the fees, but also asked the Ministry for a fee waiver, which was denied. The appellant objected to this denial, and the issue of fee waiver is the only outstanding issue in Appeal #1.

Appeal #2 (PA-010126-1)

After receiving and reviewing the records in Appeal #1, the appellant identified a total of 1,607 SORs filed by 71 agencies for the years 1997, 1998 and 1999. He submitted a new request under the *Act* for access to these SORs. Again, the appellant stipulated that all personal identifiers be removed from the records prior to disclosure.

The Ministry provided the appellant with a fee estimate of $9,170.30, after which he amended his request to include only SORs filed by the identified agencies in two of the 10 categories contained in the reports - category #4, described as "any abuse or mistreatment of a client which occurs while participating in a service"; and category #10, described as "all allegations and accusations of abuse or mistreatment of clients against staff, foster parents, volunteers and temporary care providers."

The appellant also asked for a fee waiver.

The Ministry revised its fee to $1,834.00, in line with the amended request, and denied the request for a few waiver.

The appellant paid the revised fee, but then appealed both the amount of the fee and the Ministry's decision to deny the few waiver.

Neither appeal was resolved during mediation, and both proceeded to the Adjudication stage. Both parties were provided with a Notice of Inquiry for each appeal, outlining the issues and seeking representations. The opposing party's representations were shared in this context, and both parties submitted representations on the various issues raised in the Notices.

DISCUSSION:

FEE ESTIMATE - Appeal #2 only

Under section 57(5) of the *Act*, my responsibility is to ensure that the amount charged by the Ministry in Appeal #2 is reasonable in the circumstances, subject to possible waiver. Because the appellant fee calculation in Appeal #1, it is not necessary for me to address it here.

Introduction

The charging of fees is authorized by section 57(1) of the *Act*, that 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;

(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.

Section 6 of Regulation 460 deals with fees in greater detail. It states in part:

> 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.

The Ministry's original fee calculation was based on the appellant's request for 1,607 SROs filed by the 71 agencies, as follows:

REGION	**SEARCH & PREP TIME (HOURS) ($30.00 per hour)**	**PHOTOCOPY COSTS ($0.20 per page)**	**TOTAL ESTIMATED COST**
Central East	10.4	162	344.40
North East Region	20	506	701.20
Toronto Region	27.5	687.5	962.50
Central West	36.9	1048	1316.60
Northern Region	22.8	739	831.80
Southwest Region	5.5	99	184.80
Hamilton/Niagara	70	1200	2340.00
Eastern Region	11	523	434.60
Southeast Region	60.4	1212	2054.40
TOTAL	264.50	6176.5	9,170.30

After the appellant narrowed his request to include only category #4 and category #10 reports, the number of responsive records was reduced by 80%, and the Ministry reduced it's fee by the same 80% figure, from $9,170.30 to $1,834.00. This revised fee consisted of $1,587.00 for search and preparation costs, and photocopying charges of $247.00.

Search and preparation costs

The Ministry makes the following submissions regarding search costs:

> It is the ministry's practice to retain current year plus one year of records on site in the ministry offices, either in regional or local offices based on the operational requirements of the office. The files are kept by fiscal year, by program stream, by agency. In most cases the current files are kept in a central filing area on site in the regional or local office, some of the files requested were kept in files held by the program supervisor with responsibility for the agency.
>
> Staff charged with finding the records to respond to this request needed to determine the location of the files: on-site, in regional or local area storage; or at the corporate Records Centre in Toronto. It is important to note that the Annual Summaries, from which the request for specific Serious Occurrence Reports (SOR) were identified, are filed on a calendar basis, the actual SORs are filed on a fiscal basis.
>
> As a result, for the purposes of this search, 1996/97, 1997/98, 1998/99 and 1999/00 files had to be searched for the records in the years 1997, 1998 and 1999. In some cases, regional offices that needed to retrieve files from local offices first had to determine how the records were maintained. The regional office records were filed by year; the local office records were filed by agency name. In addition to current 2 years of files for 60 agencies kept on site, approximately 100 boxes of files were retrieved from off-site storage, located either locally to the regional office or in the Corporate Records Centre in Toronto. In both cases the entire agency's files had to be reviewed to locate the Serious Occurrence Reports. Serious Occurrence Reports are not filed separately but are maintained in the main files of the specific agency.

The Ministry explains that because the original fee estimate was based on all 10 categories of SROs, it did not charge for the additional search time that would have been required in further refining its search to only include category #4 and category #10 reports. The Ministry explains that this additional step would have required staff to review all of 1,607 reports to isolate only those in category #4 and category #10, and that this could only have been done manually.

As far as preparation time is concerned, the Ministry submits:

> Even though the records requested contained highly sensitive client information the ministry did not vary from its standard 2 minutes per page for severing purposes. Additionally, as the records were kept in the ministry regional and local offices comprising almost 20 different offices, the Corporate FOI Unit, reviewed and reconciled discrepancies in severing practices, developed the final Index of Records for release. This work involved 3 staff an additional 8 days to complete. This time was not calculated into the fee estimate or final cost.

The appellant's representations focus primarily on the fee waiver issue. As far as the fee amount is concerned, the appellant submits:

> I have thought long and hard over whether I can make a solid case on the issue of fee calculation. The short answer is, I cannot. The Ministry is a large organization with many regions. I believe that they should do a better job of filing information and keeping it available for members of the public. However, I do not believe I am in a position to decide whether their method of filing and searching is the correct method.

Findings

The Ministry's representations describe the search requirements in considerable detail, although the actual fee breakdown by region lumps together both search and preparation time.

The permitted preparation fee established by this Office for severing records in a typical appeal is two minutes per page (See, for example, Orders P-26, P-184 and P-565). I have reviewed a sample of SORs at issue in this appeal. It is clear that a significant amount of personal information is contained in each of them, and that this personal information appears at various points within the record. Based on the photocopy charges identified by the Ministry, a total of 1,235 pages of records are covered by the amended request, meaning that SORs average between three and four pages in length. I find that two minutes for severing personal information from each page of records is reasonable in the circumstances. Accordingly, I find that it would take a total of 2,470 minutes or 41.17 hours to prepare the records for disclosure and, applying the $30 per hour permitted under section 6 of Regulation 460 for this activity, I uphold the Ministry's fee of $1,235.10 for preparation costs.

Although preparation costs apply only to the actual records disclosed to the appellant in response to his amended request, based on the information provided by the Ministry, it would appear that all 1,607 SORs needed to be located in order to then identify the 328 records responsive to the amended request. The Ministry's combined charges for search and preparation fees are $1,587.00, of which $1,235.10 represents allowable preparation charges. It is clear that the remaining $351.90 for search fees is defensible, based on the required search activities identified by the Ministry.

Therefore, I uphold the Ministry's fees charged for search and preparation time.

Photocopying costs

The regulation permits the Ministry to charge $0.20 for each page of records copied and provided to the appellant. Assuming the appellant received a total of 1,235 pages of records in response to his amended request, I uphold the $247.00 photocopying fee. If fewer than 1,235 pages were disclosed, the appellant is entitled to a refund calculated on the basis of $0.20 per page for each page less than 1,235.

FEE WAIVER - Both appeals

General

Fee waiver is provided for by section 57(4) of the *Act*, which states:

> 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 in the regulations.

Section 8 of Regulation 460 provides as follows:

> 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.
>
> …

Under section 45(5) of the *Act*, an appellant has the right to ask the Commissioner to review an institution's decision not to waive the fee. The Commissioner may then either confirm or overturn this decision based on a consideration of the criteria set out in section 45(4) (Order P-474).

Many previous orders have held that the onus is on the appellant to demonstrate that a fee waiver would be justified (See, for example, Orders 31, M-166, M-429, M-598, M-914, MO-1285, P-474 and P-1484). I am also mindful of the Legislature's intention to include a user pay principle in the *Act*, as evidenced by the provisions of section 57.

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the *Act*.

> 1. Whether the subject matter of the records is a matter of public rather than private interest;

2. Whether the subject matter of the records relates directly to a public health or safety issue;

3. Whether the dissemination of the records 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; and

4. The probability that the requester will disseminate the contents of the records.

Appellant's Representations

The appellant is an investigative reporter for a large Canadian newspaper. His principal submission is that he should be entitled to a fee waiver on the basis that dissemination of the records by him will benefit public health and safety.

The appellant describes how the two requests arose from a series of articles he is working on that will focus on the extent and quality of care and service for people with developmental disabilities.

The appellant provides the following context to his requests:

> As part of my investigation, I wanted to learn about the safety of people receiving service from the community agencies funded by the Ministry. In addition to conducting interviews I made a freedom of information request on April 12, 2000. I did not make this request blindly.
>
> From my [previous] child abuse investigation, I was familiar with the concept of "serious occurrence reporting". From previous FOI requests in that story, I knew that agencies funded by the Ministry are required to file a "serious occurrence report" if something happens to a person to whom they are providing service. I also knew that each agency must file an annual "summary" or "roll-up" report.
>
> Rather than blindly make a request for serious occurrences across Ontario, I proceeded methodically. I did this for three reasons: To find out if agencies were filing very many reports; to ensure that I received representative information in a timely manner; and to ensure that the ministry and its staff was not overburdened. On April 12, 2000 I filed a request for roll-up reports [the request that led to Appeal #1]
>
> In excess of 200 agencies provide residential support through the Ministry's community accommodation program. In my initial request, I asked for the summary reports for all of the agencies over a period of three years, 1997, 1998, and 1999. I chose those three years to provide a fair, chronological sample for my investigation.

> The Ministry's FOI Co-ordinator … contacted me. Over the course of the next month, we had several conversations about the request. [The Co-ordinator] told me that it was a large request which would involve high fees and a lengthy search time. I responded that I would limit the request. I asked for, and was sent, a copy of the ministry regions because I felt that would assist me to formulate my request. This was my suggestion, not the Ministry's.

The appellant then submitted an amended access request based on information he ascertained from the Public Accounts of Ontario regarding the annual transfer payments for each of the 200 agencies. This request led to the disclosure of records in Appeal #1.

Based on his review of the responsive records, the appellant proceeded with his second request (Appeal #2). He explains:

> … The roll-up reports revealed that a high number (over 300) of "abuse" related reports have been filed over the three year period. It also showed me that there were 501 injuries and 232 deaths. There were also numerous reports filed showing other, unidentified, serious occurrences. In total for my sample, there were 1,607 reports deemed serious.
>
> …
>
> Based on these [roll-up] reports, and ongoing interviews, I determined that I would have to see actual serious occurrence reports to properly investigate conditions in group homes and assisted living. On January 2, 2001, I made a new request [the request that led to Appeal #2]. This request was for 1, 607 serious occurrence reports.

The appellant comments on the factors referred to in Order P-474 as follows:

1. The quality of care in transfer payment funded group homes and day programs is a public issue. Approximately 13,000 people live in these homes or other assisted living arrangements. They are all funded by the province and, monitored by the province. In addition, approximately 90,000 people in Ontario, who have been identified as having a developmental handicap, are potential candidates for placement in these homes and programs.

2. Serious occurrence reports are to be filed by these transfer payment agencies, when an incident occurs. According to the information already released, a relatively high number of these reports are filed each year. It is apparent from the roll-up reports, the actual reports, and from the Provincial Auditor's work of the past few years, that these reports are not being adequately checked by the ministry. And they are not being adequately dealt with by the agencies. This puts the health and safety of this vulnerable sector of the population at risk.

3. The residents of group homes, their families, and the community at large will benefit by telling the public that a vulnerable sector of the population is at risk of harm. It is a very important health and safety issue.

4. I am a veteran journalist who has authored numerous public interest projects. I am a long time employee of [a named newspaper] and so have a publication in which to publish this information. Our readership is 1.3 million, so this information would be shared with a wide audience.

The appellant describes what he characterizes as typical cases chosen at random from among the various SORs disclosed to him in Appeal #2. He then submits:

> … As I hope you can see, they are an indication of serious problems in residential homes and other forms of assisted living. From my analysis of these records, it is clear that the ministry takes action in less than one per cent of cases (264 out of 272 [sic] reports). Yet the ministry's job is both to fund these agencies and to police them.

The appellant also refers to Order P-754, where a requester asked for copies of records from the Ministry of Health relating to complaints received by the Psychiatric Patient Advocate Office from current or former patients of the Queen Street Mental Centre alleging physical or sexual abuse by staff. In deciding that a few waiver was warranted in that case, Adjudicator Laurel Cropley made the following findings, which the appellant argues are relevant to the current appeals:

> In my view, institutionalized psychiatric patients are, like many other individuals such as the elderly or developmentally handicapped who have been placed in institutionalized environments, among the most vulnerable individuals in our society. I am also of the view that the care and safety of these vulnerable individuals is a public responsibility and of public concern.
>
> In reviewing the sample records and the Ministry's explanation of how the information contained in them is to be interpreted, it is clear that they identify allegations of abuse and that this information is related directly to a public health and safety issue.
>
> In order to monitor and lobby effectively for change, groups such as the patients' council must be able to substantiate their position with statistical and other documentation. Allegations of abuse are serious and significantly impact on the facility, its staff and its patients. In my view, dissemination of this information would yield a public benefit by disclosing a public health or safety concern.

Ministry's representations

In response to the appellant's fee waiver request in Appeal #1, the Ministry essentially argues that the vulnerability of people with developmental disabilities is not a relevant consideration in determining whether a fee waiver should be granted. The Ministry also submits that the public has an opportunity to evaluate and scrutinize the work of the Ministry through other means, in addition to the media. The Ministry states:

> The ministry's position is that the public does have an interest in the care, well-being and safety of people with developmental disabilities who receive supports and services from the ministry and community agencies. The ministry believes, however, that the public interest in this matter is already served through a variety of means.
>
> There are number of ways that public scrutiny is brought to bear on how services are provided to people with developmental disabilities, including:
>
> - The Provincial Auditor;
> - The Ombudsman;
> - The Office of Child and Family Advocacy;
> - police reports and court proceedings;
> - Coroner's Inquests;
> - Fire Marshall Investigations;
> - print and electronic media reports;
> - Annual General Meetings of community agencies; (The Board of Directors of a community agency is a volunteer board, with representation from the communities they serve and often times have families members with a developmental disability. An agency's Annual General Meeting is open to the public, and any concerns about the care or treatment of clients can be discussed openly in a public forum); and,
> - Conferences and public relations activities by stakeholder organizations.

The Ministry refers to Orders P-1211 and P-1117 in support of its position that certain issues do not meet the "compelling public interest" test. Both of these orders deal with the application of the public interest override found in section 23 of the *Act*, not with the fee waiver provisions.

In Order P-1211, former Adjudicator Mumtaz Jiwan dealt with an appeal from a decision of the then Ontario Insurance Commission by a member of the media for records relating to two insurance companies. After finding that certain records qualified for exemption under sections 13(1) and 15(b), Adjudicator Jiwan found that :

> …information about the two insurance companies has already been widely disseminated by the press and continues to receive media attention. I agree with

> the appellant that the events surrounding the companies raise some public policy issues. I also accept that there is, and will likely continue to be some degree of public interest in the events surrounding the two companies. However, this does not constitute the "compelling public interest" in the disclosure of the information at issue required to outweigh the purpose of the exemptions in sections 13(1) and 15(b).

In Order P-1117, former Adjudicator John Higgins dealt with an appeal from a decision of the Ontario Coroners' Council from an individual's request for records relating to a complaint made by the individual against four coroners in connection with the investigation and inquest into the death of the appellant's mother. He found that some of the records qualified for exemption under section 21, and went on to find that there was no compelling public interest in their disclosure:

> In my view, in the absence of circumstances suggesting a public interest, a request for information about a complaint, when submitted by a party to the complaint, is usually a private matter. In the circumstances of this case, I am not satisfied that there is a sufficient public interest in the Council's investigation, nor in the coroners' proceedings described in the records, to outweigh the purpose of the section 21 exemption.

The Ministry then submits that the public would not benefit from disclosure of the annual summaries:

> … Publication of the number of reports filed with the ministry, with no explanation of the circumstances that lead to the filing of a SOR, does not contribute to the public understanding of this issue. The aggregate numbers provided in the annual summaries do not provide the basis of a meaningful discussion about the care provided to people with developmental disabilities.
>
> The SORs report on events that involve or affect clients receiving services from community agencies. For example, all client deaths are reported through a SOR. However, the annual summary reporting process does not distinguish between a death that may be expected because of the age or health of the client and a death as a result of an accident or injury. Ministry policy already requires that the coroner be notified whenever a death occurs, even those deaths that take place in a hospital or were anticipated.
>
> Injuries to clients could also be misinterpreted simply based on the numbers. All injuries requiring medical attention are to be reported. This may include a client who is given medical attention as a precautionary measure as the result of an accidental all or the result of a self-inflicted injury.

As far as the appellant's few waiver request in Appeal #2 is concerned, the Ministry's main submission is that dissemination for the purposes of public health and safety is unnecessary because "…public scrutiny is brought to bear on the quality of services provided by agencies through a number of institutions that are charged with the legal obligation and responsibility to

make such inquiries." The Ministry goes on to identify the Coroner's Office, police agencies, Children's Aid Societies, and the Provincial Auditor as the relevant institutions in this regard, and describes their various roles in ensuring that vulnerable individuals are adequately protected and that the activities of the Ministry are subjected to the requisite degree of public scrutiny.

In responding to the Ministry's position, the appellant submits:

> The Ministry has argued in its representations that there are "a number of ways that public scrutiny is brought to bear on how services are provided to people with developmental disabilities". In doing so, they are saying that the media has no right to free access to these summary reports. They are also saying that the situation is well under control and the media cannot help by examining the issue. I beg to differ.
>
> In my investigation, I have discovered that only one of the agencies noted on Page 6 of the Ministry's representations has any knowledge, or made any public comment, of the serious occurrence reports. The Provincial Auditor, which does comment on the serious occurrence reports, states in 1999:
>
> > Many written reports lacked sufficient detail to permit a review or assessment of the occurrence and the appropriateness of the corrective actions to be taken. Additionally, we found no evidence that the Ministry had reviewed or, where necessary, followed up on many of the serious occurrences reported or assessed the proposed corrective actions – Provincial Auditor's report, 1999.
>
> This, as stated above, is exactly what I am trying to get at in this portion of my investigation. But to accurately probe this, and to go beyond the auditor's work, I needed to carry out a systemic series of requests. The roll up reports showed me a problem, which the auditor had touched on. The roll up reports went farther because they gave me the number of reports, the types of reports, the agencies with the most and least reports, and the number of times the ministry reviewed or followed up on reports. My next stage, as stated above, is to examine the actual reports, which show what happened and what the ministry did about it.

Findings

I find that the quality of care and service at group homes and day programs funding by the Ministry is a public rather than a private interest. Not only are these agencies funded by tax dollars, but they also provide services to a wide range of people across the province, and both parties' representations acknowledge that a significant number of people with developmental disabilities use the services provided by these organizations.

However, having found that the subject matter of the records in these appeals relates to public rather than private interests, it does not necessarily follow that this public interest is "compelling". As stated earlier, the two orders relied on by the Ministry in this regard (Orders P-1117 and P-1211) dealt with section 23 of the *Act*, which uses the term "compelling". Section

57(4)(c) does not require that any public interest be "compelling", thereby rendering findings under section 23 to be of limited value.

I also find that the subject matter of the records relates directly to a public health or safety issue. This finding is, in fact, supported by the Ministry's representations:

> Services funded by the ministry and delivered through community agencies include:
>
> - in-home and out-of-home respite;
> - specialized community supports which assist people with developmental disabilities to remain in the community;
> - community participation supports which provide people with developmental disabilities support for both competitive and non-competitive employment opportunities;
> - community living supports and residential services which include supports to assist individuals to live independently in the community, 24-hour group living situations, and associate living arrangements.
>
> Programs directly delivered by the ministry include:
>
> - Special Services At Home (SSAH), a program focused on supporting families in caring for a family member within their home; and
> - three provincially operated facilities that provide supervised living and day programs for adults who require specialized care.
>
> Community agencies receive funding to deliver specific services or combination of services that include safeguarding the health, safety and welfare of the clients.

As the Ministry acknowledges, the community agencies provide services that include safeguarding the health and safety of their clients. In both appeals, the records at issue relate directly to problems identified in the delivery of services. And as the Ministry states, the purpose of the SORs is to promote "the safety and well-being of clients." My finding in this regard is consistent with the conclusion reached by Adjudicator Cropley in Order P-754.

I am also not persuaded by the Ministry's position that dissemination of the information in the records is not necessary in order to disclose a public health or safety concern or to contribute meaningfully to the development of understanding of an important health or safety issue. While the Ministry has presented evidence that there are a number of safeguards and organizations in place to monitor and scrutinize the care provided at these transfer payment agencies, it does not necessarily follow that media attention on this issue would not contribute to the public's understanding of the health and safety issues surrounding these agencies. I prefer the appellant's position on this issue, where he states that:

> As I have stated, the people in these homes are incredibly vulnerable. While many are no doubt treated very well, others are treated horribly. The Provincial

> Auditor and others have examined these reports, but to no avail. We will publicize them and, by doing so, shine a spotlight on the conditions in which some live. This will, in turn, prompt public pressure on legislators and community agencies to correct the situation.

As far as the Ministry's position on the dissemination of the annual summaries in Appeal #1 is concerned, the appellant has demonstrated his ability to discern a public health or safety issue from his review of the records provided to him by the Ministry. As he points out, the point in seeking access to the individual SORs was to obtain further and more specific proof to support his thesis, not that the aggregate numbers contained in the summaries themselves were insufficient to establish a public health and safety issue. In my view, it is not reasonable in this context to consider the aggregate information contained in the annual summaries as distinct from the information contained in the actual serious occurrence report.

And finally, I am confident that the appellant who has been actively pursuing this story for some time, will disseminate the contents of the records.

In summary, I find that the subject matter of the SORs and the annual summaries is a matter of public rather than private interest; this subject matter relates directly to a public health or safety issue; dissemination of the records would yield a public benefit by disclosing a public health and safety concern and contributing meaningfully to the development of understanding of this important health or safety issue; and it is highly probable that the appellant will disseminate the contents of the records. Accordingly, the appellant is entitled to a few waiver, provided it is "fair and equitable" to do so in the circumstances.

Is it Fair and Equitable to Waive the Fees?

The *Act* requires that I also make a determination as to whether it is fair and equitable to waive the fee. Previous orders have set out a number of factors to be considered in determining whether a denial of fee waiver is "fair and equitable" (see, for example, Orders P-474, P-890, P-1183, P-1259 and P-1557). These factors are:

- the manner in which the institution attempted to respond to the appellant's request;
- whether the institution worked with the appellant to narrow and/or clarify the request;
- whether the institution provided any documentation to the appellant free of charge;
- whether the appellant worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether or not the appellant 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 Ministry.

The appellant points out in his representations that in dealing with his request in Appeal #1 the Ministry was not particularly helpful. While it did provide him with a list of the ministry regions free of charge, the appellant states that he, "..was frequently told by various ministry

representatives that my requests were too big and too time consuming." The appellant also provides evidence that he did narrow his original request from 200 agencies to only 60 of these agencies.

Regarding Appeal #2, the appellant notes that his original request was for 1,607 SORs, which he subsequently amended to include only those reports that were identified as "abuse". The appellant submits:

> Over the course of my two requests, deadlines were missed, telephone calls were not returned, and simple requests were not met with. With respect to both the roll-up reports and the actual reports, the Ministry refused to even send me a blank copy of the reports so that I could better formulate my requests. At no time did I have the feeling that the Ministry was working constructively with me. I, on the other hand, narrowed by request on several occasions.

The appellant also points out that he has paid more than $5,000 to the Ministry in the context of these and other related requests, the largest fee ever paid by his organization to access records under the *Act*. He points out that the fees have been paid because "we believe the information must be obtained and shared with the public (after it has been investigated)", and expresses his concern that the Ministry is using fees as "a barrier to the free flow of information".

The Ministry acknowledges that it did not attempt to help the appellant narrow his request, but points out that it did release a number of the records to the appellant, and that it has an extensive process for sharing information with the media. The Ministry also points to the extensive resources committed by a number of its offices and departments in dealing with the appellant's various requests on this topic. The Ministry also submits that granting a waiver would shift an unreasonable burden of the cost from the appellant to the institution:

> Information provided to the Appellant in response to his multiple requests is drawn from the same pool of staff resources in the ministry's regional and corporate office. This staff include: front-line Program Supervisors and Program Assistants, who work with community agencies to deliver programs and services to clients; Community Program Managers who are responsible for managing the overall services to people with developmental disabilities in their regions; and, the ministry's regional FOI Representatives who prepare the records. Additionally, staff in the ministry's policy and program delivery branches for developmental services have also been involved in searching, preparing and coordinating the large volume of information that has already been provided to the Appellant. It is this same pool of staff that continues to work on responding to the Appellant's subsequent information requests, either through the media line or access requests.
>
> While the ministry continues to make every effort to provide the reporter with information, it has meant that the same staff has had to dedicate portions of their work activities over an extended period of time, with every expectation that it will continue into the coming months, to gather information for this appellant in addition to the forthcoming appeals and inquiries.

While I accept that institutions experience significant workload pressures in responding to access requests for large number of records, I do not accept that the granting of a fee waiver in the present appeals would shift an unreasonable burden of the cost from the appellant to the Ministry. The amount of fees, while significant to a requester, in my view, do not represent a significant financial burden to the Ministry.

As far as the other considerations are concerned, it would appear that the appellant, rather than the Ministry, is primarily responsible for the narrowing and clarifying of the requests, and I accept his evidence that he worked constructively with the Ministry to narrow the scope of each request while it was in process. I am also persuaded by the appellant's representations that he advanced a compromise solution in both instances that resulted in reduced costs, and significantly reduced the number of records covered by the requests, based on what appears to be a careful consideration and focusing on the scope of each request to ensure that it met his needs, at least in part as a result of detailed independent analysis and research.

Although the Ministry points to its detailed policy for dealing with members of the media in support of its position on the issue of fee waiver, in my view, this policy is not relevant in the context of these appeals. Although most institutions no-doubt have policies in place to govern relationships with the media, it is important that these policies are not confused with statutory responsibilities. When dealing with requests for access to government records under the *Act*, all institutions, including the Ministry, must be aware of and carefully adhere to the requirements of timely and principled decision making, as provided for in the statute.

Having carefully considered all relevant circumstances and the representations provided by both parties, I find that it would be fair and equitable to waive all search and preparation fees in both Appeal #1 and Appeal #2. As far as photocopy charges are concerned, in light of the large number of records that have been disclosed to the appellant in response to his two requests, I find that it would not be fair and equitable in the circumstances to require the Ministry to absorb the costs of these charges, particularly in light of the user pay principles contained in the *Act*.

Accordingly, I find that the requirements for a fee waiver in section 57(4) of the *Act* have been established for all search and preparation charges in both appeals, but not for photocopy charges in either appeal. The fees already paid by the appellant for search and preparation charges should be refunded by the Ministry.

ORDER:

1. I uphold the Ministry's decision not to waive the photocopying charges of $92.90 in Appeal PA-000281-2 and $247.00 in Appeal PA-010126-1.

2. I order the Ministry to waive the search and preparation charges $907.50 in Appeal PA-000281-2 and $1,587.00 in Appeal PA-010126-1, and to refund these fees to the appellant.

3. To ensure compliance with Provision 2, I reserve the right to require the Ministry to provide me with evidence of compliance, upon request.

October 25, 2001

Tom Mitchinson
Assistant Commissioner