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

ORDER PO-2130

Appeal PA-020062-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1) all emails, briefing notes, notes, minutes of meetings, including minutes of the writing team meetings – *from all levels of governments*, all interested stakeholders including but not limited to the timber industry and non-governmental organizations regarding the Forest Management Guide for Natural Disturbance Pattern Emulation from July 20 2001 to December 15, 2001. Please ***do not*** include the actual document Forest Management Guide for Natural Disturbance Pattern Emulation. [requester's emphasis]

2) comments submitted to the EBR Registry # PB00E7004 in which the respondent was affiliated with or identified as – an academic institution, an academic or expert, commercial interest, timber industry, non-governmental organization.

3) summaries of the Provincial Forest Technical Committee meetings from June 2001 to November 2001.

4) summaries of the Provincial Forest Policy Committee meetings from January 2000 to November 2001.

5) summaries of the Woodland Caribou Recovery Team meetings from January 2001 to November 2001.

6) the discussion paper, Framework Policy For Room to Grow (Sharing Principle).

The Ministry issued a fee estimate of $2592.50, based on the following calculation:

Search time (40.25 hours x $30.00 per hour)	1207.50
Record preparation (9.5 hours x $30.00 per hour)	285.00
Photocopies (5500 pages x $0.20 per page)	1100.00
Total	**$2,592.50**

The Ministry requested a deposit of $1296.25 before processing the request further, and also advised that, as it has not yet reviewed the records, no final decision has been made regarding access.

The requester (now the appellant) appealed the Ministry's decision, stating:

> I wish to appeal the fees for MNR Reference Number: A-2001-152. I can only afford to pay for items 3-6, as these items are very straightforward. They are only minutes of meetings. I have asked for these before (older records) and they were sent to me without any charge. Items 1 and 2, I must appeal.

During the mediation stage of the appeal, the appellant indicated that she also wished to pursue a fee waiver on the basis of financial hardship, as well as benefit to public health and safety, and therefore submitted her written request for a fee waiver to the Ministry.

Upon further mediation of this appeal, the appellant agreed to remove Parts 2, 3 and 4 from the scope of this request. Accordingly, the appellant agreed to narrow her request to the following items:

1. all e-mails, briefing notes, notes, minutes of meetings, including minutes of the writing team meetings – *from all levels of governments*, all interested stakeholders including but not limited to the timber industry and non-governmental organizations regarding the Forest Management Guide for Natural Disturbance Pattern Emulation from July 20, 2001 to December 15, 2001. Please ***do not*** include the actual document Forest Management Guide for Natural Disturbance Pattern Emulation. [appellant's emphasis];

5. summaries of the Woodland Caribou Recovery Team meetings from January 2001 to November 2001; and

6. the discussion paper, Framework Policy For Room to Grow (Sharing Principle).

In response to the appellant's request for a fee waiver, the Ministry issued a further decision letter dated July 29, 2002, which indicated, in part:

> After careful review of the records you included with your letter, I have decided that the information provided is insufficient to support a claim of financial hardship. While the records provide details about income, there is no information regarding expenses.
>
> In the past you have requested information and correspondence with the Ministry on behalf of [a named organization]. Are you acting on behalf of [the named organization] in this instance? This may have an impact in deciding whether a fee waiver is warranted under a claim of financial hardship as the finances of the individual or organization that will pay the fee are at issue.
>
> Should you wish to provide additional information in support of your request for a fee waiver, the Ministry will reconsider this matter. However, with the information that has been provided to date, it is the Ministry's position that a fee waiver is not warranted in this instance.

In response to the narrowed request, the Ministry also issued a revised interim decision dated July 29, 2002, in which it stated, in part:

> Our preliminary estimate is that there are approximately 3736 pages of records, which include meeting minutes, e-mail messages with attachments (presentations, spreadsheets, communications information, EBR postings and analysis of

> comments received, Executive Committee pro formas), and a discussion paper. We believe that most of the information that you have requested will be available to you, however the records may contain information that would qualify for exemption under sections 13 (advice to government), and 21 (personal privacy).

In its decision, the Ministry also provided an estimated fee of $2134.70, calculated as follows:

Search time (40.25 hours x $30.00 per hour)	1207.50
Record preparation (6 hours x $30.00 per hour)	180.00
Photocopies (3736 pages x $0.20 per page)	747.20
Total	**$2,134.70**

The Ministry also noted that there was no search time charged in the initial fee estimate for Parts 2, 3 and 4 of the original request as these items were readily available. As such, the above estimate reflects a reduction in the number of pages responsive to the narrowed request, but there is no reduction in search time. The Ministry also provided a breakdown of the fees in relation to each of the three items, as well as an explanation as to how the estimated fee was calculated.

Upon further discussions, the appellant advised the mediator that she is not appealing the fee estimate for Parts 5 and 6, but is appealing the fee estimate for Part 1. The appellant advised that she also wishes to pursue a fee waiver, and would accordingly send additional information, as requested in the Ministry's letter of July 29, 2002, which she did on August 2, 2002.

On September 13, 2002, the Ministry issued a revised fee waiver decision, in which it advised the following:

> It is the Ministry's position that a fee waiver is not warranted in this instance. However, in consideration of your current financial situation as presented, the Ministry is willing to reduce the fee estimate. We are prepared not to charge you for record preparation which is estimated to be $180.00, and for ten hours of search time at $30.00 per hour. As a result, the fee estimate will be reduced by $480.00 for a revised fee of $1654.70.

Upon receipt of this decision, the appellant advised the mediator that she wishes to continue her appeal of the Ministry's decisions regarding both the fee estimate and the denial of a fee waiver relating to Part 1. The appellant also confirmed that she is not appealing the fee estimate for Parts 5 and 6, and has therefore requested that the Ministry continue to process this portion of the request separately. The appellant also offered to pay the fees for processing Parts 5 and 6 of her request. However, the Ministry advised the mediator that it would not process Parts 5 and 6 until the fee issues are completely resolved. The appellant advised the mediator that she objects to this approach.

I provided the Ministry with a Notice of Inquiry setting out the facts and issues remaining in this appeal and seeking its representations with respect to these matters. The Ministry provided me with its submissions which were shared, in their entirety, with the appellant. I also received

detailed representations from the appellant and shared them, in turn, with the Ministry, which made additional submissions by way of reply.

DISCUSSION:

PRELIMINARY ISSUE:

SEVERING THE REQUEST

As noted above, the appellant has requested that the Ministry proceed with its processing of Parts 5 and 6 of the request and indicates that she is prepared to pay the fee relating to these discrete portions. The fee estimate provided to her by the Ministry is no longer in dispute with respect to these items. As the appellant indicates that she is prepared to pay the fee relating to Parts 5 and 6 of the request, I find that she is not seeking a fee waiver with respect to these portions of the request.

The Ministry takes the position that it is not required to "split" the request into its component parts and must treat it as a whole. It argues that:

> Based on the wording of the *Act*, the requester is not entitled to records until she has paid the fees associated with her request which is for three sets/groups of documents. There is no provision in the *Act*, which requires the Ministry to separate or divide up requests at this stage, or indeed, at any stage of the process.
>
> The rationale for this is twofold. First of all, it is a long recognized principle that the *Act* is based on a user pay principle. Allowing the requester to split up the request at this stage would defeat that principle, the request effectively would become three requests for which only one filing fee was paid.
>
> However, the second point is more important. It relates to the sound and efficient administration of the *Act* for the benefit of all requesters and not just the appellant. If a requester, as the appellant has sought to do here, is allowed to break up a request into parts which can then be process[ed] a[t] different times as payments are made, it could provide a severe strain on both the resources of the Ministry and the Commission. Instead of a single appeal, mediated by a single mediator and dealt with by a single adjudicator, the matter could be broken up with numerous appeals at different times with different MNR staff dealing with each appeal and a different mediator and adjudicator. It would unnecessarily add to the complexity of the process and could lead to conflicting conclusions. This would place a strain on MNR staff and impair the Ministry's ability to make timelines under the *Act* which the Ministry has been working hard to improve. It would also place a strain on Commission staff. Accordingly, the Ministry is of the view that allowing requests to be broken up and proceeded with when the requester decides to [pay], it would impair the service to other requesters and the public by both organizations.

> Therefore, for reasons of principles of sound public administration, and that as the *Act* appears to contemplate a single request processed at the same time, and does not require the breaking up of records, the Ministry submits that it is neither prudent or reasonable to break up the request and allow it to be processed when the request[er] decides to pay for each part. Accordingly, the decision of the Ministry with respect to this matter should be upheld.

The appellant submits that her original request was framed in six parts at the suggestion of a Ministry staff person in order to reduce the filing fees to be paid. The appellant also has provided me with evidence which indicates that the Ministry would not be inordinately inconvenienced by having to locate and issue a decision on access to the information responsive to Parts 5 and 6 of her request as these records are few in number and easily accessible.

In its reply submissions, the Ministry points out that the appellant acknowledges that the Ministry has the discretion to accede to her request to "split up" the request into its component parts in order to allow for access to those portions which can be responded to at little cost. It adds that the decision to exercise its discretion not to treat portions of the request separately "has been for the sound and efficient administration of the *Act*" and should not be reviewed.

In my view, the appellant is seeking a review of the Ministry's decision to charge her a fee for certain searches and preparation time, as well as its decision not to grant a fee waiver only with respect to Part 1 of her request. The appellant is not, however, seeking a review of the quantum of the fee relating to Parts 5 and 6 of the request, nor is she seeking a fee waiver for this portion of the fee estimate. I find that there is no issue between the parties with respect to the fees payable for Parts 5 and 6 of the request and will order the Ministry to proceed on the basis that the fees relating to these parts of the request are accepted by the appellant and are not subject to her request for a fee waiver. In this way, the Ministry will recover the fee quoted for the work to be performed in responding to Parts 5 and 6 of the request and the appellant will obtain access to the records which are responsive to these parts of her request, subject to the application of the exemptions in the *Act*, if any are claimed.

I am mindful of the fact that, in different circumstances, the Ministry may be justified in refusing to process a request on this basis. However, in the present situation, I am not satisfied that proceeding in this fashion will be onerous to the Ministry. I have also considered the principle that timely access to information is important as information can often be a perishable commodity. I would urge the Ministry to be flexible in its approach to the processing of multi-part requests.

FEE ESTIMATE

Introduction

Sections 48(1)(c) and 57(1) of the *Act* require an institution to charge fees for requests under the *Act*. Section 57(4) requires an institution to waive fees in certain circumstances. More specific provisions regarding fees and fee waiver are found in sections 6 through 9 of R.R.O. 1990,

Regulation 460. The IPC may review the amount of a fee or fee estimate, or the institution's decision not to waive a fee.

Section 57(1) reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
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> (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 prescribes:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 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.
>
> 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.

During the mediation stage of the appeal, the Ministry provided the appellant with a fee of $1654.70, representing photocopying charges for some 5500 pages of documents, 40.25 hours of search time and 9.5 hours of preparation time, less the agreed-upon reduction in the fee originally provided. It would appear that this fee relates only to the searches, preparation and photocopying expenses related to Part 1 of the appellant's request.

In support of its fee, the Ministry submits that:

> A broad range of records is requested here. The records would be found in the files of 8 staff members in the Forest Policy, Wood Tenure and Measurement Sections, and Forest Management Planning Sections of the Ministry who were involved in the development of the Guidelines. The records would be found in emails, and other related electronic files, and paper files located in primarily in these sections of the Ministry. For the documents associated with the development of the guidelines, there is an estimated 3736 pages of documents.
>
> This is based on a representative sampling done [by] an analyst in the Policy Section of Forest Management Branch. The analyst participated in the development of the Forest Management Guide for Natural Disturbance Pattern Emulsion and its posting on the Environmental Bill of Rights Registry. He was also familiar with the subject matter covered by other parts of the request.
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> In conducting the sample, he examined those electronic files to which he had access. He found that he had six electronic folders, which contained roughly the same amount of records. He selected one folder and counted the number of emails and the number of pages of each email and attachment, which fitted the timeframe for the request. He recorded the time of the search. He then multiplied the number of pages and search time by six. He examined the electronic files of his manager and saw that there were a similar number of folders and emails. Accordingly, he concluded that each member of the staff would likely have similar number of records and take the same time to locate/search for the records. He looked at the paper files and found that they contained mostly print outs of emails and electronic [?]. Based on the above, he estimated that the original request would produce 5500 pages, requiring 40.25 hours to search or locate the records and 9.5 hours to prepare for release as it is likely that parts of the records would be exempt from disclosure under the *Act*.

The appellant suggests that because it appears that the Manager of the Forest Policy Section was copied on many of the e-mails which comprise the records in this appeal, the search need only have been conducted of this individual's record-holdings. The appellant also argues that records relating to the development of the guidelines during the period covered by the request should not have been very extensive as much of that time period was taken up by a "public comment period and the bulk of the writing of the guidelines was already completed."

In its reply representations, the Ministry points out that it was obliged to conduct searches of the record-holdings of all of its staff involved in the drafting of the Guidelines, not just the Manager.

It indicates that the *Act* requires that the Ministry provide the appellant with a decision respecting access to all of the records which fall within the ambit of the request. The Ministry also states that during the time period covered by the request, consultations were taking place with the public and within the Ministry itself. These efforts led to the creation of the records referred to in the decision provided to the appellant.

I am satisfied that the time claimed by the Ministry to conduct searches of eight staff record-holdings in the Forest Policy, Wood Tenure and Measurement Sections, and Forest Management Planning Sections of the Ministry was appropriate. Given the number of documents created by these individuals, I find that the time required to conduct the searches and make the necessary severances to exclude information covered by one of more of the exemptions claimed was reasonable. In order to insure that the searches were comprehensive and included all of the responsive records, I find that it was also reasonable for the Ministry to conduct searches of all of files maintained by the individuals involved in the creation of the Guidelines, and not just those of the Manager.

Accordingly, I uphold the fee provided by the Ministry of $1,654.70 for search and preparation time, as well as photocopying charges, for records responsive to Part 1 of the request.

FEE WAIVER

Introduction

Sections 48(1)(c) and 57(1) of the *Act* require an institution to charge fees for requests under the *Act*. Section 57(4) requires an institution to waive fees in certain circumstances. More specific provisions regarding fees and fee waiver are found in sections 6 through 9 of R.R.O. 1990, Regulation 460. The IPC may review the amount of a fee or fee estimate, or the institution's decision not to waive a fee.

Fee waiver

On an appeal of a fee waiver decision, the Commissioner may either confirm or overturn the decision based on a consideration of the criteria set out in section 57(4) of the *Act*. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

Factors for the IPC to consider in reviewing a decision to deny a fee waiver request include:

- the extent to which the actual cost of processing, collecting and copying the records varies from the amount charged by the institution;
- whether the payment will cause financial hardship for the requester;
- whether dissemination of the records will benefit public health or safety;
- whether the requester is given access to the records;
- if the amount charged is under $5, whether the amount of the payment is too small to justify requiring payment.

In addition to the above, section 57(4) of the *Act* also requires consideration of whether it would be "fair and equitable" to waive the fee. Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". 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 institution.

[See Order M-408]

Other decisions have stated, where dissemination of information for the benefit of public health and safety may be a relevant factor:

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

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

3. Whether the dissemination of the record would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue;

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

[Order P-474]

The appellant indicates that she is currently unemployed and has provided me with detailed information as to her finances and the financial hardship that would result if she is required to pay the full amount of the fee. She also indicates that she is a volunteer member of an organization which is concerned with ecological issues and the preservation of the natural environment. While the appellant makes it clear that she is not seeking access to the requested information on behalf of the organization, she indicates that she intends to disseminate the information she obtains within this loosely-knit group of environmental activists.

The appellant submits that the dissemination of the requested information would benefit public health and safety. She states that:

> The information I am requesting regards the government's decision to increase clearcut sizes within forests on crown land. These forests are publicly owned. The government is allowing clearcuts with no size restriction. As a result, clearcuts in Ontario's boreal forest consistently range from 10,000 hectares and upward especially in northwestern Ontario – the province's largest remaining tract of pristine wilderness forest. This is considered illegal under the *Crown Forest Sustainability Act*.
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> . . .
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> Furthermore, the Ministry of Natural Resources intentionally misled the public on this issue. They stated that a move to larger clearcuts would halt the decline of biodiversity but documents released through the *Freedom of Information and Protection of Privacy Act* show that increasing clearcut sizes would actually result in more timber being harvested clearing out our forests faster than before. Many reject the notion that leaving LESS timber on the landscape will benefit wildlife or the forest ecosystem overall.
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> . . .
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> The destruction of these forests will negatively impact on the natural environment's ability to provide us with: clean water (forests hold and filter water before it is added to the overall aquatic system); clean air (along with the world's oceans, forests produce oxygen and filter our air); and stable climate patterns (the disappearance of large tracts of forests contributed to desertification, soil erosion and drought).
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> . . .
>
> I wish to pursue this issue on behalf of myself and everyone else that lives in this province. I think the public has a right to know if actions taken by the government may be illegal. We have a right to investigate because Ontario's forests are publicly owned.

In support of its decision not to grant a fee waiver, the Ministry submits that:

> The records subject to the request do not relate to public health or safety. While the subject matter may be of public interest, it is doubtful that these records in themselves would [be] of interest as there has been no suggestion of impropriety in the development of the Guide or associated with the Woodland Caribou Recovery Team meetings. In any event, the 'public interest' is not one of the factors to be considered. Accordingly, the request does not qualify for a fee waiver under subclause 57(4)(c).

The Ministry also submits that the actual cost of processing the request was reduced by 25% as a result of its decision letter dated September 13, 2002. "Accordingly, the actual cost of processing the request is 25% higher than the amount which the appellant would be paying; thus it is the position of the Ministry that subclause 57(4)(a) does not apply to justify a fee waiver."

In addition, the Ministry relies on some of the criteria described in Order M-408 in support of its contention that it would not be "fair and equitable" in the circumstances to grant the appellant a fee waiver. It indicates that the appellant refused to narrow the scope of Part 1 of her request in order to reduce the cost of the fee for access to this information and that at least some of the information may be downloaded from the Ministry's publicly-available records on its website. The Ministry also suggests that "the appellant made no attempt to work constructively with the Ministry" and that she was "abusive with staff". It goes on to state that it has reduced the fee substantially in order to accommodate the appellant's modest means.

In its reply representations provided to this office following the sharing of the appellant's submissions, the Ministry submits that:

> Contrary to the representation of the appellant, the records relating to the Guide do not relate to public health or safety. These records relate to the development of a guide dealing with the silvicultural practice of emulating natural disturbances, commonly known as clear cutting.
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> . . .
>
> The purpose of the Guide is to guide the harvesting of forest resources in such a manner that it emulates these natural disturbances [described in detail but not included in this discussion].
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> . . .
>
> The requester has not shown any link between these guidelines and public health or safety.

I must again re-iterate the "user-pay" principles inherent in the *Act*. The fees set out in section 57(1) and the Regulations are mandatory unless the appellant makes sufficient argument that a fee waiver is warranted on the basis that it is "fair and equitable" to do so. In the present case, I find that the appellant has not provided me with sufficient evidence to substantiate a finding that this is the case. I accept that the payment of the requested fee will cause the appellant financial hardship within the meaning of section 57(4)(b). Clearly, the payment of the sum of $1654.70 by a person in the appellant's financial situation would be onerous.

I do not, however, accept the appellant's arguments that the dissemination of the information contained in *the requested records* will serve to benefit public health or safety. I specifically find that the appellant has failed to establish that the subject matter of the records responsive to item 1 of her request will in some tangible way benefit public health or safety. I agree with the

position taken by the Ministry that while there may exist a public interest in the subject matter of the records, they do not contain information whose dissemination will result in a benefit to public health or safety.

In addition, I find that the appellant has not worked constructively with the Ministry in an effort to reduce the costs of the searches and preparation time with respect to Part 1 of the request. I accept the Ministry's submissions that some of the records sought by the appellant are available on the Ministry's website at no cost to her.

Taken as a whole, I find that it would not be "fair and equitable" in the circumstances of this appeal to order the Ministry to grant the appellant a fee waiver with respect to the search and preparation time necessary to respond to item 1 of her request. Accordingly, I uphold the Ministry's decision not to do so.

ORDER:

1. I order the Ministry to provide a decision letter and a fee estimate with respect to Parts 5 and 6 of her request treating the date of this order as the date of the request and without recourse to a time extension under section 27 of the *Act*.

2. I uphold the Ministry's fee of $1654.70 with respect to Part 1 of the appellant's request.

3. I uphold the Ministry's decision to deny the appellant a fee waiver under section 57(4) of the *Act* with respect to Part 1 of the appellant's request.

Original signed by: March 20, 2003
Donald Hale
Adjudicator