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

ORDER PO-2514

Appeal PA-050160-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records covering the period from 1971 until the present relating to the Edwards Landfill Site, which is located near Cayuga, Ontario.

The Ministry initially located 1,750 pages of responsive records after conducting searches at its Hamilton District Office, Spills Action Centre, Investigations and Enforcement Branch, Environmental SWAT Team, and Environmental Monitoring and Reporting Branch. It later determined that the actual number of pages of responsive records generated from this search was 2,362 pages.

It then issued an interim access decision to the requester that provided a fee estimate of $525.00 for providing partial access to the records. The Ministry stated that some information would be severed from the records pursuant to the mandatory exemptions at sections 21(1) (personal privacy) and 17(1) (third party information) of the *Act*. It asked him to provide a 50 per cent fee deposit of $262.50.

The decision letter also informed the requester that the statutory 30-day time limit for responding to the request would be extended by an additional 60 days after receiving the requested deposit, owing to the large volume of additional material to be reviewed and prepared for disclosure. It also stated that there would be an additional $30.00 fee if the requester wanted the Ministry to search for Certificates of Approval at the Environmental Assessment and Approvals Branch, and an additional $60.00 fee for retrieving records that may exist at the Records Centre in Mississauga.

In response, the requester wrote to the Ministry and asked that they search for additional records at the Environmental Assessment and Approvals Branch and the Records Centre in Mississauga. He calculated that this would raise the fee estimate to $610.00 and paid the Ministry a fee deposit of $305.00. In his letter, he also asked that the Ministry waive the fee because payment would cause financial hardship for the citizens' group that he represents. The Ministry issued a further decision letter to the appellant that denied the fee waiver.

Subsequently, the Ministry issued a second interim access decision that stated that it had located approximately 8,000 pages of additional records and 20 large drawings at its Environmental Assessment and Approvals Branch. It later determined that the actual number of large drawings was 25. It provided a fee estimate of $1,800.00 for providing partial access to these records and informed the requester that an additional deposit of $360.00 would be required. The appellant paid the additional fee deposit of $360.00 to the Ministry.

The total fee estimate, therefore, was $2,350.00 ($525.00 + $1,800.00).

The requester (now the appellant) appealed the Ministry's fee waiver decision to this office, although he subsequently clarified that he was also appealing the total fee estimate.

After the appeal was filed, the Ministry notified the appellant that it was extending the time for issuing a final access decision by a further 60 days.

During mediation, the appellant maintained that the fee was not reasonable and in the alternative, that the citizens' group he represented qualified for a fee waiver on the basis of financial hardship. He also submitted that the dissemination of the record would benefit public health and safety. The appellant further stated that he was prepared to go to the Ministry's office to view the records in an effort to reduce the photocopying charges. The Ministry responded that viewing the records was not possible because of the severances that needed to be made pursuant to the exemptions at sections 21(1) and 17(1) of the *Act*.

The issues in this appeal were not resolved in mediation, and the file was transferred to the adjudication stage of the appeal process. After the mediator issued her report, the appellant wrote a letter to this office to advise that the Ministry had not met the second 60-day time extension for issuing a final access decision, and that he would like this issue to be part of the appeal. As a result of the appellant's letter, this office added to the issues to be addressed the question of whether the time extension was reasonable and whether the Ministry is in a "deemed refusal" position.

Initially, this office issued a Notice of Inquiry to the Ministry and invited it to provide representations. In response, the Ministry submitted representations and also appended a final access decision that it had issued to the appellant which granted him partial access to the records. It denied access to some information in the records pursuant to the exemptions at sections 21(1) (personal privacy), 13(1) (advice to government), 19 (solicitor-client privilege) and 22(a) (information soon to be published).

The final access decision also substituted an actual fee of $2,490.20 for the fee estimate of $2,350.00. It informed the appellant that a copy of the records would be forwarded to him upon payment of this fee. It further informed him that although the documents had been prepared for disclosure, he could reduce his costs by viewing the 25 large documents at the Ministry's office in Toronto and if he eliminated from his request all of the records that contain public comments that were submitted in response to a posting under the *Environmental Bill of Rights*. In addition, the Ministry agreed to waive the $120.00 cost of shipping boxes from the Records Centre in Mississauga to the Ministry's Hamilton office and back.

After receiving the Ministry's representations, this office issued a Notice of Inquiry to the appellant, along with the complete representations of the Ministry, and invited him to provide submissions. The appellant submitted representations in response. Finally, this office sent the appellant's representations to the Ministry and invited it to provide reply representations. The Ministry submitted representations by way of reply, as well.

DISCUSSION:

FEE

Should the fee be upheld?

Section 57(1) requires an institution to charge fees for requests under the *Act*:

> 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.

More specific provisions regarding fees are found in section 6, 7 and 9 of Regulation 460:

> 6. 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.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under Subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

The Ministry's representations

Before submitting its initial representations to this office, the Ministry issued a final access decision to the appellant that provided the following calculation of the total "actual fee":

Search time 2 hours @ $30.00 per hour	$60.00
Photocopying 8826 pages @ 20 cents per page	1765.20
Preparation time 13.5 hours @ $30.00 per hour (to remove exempt information)	405.00
Reproduction of large drawings (outside vendor) 25 @ $10 each	250.00
Delivery	10.00
Total	$2490.00
Deposit received	667.50
Balance due	**$1822.70**

However, in its representations, the Ministry amended its calculations and provided a slightly lower total fee:

Description	Cost	Amount Paid
2.5 hours of search time @ $30.00/hour	$75.00	

photocopying 8,826 pages@ $0.20 each	$1,765.20	
reproduction of 25 large drawings	$46.40	
13.5 hours of preparation time @$30.00/hour	$405.00	
delivery by Purolator	$29.11	
Total	**$2,320.71**	**$667.50**
Balance due	**$1,653.21**	

In response to a telephone call from this office, the Ministry confirmed that the correct total fee is the $2,320.71 cited in its representations, rather than the $2,490.20 cited in its final access decision. Consequently, the fee amount that is at issue in this appeal is $2,320.71, as calculated above.

The Ministry has provided detailed representations on how it calculated the total fee that was charged to the appellant.

Search fee

After receiving the appellant's request, the Ministry asked the following offices to conduct searches: Hamilton District Office (HDO), Spills Action Centre (SAC), Investigations and Enforcement Branch (IEB), Environmental Monitoring and Reporting Branch (EMRB), Environmental SWAT Office (SWAT), and Environmental Assessment and Approvals Branch (EAAB).

The Ministry's representations provide the name and expertise of the staff person in each of these offices who conducted the search, the types of searches that were conducted, what records (if any) that were located, and the amount of time it took to conduct the search.

The Ministry's representations then provide the following breakdown of the actual search time that was incurred by the staff in each office: HDO (1.0 hour), SAC (0.25 hour), IEB (0.8 hour), EMRB (0.25 hour), SWAT (0.8 hour), EAAB (1.0 hour). The total search time was 2.66 hours, which the Ministry rounded down to 2.5 hours for the purpose of calculating a search fee of $75.00 (2.5 hours x $30.00/hour).

Photocopy fee

The Ministry submits that the records that would be disclosed to the appellant are 8,826 pages in total. The photocopy fee was assessed at $1,765.20 (8,826 pages x $0.20/page).

Fee for reproduction of 25 large drawings

The Ministry further submits that the records include 25 large drawings. Although the Ministry typically charges $10.00 per drawing for reproduction requests, it sent the 25 large drawings to a private company which charges by the square foot rather than per drawing. Consequently, the Ministry submits that it is able to charge the appellant a reduced total fee of $46.40 for reproducing the 25 drawings.

Preparation time fee

The Ministry states that there are 410 pages where partial severances are required. It submits that it would take two minutes to sever each page, which would produce a total preparation time of 13.67 hours. It calculated the total fee for preparing the records by rounding down the total preparation time to 13.5 hours and multiplying it by $30.00 per hour, to produce a preparation time fee of $405.00.

Shipping fee

The Ministry states that it would be shipping four boxes of records to the appellant. It contacted Purolator, which quoted a delivery charge of $29.11.

Further fee representations

In its representations, the Ministry further submits that the appellant has made no attempts to minimize the costs, as outlined in its final decision letter. In particular, it states that the appellant was informed that he could minimize costs by eliminating records relating to comments received from the public pursuant to the *Environmental Bill of Rights* process ($450.00) and viewing the large drawings ($250.00, which was subsequently reduced to $46.40).

The Ministry also claims that it is not possible to view the records because the exempt information is mixed throughout the files.

The Ministry take the position that the fee was accurately calculated and should be upheld.

The appellant's representations

The appellant makes three points in his representations.

First, he expresses concern that the Ministry has provided two different fee amounts. The Ministry provided a "balance due" of $1,822.70 in its final access decision. However, in its representations to this office, the Ministry provided a "balance due" of $1,653.21. The appellant submits that "we are concerned by the discrepancies displayed by the Ministry's figures" and therefore questions whether the total fee amount of $2,320.71 is reasonable.

Second, the appellant submits that his group has attempted to find a "middle ground" to reduce the costs relating to their request. In particular, the appellant states that he is willing to go to the Ministry's office to view the records to reduce the photocopying costs. He rejects the Ministry's assertion that viewing the records is not possible because of the severances that would need to be made to the records pursuant to the personal privacy and third party information exemptions under the *Act*. He points out that 410 out of the 8,826 pages require severing:

> Whether these records are sent in the mail or viewed at the Ministry's offices, they still have to be severed. Why not sever the records ahead of time. Then the appellant can come to the institution's office and save substantial photocopying charges which is less work for the Ministry and less cost for the appellant. Just photocopy the pages to be severed and then the appellant can review the rest of the documentation and determine what records need to be photocopied. In reviewing the Ministry's [final access decision], $1,765.20 represents better than 70% of [the Ministry's] fee estimate. Surely substantial savings could be realized here.

Third, the appellant submits that he does not want any duplicates of records. In other words, he questions whether the final fee includes costs of photocopying more than one copy of the same record.

The Ministry's reply representations

With respect to whether the fee should be upheld, the only reply representation that the Ministry made on this issue was that for the final page count, duplicates were removed.

Analysis and findings

I have carefully considered the representations of both the Ministry and the appellant. In my view, the Ministry has generally complied with the requirements of section 57(1) of the *Act* and section 6 of Regulation 460. It has provided a detailed breakdown of the total fee, and a detailed statement as to how the fee was calculated. I find that the search fee, the preparation fee and the shipping fee charged by the Ministry are in compliance with the fee provisions in the *Act* and Regulation 460 and would note that the Ministry has rounded down or modified these fees to the benefit of the appellant.

Moreover, I find that the Ministry's photocopying fee of 20 cents per page for the 8,826 pages of responsive records and the $46.40 fee for reproduction of the 25 large drawings are both in

compliance with the fee provisions in the *Act* and Regulation 460. Although the appellant expressed concern that the Ministry may have included duplicate records in its calculation of the total photocopying fee, the Ministry has confirmed that duplicate records were removed before conducting the final page count.

I have concluded, however, that the Ministry has not taken adequate steps to assist the appellant in lowering the total fee for accessing the responsive records, particularly the photocopying fees. The fee provisions in the *Act* and Regulation 460 are based on a "user pay" principle. However, an institution must always strive to provide access at the lowest possible cost to the public, and the *Act* provides mechanisms for doing so.

Section 30(2) of the *Act* requires an institution to give a requester the opportunity to view an original record or part of an original record, in prescribed circumstances:

> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

Section 30(2) is a mandatory provision, subject only to the requirement of reasonable practicability. The burden is on the institution to demonstrate that the means of viewing requested by the appellant is not reasonably practicable.

According to the Ministry's fee calculation, $1,765.20 out of the total fee of $2,320.71 is for photocopying costs. In other words, the fee for photocopying the 8,826 pages of responsive records makes up 76 percent of the total fee in this appeal.

The appellant has offered to go in person to the Ministry's office to view the 8,826 pages of records in order to reduce photocopying costs.

The Ministry submits that viewing these records is not possible because of the severances that would need to be made to 410 pages of records. In particular, it claims that the exempt information is mixed throughout the records. The only records that the Ministry has offered the appellant the opportunity to view in order to minimize reproduction costs are the 25 large drawings.

Although the Ministry does not cite section 30(2) of the *Act* in its representations, it is essentially arguing that it is not reasonably practicable to give the requester the opportunity to examine the 8,826 pages of records because the exempt information is mixed throughout the records.

I do not accept the Ministry's position on this issue for two reasons.

First, the Ministry states that only 410 pages require partial severances before being released to the appellant. However, there are 8,826 pages of responsive records. This means that the vast

majority of the records (8,826 – 410 = 8,416 pages) does not appear to have any information that is subject to an exemption claim and could therefore easily be examined by the appellant at the Ministry's office. In other words, it is reasonably practicable for the Ministry to allow the appellant to view these 8,416 pages of unsevered records.

Second, the appellant submits that the Ministry could sever the 410 pages of responsive records that are subject to an exemption claim in advance of his examination of all of the records. I agree with the appellant. Section 30(2) requires an institution to allow a requester to examine a record or "part thereof". Consequently, this section clearly contemplates that a requester has a right, subject to the requirement of reasonable practicability, to view not only records that do not require severing, but those that require severing as well (i.e., part of a record).

In my view, it is reasonably practicable for the Ministry to sever in advance the 410 pages of responsive records that are subject to an exemption claim and then make these available for the appellant to view, in conjunction with the 8,416 pages that do not require severing.

In terms of fees, I have already upheld the Ministry's preparation fee of $405.00, which covers the staff time that would be required to sever the records. Consequently, the Ministry may charge this fee to the appellant before allowing him to view the severed records.

In short, I find that section 30(2) of the *Act* requires the Ministry to provide the appellant with the opportunity to examine the 8,826 pages of responsive records (including the 410 pages of severed records), and I will be ordering the Ministry to do so. The Ministry has already offered the appellant the opportunity to view the 25 large drawings.

As an aside, I would note that the heading to section 30(2) refers to "Access to Original Record." Consequently, this section contemplates that a person will be provided with the opportunity to examine *original* records in whole or in part.

In the circumstances of this appeal, the Ministry's freedom of information (FOI) office appears to have collected photocopied versions of the 8,826 pages of original records from various offices within the Ministry. I will assume that the appellant will not object to viewing these photocopied versions, although he is technically entitled to examine the original records. Consequently, if the Ministry's FOI office has photocopied versions of the original records that it has compiled from other offices, it may treat them as the original records, for the purposes of complying with section 30(2) of the *Act*.

The appellant states that after examining the records, he would determine which pages need to be photocopied.

Section 30(3) of the *Act* states:

> Where a person examines a record or a part thereof and wishes to have portions of it copied, the person shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

The Ministry has already provided a fee for photocopying the 8,826 pages of records. This clearly indicates that it is reasonably practicable for the Ministry to provide the appellant with copies of any of the 8,826 pages of responsive records that he wishes to obtain. Consequently, I find that section 30(3) of the *Act* requires the Ministry to provide the appellant with copies of any of the responsive records that he wishes to obtain after viewing them.

Section 57(1)(c) of the *Act* requires an institution to charge a requester a fee for computer and other costs incurred in locating, retrieving, processing and copying a record. This office has held that a photocopying fee may only be assessed for pages of records that are *disclosed* to the appellant (Orders M-203, M-218 and M-981). Consequently, if the appellant decides to obtain any of the 8,826 pages pursuant to section 30(3) of the *Act*, the Ministry must charge a photocopying fee. Specifically, the Ministry is required to charge the appellant 20 cents per page for providing photocopies, in accordance with section 6, provision 1, of Regulation 460.

The Ministry has provided a fee of $29.11 for shipping the records to the appellant. However, it may be possible to reduce or even eliminate this fee, depending on the number of records that the appellant decides to obtain after examining them and whether he is willing to pick them up. Consequently, I will be ordering the Ministry to reconsider its shipping fee.

FEE WAIVER

Should the fee be waived?

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.

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].

Part 1: basis for fee waiver

Section 57(4)(a): actual cost in comparison to the fee

In deciding whether it is fair and equitable to waive payment of all or part of the fees, an institution must consider whether the actual cost of processing, collecting and copying the record varies from the amount of the fee.

The Ministry submits that the actual costs that the Ministry has incurred in processing the request "significantly" exceed the chargeable fees. For example, it states that in order to photocopy the 8,000 pages at the Environmental Assessment and Approvals branch, a staff person took five working days and a temporary staff person was brought in for two additional days. Moreover, the Ministry's FOI office spent 5.5 days reviewing and copying the records for the requester.

The appellant did not provide representations that specifically address whether the actual cost of processing, collecting and copying the record varies from the amount of the fee.

In my view, the Ministry's representations make it clear that it has incurred significant costs that have not been charged to the appellant. Various offices of the Ministry spent several days of staff time making photocopies of the 8,826 pages of responsive records and then sent them to the Ministry's FOI office. The Ministry's FOI office also spent 5.5 days reviewing and copying some of the records, which is a considerable amount of time to spend on one request.

Consequently, I find that the actual cost of processing, collecting and copying the record is higher than the amount of the fee.

Section 57(4)(b): financial hardship

In deciding whether it is fair and equitable to waive payment of all or part of the fees, an institution must consider whether the payment will cause a financial hardship for the person requesting the record.

The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402].

Generally, a requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365, P-1393].

The Ministry submits that the appellant has provided no information about his personal ability to pay. Furthermore, it states that the financial statement that the appellant submitted for the citizens' group he represents shows that two fundraising activities raised almost $10,000. The Ministry submits that these fundraising activities demonstrate that the citizen's group has the capacity to raise the necessary funds to pay for the request. Although the group's financial statement shows that it was facing a deficit, the Ministry submits that allowing a projected deficit to be sufficient grounds to establish a financial hardship would essentially eliminate the user pay principle and allow any requesters with outstanding loans or mortgages to have their request processed for free.

The appellant submits that the citizens' group he represents is made of up volunteers who are opposed to the reopening and expansion of the dormant Edwards Landfill Site. In order to fight the proposed expansion, the group has engaged environmental lawyers, a landfill engineer and a hydrogeologist. The appellant submits that the majority of the group's funds cover the fees of these experts:

> It is a tremendous financial hardship to pay the Ministry's FOI fee in addition to the fees we pay our consultants … At this time we have in excess of $43,000 in legal expenses we cannot cover. We anticipate that further legal expenses will be in the tens of thousands of dollars more in cost. In this instance every penny counts.

To support his claim of financial hardship, the appellant provided the following picture of his group's overall financial status:

- Assets – $25,848.63
- Liabilities – $100,000.00

- Revenues – $57,717.12
- Expenses – $54,373.99

The appellant also submitted a balance sheet and income statement that was attached as an appendix to his representations.

In its reply representations, the Ministry submits that since the appellant has been able to pay for some of the fees to date and can raise $100,000 for legal fees, he should be able to raise additional fees to pay for the fee relating to his access request. Furthermore, it states that the access fee that the appellant would be required to pay represents only a small percentage of the total costs associated with his group's actions to stop the expansion of the Edwards Landfill Site.

I have considered the representations of both the Ministry and the appellant. At the outset, I would point out that that the financial hardship criterion should be applied to the citizens' group that the appellant represents. In its representations, the Ministry submits that the appellant has provided no information about his personal ability to pay. In my view, this is an overly technical interpretation of who the requester is in this appeal. Although the appellant submitted his initial access request only in his own name, he has subsequently and repeatedly emphasized that he is representing a citizens' group that is fighting the expansion of the Edwards Landfill Site. Consequently, for the purposes of this appeal, it must be determined whether the payment will cause a financial hardship for the citizens' group.

The appellant has provided details regarding his group's financial situation, including information about its income, expenses, assets and liabilities. In my view, it is plain and obvious that the appellant's group is facing a financial struggle in its overall efforts to fight the expansion of the Edwards Landfill Site and I do not wish to minimize the challenges it is facing. I accept that it is expensive for a group made up of volunteers to pay for legal counsel and other experts, and the fees required to access the records at issue in this appeal add to those expenses.

I am not persuaded, however, that the group would face a financial hardship in paying for the fee at issue in this appeal. The *Concise Oxford Dictionary* defines a hardship as "severe suffering or privation." In my view, the fee in this appeal may pose a financial challenge for the appellant's group, but I am not convinced that paying this fee alone would cause the group to undergo severe financial suffering or privation. I accept the Ministry's submission that the access fees that the appellant's group would be required to pay only represent a small percentage of the total costs associated with the group's actions to stop the expansion of the Edwards Landfill Site.

Moreover, the fact that I will be ordering the Ministry to allow the appellant to view the records at issue before deciding which ones he needs to be photocopied will likely enable the group to significantly reduce the total fee that it will have to pay. Consequently, I find that paying the fee does not meet the threshold of causing a financial hardship to the appellant.

Section 57(4)(c): public health or safety

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]

The Ministry submits that the appellant currently has an appeal before the Environmental Review Tribunal (ERT) with respect to expansion of the Edwards Landfill Site. It submits that

the ERT hearing process will result in the dissemination of "relevant" records that will benefit public health and safety:

> The current appeal before the ERT will ultimately decide whether additional terms and conditions are needed to protect the public.
>
> It is the requirement and practice of the ERT that all of the evidence will be made available to the parties to the hearing, including [the appellant] at no cost.
>
> It is the Ministry's position that records dating back to 1971 where the circumstances were very different will not be reasonably necessary to assess the current application and current appeal.
>
> If [the appellant] can demonstrate the need for these records, the ERT would order production at no photocopying cost to [the appellant]. This provides an avenue to obtain relevant records rather than the current FOI request whereby all records from 1971 are requested.

The appellant submits that disseminating the records will benefit public health and safety. Attached to his representations are documents that purport to show that the Edwards Landfill Site contains "solvents and solidified resins" and other hazardous waste. The appellant also cites Order M-408, which found that dissemination of records relating to a proposed landfill site will benefit public health and safety. He submits that the records at issue in this appeal will provide a public benefit by contributing to understanding of the contamination of the site and its potential effects on the community:

> [The appellant] will disseminate this information to the public. The organization's mandate includes educating the public on environmental concerns. Our track record includes regular updates to the public through the media, public meetings and our website.

In its reply representations, the Ministry submits that all documents relating to the current expansion of the landfill site have been made available to the appellant at no charge. Although the Ministry does not explain how this has occurred, it is presumably referring to the hearing before the ERT, in which that tribunal may order that records be produced to the appellant without charge.

I have considered the representations of both the Ministry and the appellant and other relevant factors. In my view, it is clear that the records relating to the Edwards Landfill Site are a matter of public rather than private interest, and they relate directly to public health and safety. I do not accept the Ministry's submission that because all "relevant" records will be made available to the appellant during the ERT's hearing process, other records held by the Ministry that have not yet been disclosed would not benefit public health and safety through their dissemination.

Even if some of the records stretching back to 1971 are arguably not relevant to the current controversy with respect to the expansion of the Edwards Landfill Site, there are undoubtedly other records amongst the 8,826 pages that will shed light on the public health and safety issues relating to the site. Moreover, the appellant has stated that his group will disseminate such information to the public through the media, public meetings and its website. Consequently, I find that there is a high probability that the records will be disseminated to the public.

In short, I find that dissemination of the records relating to the Edwards Landfill Site will benefit public health or safety. However, I must still consider whether it would be fair and equitable in the circumstances to grant a fee waiver.

Part 2: fair and equitable

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 Ministry submits that it worked constructively with the appellant to narrow his request and lower the fees. In particular, it states that it informed the appellant that he could reduce his costs by viewing the 25 large drawings and then deciding which ones he requires to be copied. Furthermore, it suggested to the appellant that the preparation fee could be reduced if he did not seek access to the specific public comments the Ministry received with respect to whether the Edwards Landfill Site should be expanded. The Ministry submits that these comments have been summarized on the Environmental Registry and in other records.

The appellant submits that it would be fair and equitable to provide a fee waiver. He states that the Ministry did not work with him to narrow or clarify the request until it issued its final access decision. Moreover, he states that the Ministry's staff did not return his phone calls or otherwise respond to a letter that he sent in which he offered reduce costs by coming to the Ministry's offices to view the records, including the large drawings. He also claims that the Ministry did not meet its own deadlines for responding to the request.

I find that there are a number of factors in this appeal that are relevant to determining whether it would be fair and equitable in the circumstances to grant a fee waiver to the appellant.

The Ministry responded to the appellant's request in a contradictory manner. Although the Ministry devoted significant staff time and resources to locating and retrieving records responsive to the request, it apparently did not respond to some of the appellant's phone calls and correspondence and did not meet its own deadline for providing a final access decision. In my view, this factor weighs slightly in favour of granting a fee waiver.

The Ministry worked with the requester to narrow and clarify his request. It suggested to him how he could reduce copying costs (by viewing the 25 large drawings) and the preparation fee (by not seeking access to the records containing public comments, which require severing). I find that this factor weighs against granting a fee waiver.

Although the appellant did not significantly narrow the scope of his request, he attempted to advance a compromise solution which would reduce the photocopying costs. In particular, he offered to go in person to the Ministry's office to view the 8,826 pages of records in order to reduce photocopying costs. I find that this factor weighs in favour of granting a fee waiver.

The Ministry has not provided any records to the appellant free of charge. However, it rounded down the search and preparation time fees charged to the appellant. In addition, it lowered the fee for reproducing the 25 large drawings from $250.00 to $46.40. It also agreed to waive the $120.00 cost of shipping boxes from the Records Centre in Mississauga to the Hamilton office and back. I find that this factor weighs against granting a fee waiver.

In this appeal, there are 8,826 pages of responsive records, which is a very large number. This is a significant factor weighing against granting a fee waiver.

Another important factor to consider is whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution. I have already found that the actual cost of processing, collecting and copying the record is higher than the amount of the fee that is being assessed to the appellant. Due to the broad scope of the appellant's request, various offices of the Ministry spent several days making photocopies of the 8,826 pages of responsive records and then sent them to the Ministry's FOI office. The Ministry's FOI office also spent 5.5 days reviewing and copying some of the records, which is a considerable amount of time to devote to one request.

In my view, the complete waiver of the fee would shift an unreasonable burden of the cost from the appellant to the Ministry, particularly given the substantial efforts the Ministry has made to locate, retrieve and copy records responsive to the appellant's request. I would note as well that I will be ordering the Ministry to allow the appellant to view all 8,826 pages of responsive records, which will significantly lower photocopying costs for the appellant. I find that this factor weighs heavily against granting a fee waiver.

I have found that dissemination of the records relating to the Edwards Landfill Site will benefit public health or safety. However, after considering the factors that are relevant in deciding whether or not a fee waiver is "fair and equitable," I have concluded that the factors that weigh against granting a fee waiver outweigh those in favour of doing so. I am particularly swayed by the fact that waiving the fee would shift an unreasonable burden of the cost from the appellant to the Ministry, and that I will be ordering the Ministry to allow the appellant to examine the 8,826 pages of responsive records. Consequently, I find that it would not be fair and equitable in the circumstances of this appeal to grant a fee waiver.

TIME EXTENSIONS

Was the Ministry entitled to extend the time under section 27(1) of the *Act* for responding to the appellant's request?

Time extensions are governed by section 27(1) of the *Act*:

> A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
>
> (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

Section 26 of the *Act* requires an institution to issue an access decision to the requester within 30 days of receiving the request.

The issue to be addressed is whether the extension was reasonable in the circumstances of the request, in the context of the provisions of section 27(1). Factors which might be considered in determining reasonableness include:

- the number of records requested;

- the number of records the institution must search through to locate the requested record(s); and

- whether meeting the time limit would unreasonably interfere with the operations of the institution.

After mediation, the appellant wrote a letter to this office that stated that the Ministry had not met the second 60-day time extension for issuing a final access decision, and that he would like this issue to be part of the appeal. Consequently, this office added to the issues to be addressed the question of whether the time extension was reasonable and whether the Ministry is in a "deemed refusal" position.

In its representations, the Ministry states that there are a large number of records in this appeal. It submits that reviewing thousands of pages of records is time consuming, and to avoid unreasonable interference with the daily operations of the Ministry, a 120-day time extension would be considered reasonable.

The appellant submits that he did not have a problem with the Ministry stating that a time extension was required due to the volume of records. However, he submits that the Ministry should have anticipated that it would not be able to meet the deadline and also contacted him to explain that the deadline was not going to be met and why.

I have considered the representations of the Ministry and the appellant. In its first interim access decision, dated April 18, 2005, the Ministry informed the requester that the statutory 30-day time limit for responding to the request would be extended by an additional 60 days after receiving a deposit, because of the large volume of additional material to be reviewed and prepared for disclosure.

In a letter dated May 3, 2005, the requester paid the Ministry the requested fee deposit. I do not have any evidence before me that states the precise date on which the Ministry received the appellant's fee deposit. However, given that the appellant's letter is dated May 3, 2005, it is reasonable to conclude that the fee deposit was received by the Ministry in the first half of May. Consequently, the 60-day extension issued by the Ministry would have taken effect at that time and would likely have expired in the first half of July.

In its second interim access decision, dated June 21, 2005, the Ministry stated that it had located an additional 8,000 pages of records and 20 large drawings at its Environmental Assessment and Approvals Branch. It provided a fee estimate of $1,800.00 for providing partial access to these records and informed the requester that an additional deposit of $360.00 would be required. The appellant paid the additional fee deposit of $360.00 to the Ministry.

In a letter to the appellant dated July 7, 2005, the Ministry confirmed that it had received the appellant's fee deposit of $360.00. It further stated that the appellant's request had been given a

further 60-day time extension because of the large volume of additional material to be reviewed and prepared for disclosure.

In short, it appears that the Ministry extended the time for responding to the request by a total of 120 days beyond the 30-day time limit set out in section 26 of the *Act*.

In determining whether the Ministry's 120-day time extension for responding to the request was reasonable in the circumstances pursuant to section 27(1) of the *Act*, I have considered the fact that the appellant's request required the Ministry to locate and review thousands of responsive records. Moreover, the large volume of responsive records only became evident as the Ministry conducted its searches in response to the request. It is also clear that the Ministry could not have met the 30-day time limit for responding to the request without devoting a disproportionate amount of staff time and resources to this particular request. I conclude that this would have constituted an unreasonable interference in the Ministry's operations.

In my view, a 120-day time extension was reasonable in the circumstances of this request. Consequently, I find that the Ministry's time extensions were in compliance with section 27(1) of the *Act*.

DEEMED REFUSAL

Is the Ministry in a "deemed refusal" situation?

Section 26 of the *Act* requires a Ministry to issue a decision within 30 days of receipt of a request. If a decision is not issued within that time period, the Ministry is in a "deemed refusal" situation pursuant to section 29(4) of the *Act*:

> A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

The Ministry submits that it issued its final decision letter to the appellant on September 9, 2005. Consequently, it is not in a "deemed refusal" position.

The appellant submits that if one were to adhere strictly to section 29(4) of the *Act*, the Ministry was clearly in a "deemed refusal" position. He points out that he did not receive the Ministry's final decision letter until September 21, 2005.

I have considered the representations of both the Ministry and the appellant and the chain of correspondence issued to the appellant by the Ministry. In a letter to the appellant dated July 7, 2005, the Ministry stated that the appellant's request had been given a further 60-day time extension. This means that the Ministry was required to issue a final access decision to the appellant by September 5, 2005. However, the Ministry did not issue its final decision letter to

the appellant until September 9, 2005, and the appellant apparently did not receive it until September 21, 2005.

In my view, the Ministry was technically in a "deemed refusal" position as of September 6, 2005. However, it issued its final decision letter shortly thereafter and is no longer in a "deemed refusal" position. Consequently, for the purposes of this appeal, this issue is now moot.

OTHER MATTERS

In his representations, the appellant raises several issues that are not at issue in this appeal. For example, he submits that the Ministry did not use the proper search terms to track down records relating to the Edwards Landfill Site. In other words, the appellant is questioning whether the Ministry conducted a reasonable search for the records, as required by section 24 of the *Act*. Furthermore, he provides brief submissions as to whether the Ministry has properly claimed the exemptions at sections 13(1), 19 and 21(1) of the *Act*.

The only issues in this appeal are fee, fee waiver, time extensions, and deemed refusal. Consequently, I will not consider the issue of reasonable search, which has been raised by the appellant at a late stage in this appeal. I would note as well that the appellant did not formally appeal the Ministry's final access decision, in which it claimed four exemptions: sections 21(1), 13(1), 19 and 22 of the *Act*. Consequently, whether these exemptions apply to the records at issue is not an issue that is before me for the purposes of this appeal.

ORDER:

1. I uphold the Ministry's search fee of $75.00 and its preparation fee of $405.00.

2. I order the Ministry to allow the appellant to examine the 8,826 pages of responsive records at the Ministry's office in Toronto within 30 days of this order.

3. I order the Ministry to sever the 410 pages of responsive records that are subject to an exemption claim in advance of these records being examined by the appellant.

4. I order the Ministry to allow the appellant to examine the 25 large drawings at the Ministry's office in Toronto within 30 days of this order.

5. I order the Ministry to provide the appellant with copies of any of the 8,826 pages of responsive records and 25 large drawings that he wishes to obtain after examining them.

6. I find that the Ministry is required to charge the appellant 20 cents per page for providing photocopies of any of the 8,826 pages of responsive records that he wishes to obtain, in accordance with section 6, provision 1, of Regulation 460.

7. I find that the Ministry may charge the appellant a fee for reproducing any of the 25 large drawings that he wishes to obtain. This fee must be based on the estimate provided by the private company consulted by the Ministry which charges by the square foot rather than per drawing.

8. I order the Ministry to reconsider its shipping fee of $29.11 after taking into account the number of records that the appellant wishes to obtain after examining them and whether he is willing to pick up the records.

9. I uphold the Ministry's decision to deny a fee waiver to the appellant.

Original signed by: October 23, 2006
Colin Bhattacharjee
Adjudicator