



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2463

Appeal PA-050135-2

Ministry of Transportation



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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received an 8-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the construction of an access road in the Municipality of Muskoka. Specifically, the requester sought access to:

1. Any and all plans, maps, diagrams and surveys of proposals, options or plans
2. All engineering plans, diagrams, surveys and data
3. All data in the possession of the Ministry of Transportation

All correspondence, agreements, draft agreements, memoranda, information, communications and data passing between the Ministry of Transportation

4. **and** other provincial ministries
5. **and** the federal government, the Ministry of Indian and Northern Affairs or any other federal ministries
6. **and** the Township of Georgian Bay or the District of Muskoka
7. **and** the Township of Georgian Bay or the District of Muskoka in relation to Highway 69/400, between January 1, 2002 and the present; and
8. **and** the Ministry of Indian and Northern Affairs in relation to Highway 69/400, between January 1, 2002 and the present.

The Ministry subsequently clarified the scope of the request in a letter to the requester dated March 30, 2005 and issued a fee estimate in the amount of **\$830.00** for providing copies of the records responsive to the request, as clarified. The request was further clarified in a further letter from the Ministry to the requester dated April 15, 2005 in which the scope of the request was again restated and a revised fee estimate in the amount of **\$600.00** for providing records responsive to the request was also provided. On April 18, 2005, the requester paid the deposit of \$300.00 and asked that the records be provided to him in stages.

On May 17, 2005, the Ministry requested a time extension of 30 days for providing the responsive records. However, on May 24, 2005, the Ministry disclosed to the requester some of the records responsive to parts 1 to 6 of the request. Access to other records was denied on the basis that they were exempt under the exemptions in sections 13(1), 18(1) and 21(1) of the *Act*. The requester paid the balance of the outstanding fee and the Ministry disclosed the remainder of the records that were not subject to one of the exemptions described above. On June 1, 2005, the Ministry issued a final access decision citing sections 18(1), 21(1) and 21.1 of the *Act* as the basis for its refusal to grant access to the remaining records. The Ministry also advised the requester that some of the requested records do not exist.

The requester initially filed an appeal with this office seeking a fee waiver despite not having asked the Ministry for a waiver of the fees paid. The Commissioner's office opened Appeal Number PA-050135-1. During the intake stage of the appeals process, the Commissioner's office advised the requester that first he must submit his request for a fee waiver to the Ministry, and if he is not satisfied with the outcome of that request, he may appeal it. This office then closed Appeal Number PA-050135-1.

The requester then submitted a fee waiver request to the Ministry, which was denied and he appealed that decision. The Commissioner's office then opened Appeal Number PA-050135-2, the present appeal.

Mediation was not successful in resolving the issue and the matter was transferred to the adjudication stage of the process. The sole substantive issue to be determined in this appeal is whether the Ministry properly decided not to grant the fee waiver requested by the appellant.

I sought and received representations from the Ministry, initially. A complete copy of those submissions was provided to the appellant, who also submitted representations. I then shared the appellant's submissions with the Ministry and invited it to submit additional representations by way of reply. The Ministry filed reply submissions in response.

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 by 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.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
 - (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 the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate 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]

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]

Review of the representations of the parties

The Ministry provided me with background information respecting the request. The appellant is counsel to a landowner whose property was subject to an expropriation pursuant to the *Expropriations Act* (the *EA*) for the construction of an access road in the Township of Georgian Bay. Under section 6(1) of the *EA*, a landowner whose property is the subject of an expropriation by the Ministry may request a “Hearing of Necessity” into whether the proposed expropriation is appropriate. The hearing does not focus on the amount of compensation but rather relates solely to the extent and location of the proposed taking of lands. The appellant represents a landowner whose property was the subject of such an inquiry that occurred in June of 2005.

The Ministry indicates that it exercised its discretion not to grant a fee waiver in this case because, based on the appellant's written request to it and the Commissioner's office, he "did not meet the onus of demonstrating why this is an appropriate case for departing from the user-pay principle enshrined in the *Act*."

The Ministry then reviewed the factors set out in the *Act* and the Regulation and provided submissions on its reasons for finding that it was "fair and equitable" for it not to grant the requested fee waiver, based on the application of the listed factors. It states that:

- with respect to section 57(4)(a), the Ministry argues that the fee represents just 14 hours of search time while the searches actually undertaken took more than 40 hours to complete. It points out that it also incurred "considerable expense" preparing the "large roll plans in respect of records 221 to 223" and that these costs were not passed along to the appellant;
- the appellant has not raised the application of section 57(4)(b);
- none of the elements of the four part test for determining whether the dissemination of the record will benefit health or safety under section 57(4)(c) as set out by former Assistant Commissioner Tom Mitchinson in Order P-474 are present in this case. It argues that the appellant's interest in the records is strictly a private one on behalf of his client, a private landowner, and that the subject matter of the records does not relate to a public safety issue.

The Ministry then set out a lengthy discussion of the unlisted factors and considerations which it feels are relevant to a determination of whether the granting of a fee waiver in the present circumstances is "fair and equitable" under section 57(4). The Ministry points out that "it does not follow that records that are not available under the *EA* should be provided to the appellant free of charge under [Freedom of Information] rules" and that the appellant received access to all of the material to which he was entitled under the *EA*, specifically, all of the information being relied upon by the Ministry to present its case before the Inquiry Officer at the Hearing of Necessity. It further submits that the Inquiry Officer appointed pursuant to the *EA* determined what documents were relevant and required for the Hearing of Necessity and that the appellant has been provided with access to all of them without charge under the disclosure mechanisms in the *EA*.

The Ministry then reviewed in detail the application of each of seven considerations articulated by the Commissioner's office in past orders, and reproduced above, to assist in determining whether the denial of a fee waiver is "fair and equitable". The Ministry describes the steps taken to ensure that the appellant was provided with the documents he requested in time for the Hearing of Necessity and sets out the Ministry's attempts to work with the appellant in order to focus the scope of the request and contain the costs of obtaining such records.

The Ministry concludes its initial submissions by reiterating that the appellant has not raised a claim of financial hardship and that he is pursuing a "private aim with no evidence of a tangible

benefit to public health or safety”. It argues that none of the considerations favouring a departure from the usual “user-pay” principles in the *Act* apply in the present circumstances.

The appellant argues that the request relates to an issue of public safety as contemplated by section 57(4)(c). In support of this position, he argues that:

A Hearing of Necessity is a public hearing, intended to review whether the expropriation is ‘fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority’. The Inquiry Officer is to consider factors such as the appropriateness of the taking, the route for the taking, consideration of other routes, and evaluating the safety of the proposed undertaking. . .

The appellant concludes this portion of his submissions by stating:

This [Hearing of Necessity], therefore, was for the consideration of public safety and for the public good.

The appellant also claims that the Ministry took steps to limit his ability to obtain access to relevant documents by refusing to produce them at his office in Toronto and by failing to “fulfill any obligation other than what is strictly required under section 7 of the *Expropriations Act*.”

The appellant also suggests that because the decision of the Inquiry Officer following the conclusion of the Hearing of Necessity found that the “undertaking is a public undertaking, which is financed by the public and is intended to be used by the public”, the subject matter of the record is a matter of public interest.

The appellant also refers to the purpose of the request. In the circumstances, the appellant’s client was subject to an expropriation and is attempting to dispute first its necessity, though the Hearing of Necessity process and, ultimately, the valuation of the property that is subject to the process. The appellant points out that the request was made only because of the expropriation decision by the Ministry. Essentially, the appellant argues that his clients were not treated fairly in the expropriation process and that:

To force the Claimants to pay fees to the Ministry, by virtue of the fact that they were attempting to properly exercise their statutory rights as a result of the expropriation, is neither fair nor equitable.

In response, the Ministry reiterates its reliance on the user pay principle set out in the mandatory fee provisions in section 57(1) and argues that only 2 of the 234 records disclosed to the appellant as a result of his request under the *Act* were actually submitted to the Inquiry Officer at the Hearing of Necessity. The Ministry also points out that the appellant clearly concedes that the Ministry’s disclosure of evidence prior to the Hearing was in compliance with its

requirements under the *EA*, and that this was confirmed by the Inquiry Officer. It concludes its reply submissions with the following:

. . . the appellant is attempting to use the access provisions of the *Act* to expand his entitlement to free disclosure beyond that which is provided for in the *Expropriations Act*. It is submitted that the appropriate forum for determining the extent to which the costs of disclosure should be borne by the Ministry is one operating under that statutory regime, not under the *Act*.

Conclusion

In my view, the appellant has failed to tie in the disclosure and consequent dissemination of the records sought by the request to some benefit to public health or safety. I find that the appellant has not provided me with sufficient evidence to link the disclosure and dissemination of the responsive records to some benefit to public health or safety. As a result, I find that the consideration listed in section 57(4)(c) has no application in the present appeal.

For similar reasons, I cannot agree with the appellant's statement that there exists some public interest in the subject matter of the expropriation process because it involves a public road. In my view, the expropriation process at work in this case represents a private dispute between the Ministry and the appellant's client. While the ultimate result of the expropriation may be a public road or right of way, I cannot agree that there exists some public interest in *these particular records* [my emphasis].

While the appellant's involvement with the Ministry came about as a result of an expropriation procedure, that process provides for the disclosure of a wide assortment of documents to those who are subject to its terms. There is no serious dispute that the Ministry did not completely comply with its disclosure obligations under the *EA*; this fact was confirmed by the Inquiry Officer in his decision. The appellant made his request under the *Act* for additional records to which he may be entitled, as is his right. The use of the access provisions in the *Act* by the appellant was a prudent way to ensure that he obtained all of the documentation maintained by the Ministry which related to the expropriation of his property. I do not agree with the Ministry's characterization of the request as a "fishing expedition". Rather, in my view, the request was related directly to the expropriation process and was not undertaken for some inappropriate purpose.

However, that does not operate to entirely answer the questions posed by a fee waiver request. The fee provisions in the *Act* are premised on a "user-pay" principle whereby requesters are expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. None of the considerations set out in section 57(4) or in section 8 of Regulation 460 are present in the present appeal. There is not any public interest in the disclosure of this information; nor is there any public safety or health benefit that will flow from disclosure. In my view, the fee charged by the Ministry was reasonable in the circumstances and its quantum was not challenged by the appellant. Based on all of the circumstances surrounding

this request for a fee waiver, I find that it is fair and equitable that Ministry declined to waive the fee. In my view, the user-pay principle, coupled with the lack of any public health or safety inherent in the records, tips the balance against a waiver of the fees in this case.

Accordingly, I dismiss the appeal of the Ministry's decision not to grant a fee waiver.

ORDER:

I dismiss the appeal.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 4, 2006