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

ORDER PO-2278

Appeal PA-020140-2

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). In that decision, the Ministry denied a request to waive the fees associated with a request.

As background, the requester (now the appellant), a member of the media, submitted a request on January 14, 2002 for access to

> all records related to complaints about long-term care facilities in Hamilton and Halton that were dealt with by the Ministry in the past two years….including ones that describe what the complaint was about, how it was handled by the ministry and the nursing home involved, and the length of the investigation.

The Ministry issued an interim decision on April 12, 2002, amended on June 14, 2002, in which it provided a fee estimate for processing the request. The fee estimate included $600.00 for search time, $301.40 for photocopies and $1,374.00 for preparation of records (severances). The Ministry stated that access to the records would be granted in part, with severances based on sections 21(1) and 18(1) of the *Act*. The decision indicated that there were approximately 1,507 pages of records.

The appellant appealed this decision, and Appeal No. PA-020140-1 was opened. During mediation of the appeal through this office, the Ministry sent notice of the request to a number of third parties, and then issued a revised decision in which it withdrew its reliance on sections 18(1) and 17(1), indicating that severances would be made based on section 21(1) (personal information) only. It also issued a revised fee estimate of $901.40, and requested a deposit for half of this amount. The appeal was resolved on this basis, and Appeal No. PA-020140-1 was closed. The revised estimate reflected the Ministry's decision to withdraw the amount associated with severing the records ($1,374.00).

The appellant provided the deposit to the Ministry shortly after the resolution of the above-noted appeal. After being notified on March 10 that the records were available for release, the appellant paid the balance on March 12, 2003. The Ministry sent the records to the appellant in July, 2003, totalling 949 pages. Subsequently, the appellant requested a waiver of the fees, which was denied by the Ministry. The appellant appealed this denial of a fee waiver, and this appeal, Appeal No. PA-020140-2 was opened. Although this appeal could not be resolved through mediation, the Ministry advised the appellant that it had made an error of $110.60 in its fee estimate in calculating photocopying charges, and sent the appellant a cheque in this amount.

The issue before me in this appeal is whether the fee of $790.80 ($901.40 less $110.60) should be waived.

DISCUSSION:

FEE WAIVER

General principles

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 57. (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 in the regulations.
>
> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

In reviewing a decision by an institution denying a fee waiver, this office may decide that all or part of a fee should be waived [Order MO-1243].

Whether dissemination will benefit public health or safety

In this appeal, the appellant relies on section 57(4)(c) (benefit to public health or safety). In prior orders of this office, the following factors have been found relevant in determining whether dissemination of a record will benefit public health or safety:

- whether the subject matter of the record is a matter of public rather than private interest

- whether the subject matter of the record relates directly to a public health or safety issue

- whether the dissemination of the record would yield a public benefit by

    (a) disclosing a public health or safety concern, or

    (b) contributing meaningfully to the development of understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

This office has found that dissemination of records will benefit public health or safety under section 57(4)(c) where they related to:

- compliance with air and water discharge standards [Order PO-1909]

- a proposed landfill site [Order M-408]

- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]

- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]

- safety of nuclear generating stations [Orders P-1190, PO-1805]

- quality of care and service at group homes [Order PO-1962]

Representations

In this appeal, the appellant submits that these records are undoubtedly about matters of public interest, relating to complaints received and investigated in long-term care facilities (nursing homes) in the Hamilton and Halton regions. Nursing homes are funded, inspected and regulated by the Ministry. She submits that long-term care facilities, unlike private retirement or care homes, are public institutions. Taxpayer dollars flow to these homes for the care of residents that in many cases are unable to feed, wash, medicate, or advocate for themselves. Many nursing home residents are sick or dying. The care that residents of such homes receive should be subjected to public scrutiny. Complaints offer a window into the concerns of residents, their

families and outside caregivers and help to illustrate the living conditions inside these public institutions. The appellant also refers to Order P-754, which described the care and safety of the residents of institutions as a "public responsibility and of public concern."

The appellant submits that the complaints contained in the records released by the Ministry relate directly to a public health or safety issue. They detail issues surrounding the health care and physical care of nursing home residents. They discuss incidents and allegations of abuse, assault, safety and mistreatment, and point out shortcomings in resident care, including the treatment of health problems and allegations of neglect. They raise concerns about nutrition and the quality of food being served, and quality of life issues related to residents' basic rights and freedoms. They point out problems with the physical environment of homes, including issues of cleanliness, odours, deteriorating supplies and equipment, and the need for repairs and maintenance.

The appellant states that dissemination of the records puts a spotlight on the conditions inside nursing homes, as reported by residents and caregivers. Publicizing these complaints helps shine a light on how homes are performing and in turn can compel homes to make changes.

The appellant described a series of stories she wrote examining the care the elderly receive in nursing and retirement homes, before she received the records from the Ministry. She states that after she received these records, another reporter at her newspaper wrote a front-page story about a bankruptcy in the long-term care industry, using the information in the records.

The appellant further submits that in the circumstances, a fee waiver is fair and equitable. She submits that the Ministry's handling of the request was "riddled with errors and oversights". Among other things, she refers to the Ministry's long delay in sending the records after she had paid the full fee. Although the Ministry advised her that the records were available for release on March 10, 2003, she did not receive them until July.

The appellant also states that she attempted to work constructively with the Ministry to narrow her original request in order to reduce the amount of search time and paperwork involved.

The appellant acknowledges that the reduction of photocopying fees by $110.60 by the Ministry was helpful and appreciated. However, she questions whether the Ministry would have reviewed the fees and discovered this discrepancy, had she not appealed the denial of the fee waiver. She also acknowledges that the Ministry did not apply a charge for severing the records. She states, however, that this stemmed from their decision not to apply section 17(1) to withhold the names of the nursing homes referred to in the records.

Finally, the appellant submits that a fee waiver would not shift an unreasonable burden of the cost from her newspaper to the Ministry. She states that the Ministry conducted the search even before she paid the fees. Therefore, it was not an unreasonable cost and effort for the Ministry to find the records requested. She also submits that as the Ministry refunded $110.60 in photocopying charges, it is reasonable for them to be asked to refund the rest of the photocopying fee, in order that they be held to account for an easily preventable error.

In its representations, the Ministry submits that the search for records required an extensive manual search. Records relating to long-term care facilities are kept in regional offices, and the files of every compliance advisor in the Halton and Hamilton regions had to be searched in order to identify records responsive to the request.

The Ministry refers to the prior appeal in which it agreed to waive the preparation costs of $1,374.00. It states that the records provided to the appellant were entitled "Complaint Investigation Reports", and contained personal information which needed to be manually severed. This information included personal information of residents including name, date of birth, date of admission, medical treatment, medications, family members, personal physician, and a description of the occurrence. The records also can contain the personal information of other individuals who may have been involved in the occurrence, as well as the names and addresses of family members. The Ministry submits that much of the information was handwritten and difficult to decipher. Severing the records necessarily involved an extensive and detailed review that in fact took more than the two minutes per page reflected in the fee estimate.

With respect to section 57(4)(c), the Ministry acknowledges that the public does have an interest in the care of nursing home residents and agrees that the subject matter of the records is therefore a matter of public interest.

However, the Ministry does not agree that the records relate "directly" to a "public" health issue. The Ministry submits that the subject matter of the records relates to a particular population affected by the issue, but it is not a "public health or safety issue" such as the control of an infectious disease, or the management of an environmental hazard. Strictly speaking, "public health" issues relate to health matters governed by the *Health Protection and Promotion Act*. The Ministry expresses a concern that an overly broad interpretation of section 57(4)(c) would result in its application to almost all Ministry records, as a fundamental aspect of its mandate is to oversee and promote the health and well-being of the "people of Ontario."

Further, the Ministry submits that the dissemination of the records by the appellant does not yield a public benefit above and beyond that which results from the Ministry's monitoring of complaint investigation reports. The Ministry states that the public did not, in fact, benefit from dissemination of the records provided to the appellant in this case. The articles produced by the appellant's colleague focused on the financial situation of a named nursing home and its owners, rather than the client incidents contained in the complaints.

As to whether it would be "fair and equitable" to waive the fee, the Ministry refers to its decision to waive the fees associated with severing the records for disclosure, reducing the initial fee from $2,275.00 to $901.40, and the refund to the appellant of $110.60 due to overpayment on the photocopying charges. The Ministry submits that the waiver of the fee would shift an "unreasonable burden of the cost" from the appellant to the Ministry. The requester works for a media outlet and therefore is not paying the fees personally. On the other hand, Ministry staff spent significant amounts of time searching for and preparing responsive records. The Ministry submits that media requests often involve numerous records and extensive search time. If I decide to order a fee waiver in this case based on section 57(4)(c), it is concerned that it will set a

precedent for future media requests, and will precipitate a significant increase in such requests to this Ministry, for voluminous records.

Analysis

I am satisfied that it has been shown that dissemination of the records will benefit public health or safety. Prior orders have recognized that the quality of care and service at institutions funded by the government are matters of public concern (see Orders P-754 and PO-1962), and the Ministry does not disagree with this. The records at issue, in the words of the appellant, "paint a picture" of the quality of care and service at nursing home facilities funded by the Ministry. Undoubtedly, private interests are also reflected in the records, to the extent that they document concerns raised about the care of specific residents at specific nursing homes. However, the appellant is not seeking access to the information of a specific resident and is content to receive the records without any personal information. I am satisfied that taken as a whole, without personal information, the records are more a matter of public rather than private interest.

As indicated above, the Ministry disputes that the records relate "directly" to a "public health or safety issue", and that their dissemination by the appellant has yielded a benefit beyond that resulting from the Ministry's monitoring of the complaints. The Ministry also refers to the *Health Protection and Promotion Act* as the source of the meaning of "public health" issues. I find no reason to link the scope of "public health" issues to those addressed in the *Health Protection and Promotion Act*. Such a view of section 57(4)(c) is not found in the discussions of the purpose and genesis of this section by the Williams Commission, by former Commissioner Sidney B. Linden in Order 2, and by other adjudicators (for a useful synopsis of these discussions, see Order PO-1953-F).

I am satisfied that, to the extent that nursing homes have responsibilities for the health and safety of their residents, and their discharge of these responsibilities is overseen by the Ministry, complaints about conditions at nursing homes relate directly to issues of public health or safety. My finding here is consistent with that in Order PO-1962, in which serious occurrence reports arising out of incidents at agencies serving individuals with developmental disabilities were found to relate directly to a public health or safety issue.

I acknowledge the Ministry's concern that an overly broad understanding of "public health issues" could arguably cover all records within its custody and control, in view of its mandate to oversee and promote the health and well-being of the people of Ontario. Below, I take this consideration into account in assessing whether it would be fair and equitable, in the circumstances, to waive the fee.

Finally, I find that dissemination of the records would, and indeed has, yielded a public benefit. The Ministry takes issue with the level of the benefit to the public from the newspaper story that used some of the information provided to the appellant. Without judging precisely how significant a contribution has been made to the public's understanding of conditions at nursing homes in Ontario, it is sufficient to note that release of the records did result in dissemination of some of the information in them, and that this information contributed in some measure as

background to a newspaper article about a high-profile bankruptcy in the local nursing home industry. Further, I do not agree with the Ministry that dissemination of the records does not yield a public benefit beyond that provided by its own monitoring of complaints. I agree with the appellant that there is a public benefit in shining a "spotlight" on the conditions inside nursing homes, as reported by residents and caregivers themselves, which can be a positive influence in compelling improvements in care. Release of the information also allows for public scrutiny of the Ministry's actions in response to the complaints, an aspect that is not addressed through the Ministry's monitoring alone.

In sum, I am satisfied that dissemination of the record will benefit (and indeed, has benefited) public health or safety. I turn to consider whether, even considering this, it would be fair and equitable to require the Ministry to waive the fee.

Whether it would be fair and equitable to waive the fee

For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408, PO-1953-F]

The representations also suggest that sections 57(4)(a), (b) and (d) may be relevant in this appeal.

After considering the facts of this appeal, I find that some of the above factors favour a fee waiver, and other factors do not. While I do not agree with the appellant's characterization that the Ministry's handling of her request was "riddled with errors and oversights", I find that there were delays at several steps during the processing of the request that diminished the value of the information ultimately obtained by the appellant. Some of the delay was due to genuine oversight or the need to observe fairness (for instance, the notification of third parties). Some of it was unexplained. It should be noted that the original request was made in January of 2002, for records relating to 2000 and 2001, and that the appellant did not receive any records until July of 2003. As the appellant points out, "…We're a newspaper. Currency is extremely important to

what we do." In this respect, the delays in access served to undermine the purpose for which the information was sought.

Further, I accept that the requester worked constructively with the Ministry to narrow the request in order to reduce the fees.

On the other hand, I find that section 57(4)(a) does not favour waiving the remaining fee. It is important to note that the Ministry has already reduced the fee, by agreeing to waive the amount attributable to severing the records. I find that severances were required in order to prepare the records for disclosure, that the Ministry performed this work, and that it chose not to recover the cost of this work from the appellant. I do not accept the appellant's contention that the need for severances was based on the Ministry's initial position to withhold the names of the nursing homes. It is reasonable to expect from the nature of the records that they would contain personal information, and the appellant acknowledged the need to severe this type of information. Although the appellant takes issue with the amount charged by the Ministry for search time, I accept the Ministry's explanation about the type of search required in order to locate the records. Having regard to all of these factors, I find that the actual cost of providing access exceeded the fee collected from the appellant.

I am satisfied that payment did not cause a financial hardship. The appellant is a member of a sizeable media organization. This is not a case where my decision on the waiver of fees may determine the appellant's ability to obtain access to the records. The appellant has paid the fee in full, and has been provided with all of the records. This is also not a case where the appellant was asked to pay a large sum due to an extensive search for records, but was given minimal disclosure. Here, the appellant was given all the responsive records, after severances of personal information only.

In assessing whether waiver of the remaining fee would shift an unreasonable burden of the cost from the appellant to the Ministry, I also acknowledge the Ministry's concern about the broad scope of its mandate, and the possibility that almost all Ministry records might arguably relate to the health of the people of Ontario. It is not intended that the fee waiver provisions undermine the user-pay principles of the *Act*. The circumstances of this appeal are not extraordinary. They involve, in essence, a request by a member of the media for records kept by the Ministry in the ordinary course of its monitoring responsibilities over one sector of its mandate. I accept that a waiver of fees in this case would make it difficult for the Ministry to deny a waiver of fees in many other cases.

In considering all of these circumstances, I might have been inclined to order a partial waiver of the fees. However, given that the Ministry has already agreed to a substantial reduction in its fees, I am satisfied that no further waiver is appropriate.

ORDER:

I uphold the decision of the Ministry.

Original Signed by: May 6, 2004
Sherry Liang
Adjudicator