



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

ORDER PO-2971

Appeal PA09-317-2

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request, under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* on behalf of an organization for access to:

- A complete copy of the report carried out by [a named hospital (the Hospital)] at the behest of the Paediatric Death Review Committee [PDRC] of the Office of the Chief Coroner of Ontario, relating to the death of [named child] on [date].
- Complete copies of any other records or reports in the custody and control of the Office of the Chief Coroner of Ontario or any other office of the Ministry of Community Safety and Correctional Services related to the death of [named child].

The requesters advised that they did not wish to obtain access to the personal information of other patients. They also provided a consent form signed by the parents of the deceased child consenting to the disclosure of their deceased child's records to the requesters.

Before issuing its decision on access, the Ministry contacted the requesters to obtain clarification of the request. The requesters narrowed the request and advised that they are not seeking access to correspondence from the parents to any Ministry staff or outside organization. The Ministry also asked the requesters to provide consent from the parents to disclosure of their own information that may be intermingled with their deceased child's information. The requesters provided this consent from the parents.

In its letter of June 16, 2009, the requesters clarified that they are seeking access to all of the Ministry's and the Chief Coroner's records relating to the death of the named child, including "... any other reports, analyses, briefing notes, emails, or any other records of communication within or between the Minister's office and the Office of the Chief Coroner relating to the named child" and the Hospital.

The requesters further clarified that they only want website links for records that are publicly available. The requesters also advised that they did not consent to the disclosure of their identity to organizations notified of the request by the Ministry.

At this point, the requesters, now the appellants, filed an appeal because a decision had not been issued and they had not obtained the records. As a result, appeal file PA09-317 was opened.

In response to the appeal, the Ministry issued an access decision based on the clarifications provided by the requesters on June 16, 2009. The Ministry also advised the appellants that it had undertaken consultation with a large number of organizations and that only five responses had been received. As a result, the Ministry granted partial access to the records. Access was denied to records pursuant to sections 13(1) (advice or recommendations), 14(1) (law enforcement), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act* and because some information is not responsive to the request. The Ministry also denied access to a record on the basis that the

Quality of Care Information Protection Act (the *QCIPA*) prevailed over the *Act*. A fee estimate was issued in the amount of \$371.92. The Ministry also asked the appellants to provide more information as to their claim that section 23 (public interest override) of the *Act* applies. As the Ministry had issued a decision on access, appeal file PA09-317 was closed.

The appellants subsequently provided the Ministry with representations regarding section 23 of the *Act*. They asked for a fee waiver and asked to be provided with the records “in Adobe PDF format on CD or DVD media.”

The Ministry issued a supplementary decision dated November 20, 2009 advising that section 23 of the *Act* does not apply. The Ministry also denied the appellants’ request for a fee waiver. The Ministry advised that it would provide electronic copies of records that do not require severing and paper copies of 19 pages that do require severing, resulting in a reduced fee of \$160.92.

The appellants appealed the Ministry’s decisions to deny access to some records and to deny the request for a fee waiver and, as a result, file PA09-317-2 was opened.

During mediation, the appellants confirmed that they were not appealing the amount of the fee, that they were not interested in obtaining access to any non-responsive information or the personal information of other individuals, nor were they interested in obtaining information for which sections 13(1) and 19 had been claimed.

With respect to the Office of the Chief Coroner records, due to consent obtained by the Ministry, section 14(1) was no longer at issue.

Before issuing its decision on access to recommendations in the *QCIPA* Report, the Ministry notified a party who may have an interest in the record (the affected party). The affected party objected to the disclosure of pages 1904-1908 of this report on the basis that section 2 of the *QCIPA* prevails over the *Act*. The Ministry then issued its decision denying access to these pages.

As mediation did not resolve this appeal, the file was transferred to adjudication. The Ministry then decided to disclose one of the two records remaining at issue in the appeal. I sent a Notice of Inquiry to the Ministry and the affected party seeking their representations. I received representations from the Ministry only. In its representations, the Ministry agreed to disclose the remaining pages of the *QCIPA* Report (pages 1904-1908), subject to the fee issue being resolved. Accordingly, the application of the claimed exemptions and the applicability of the public interest override in section 23 of the *Act* to the records are not at issue in this appeal.

In its representations, the Ministry reduced its fee to \$147.79 by adjusting the anticipated shipping costs of \$17.12 to \$3.99 to reflect the reduced shipping costs associated with the disclosure of five CDs and 24 pages of paper records. Accordingly, the only issue remaining to be adjudicated upon was the waiver of the fee of \$147.79 under section 57(4)(c).

I sent a complete copy of the Ministry’s representations, along with a copy of its supplemental decision letter to the appellants, along with a Notice of Inquiry. I received representations from

the appellants in response. I then sought and received reply and surreply representations from the parties.

DISCUSSION:

FEE WAIVER

I will now decide whether the fee of \$147.79 should be waived.

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. The appellants rely on section 57(4)(c) as the basis for their fee waiver. This provision states:

A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

whether dissemination of the record will benefit public health or safety;

Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee.

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.

The fee provisions in the *Act* establish a user-pay principle, which is founded on the premise that requesters should be 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. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees (Order PO-2726).

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 and 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)(c): public health or safety

The Ministry states that the records relate to a deceased child and that, in support of the fee waiver, it was advised by the appellants that:

- a) [the] request is made on behalf of the [two] group[s], which demonstrates that this is a matter of public rather than private interest;
- b) the subject matter of the records relates directly to a public health and safety issue;
- c) the dissemination of the records would disclose a public health or safety concern and contribute meaningfully to the development of understanding of an important public health or safety issue;
- d) the records will be disseminated (with discretion) by the [appellants] to members of the aforementioned groups. ...

The Ministry denied this fee waiver request because it did not agree that disclosure of the records will benefit public health or safety. The Ministry submits that:

The Office of the Chief Coroner's [which is part of the Ministry] investigation into the circumstances of the death of the child is closed. It is the view of the Office of the Chief Coroner that there are no outstanding public safety issues in relation to this case...

The appellants state that the child's parents have raised concerns about the quality of care that the child received at the Hospital prior to her death. They submit that:

The appellants are seeking access to records held by the Office of the Chief Coroner of Ontario or any other office of the Ministry with respect to the investigation of the allegations made by the [parents] regarding [their daughter's] death at the Hospital.

Not only do the [parents] have significant concerns about the quality of care given to [their daughter] by the Hospital, but also have similar concerns about the

quality of the investigation by the Paediatric Death Review Committee and the Office of the Chief Coroner of Ontario, as well as the failure of the Chief Coroner and former Minister of Community Safety and Correctional Services [name] to adequately respond to their numerous requests for information.

[The child's] story and [her parent's] allegations against the Hospital and the Office of the Chief Coroner have been the subject of media coverage in Ontario (e.g., Toronto Star), nationally (e.g., National Post), and in the Canadian Medical Association Journal. [The mother] has authored several commentaries about [the child's] treatment, which have been published in peer-reviewed bioethics journals such as Paediatrics & Child Health and the Hastings Centre Report...

The [parent's] concerns about the lack of accountability by the Office of the Chief Coroner and Minister [name] have been addressed in the Legislative Assembly of Ontario on several occasions...

[Their] concerns with both the Hospital and Office of the Chief Coroner relate to alleged systemic problems in both organizations, which may affect the health and wellness of vulnerable individuals with various disorders who receive medical treatment in the province of Ontario, which is clearly in the public interest.

One of the groups that the appellants represent is a named Facebook group, which at the time that the representations of the appellants were made, consisted of 1240 members. This group is dedicated to getting justice for the child who is the subject of the records, who they claim died under suspicious circumstances at the Hospital. This Facebook group alleges that multiple narcotics violations occurred during the final 24 hours of the child's life, and both the Hospital and government agencies (e.g., the Coroner's Office) have been evasive and non-cooperative in answering basic questions.

The appellants also offered to have individuals (parents, educators, disability activists, concerned citizens) who belong to the second group send correspondence to the Ministry to document the public interest in the requested information. The Ministry did not respond to this offer.

The appellants believe that children with disabilities under the care of provincial health services are similarly vulnerable individuals as was found in Orders P-7554, PO-1962, PO-2278 and PO-2333, and that the care and safety of these vulnerable individuals is a public responsibility and of public concern. Dissemination of records relating to such matters would yield a public benefit.

In reply, the Ministry submits that the deceased child's mother and one of the appellants are listed as the administrators of the named Facebook group. The family of the deceased child has already been provided with access to a large number of records from the Office of the Chief Coroner in accordance with the *Act*. The parents are already in a position to disseminate the records to both named groups for the purposes of education and advocacy should they wish to do so.

In surreply, the appellants confirm that the child's mother and one of the appellants are listed as the administrators of the named Facebook group. They state that the appellants' request was made independently from any other request that the Ministry may have received from the parents of the deceased child. In addition, the scope of the appellants' request is distinct from that made by the parents both temporally and in terms of the types of information being sought. As such, the appellants will be in a position to disseminate information to members of both groups, or any other groups or individuals they see fit, including the parents.

Analysis/Findings

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 and PO-1962)

The focus of section 57(4)(c) is "public health or safety." It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know." There must be some connection between the public interest and a public health and safety issue (Orders MO-1336, MO-2071, PO-2592 and PO-2726).

The records at issue concern the death of a child at a hospital where allegations of improper care by hospital staff prior to the child's death have been made. In addition, the records relate to the adequacy of the investigation into this death undertaken by the Office of the Chief Coroner and the Paediatric Death Review Committee, which is part of the Office of the Chief Coroner.

In the specific circumstances of this appeal, having reviewed the records and taking into account the information provided by the appellants in their representations about the circumstances surrounding the child's death at the Hospital and the subsequent investigation into this death, I find that the records relate to a matter of public health. Even though the Coroner's investigation into the child's death has been closed, given the Legislative Assembly's, the media's, academics' and other organizations' interest in the subject matter of in-hospital paediatric deaths, including

the death of the child referred to in the records, I find that the subject matter of the records is a matter of public rather than private interest.

Based upon the contents of the records and the extensive representations and supporting documents provided by the appellants, I find that the appellants will disseminate the records and that dissemination of the records would yield a public benefit. Dissemination of the records will contribute meaningfully to the development of an understanding of important public health issues concerning the death of similarly situated infants and the Ministry's investigation of paediatric deaths at Ontario hospitals.

Based on my review of the parties' representations, I find that part 1 of the test has been met as dissemination of the records will benefit public health.

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 and PO-1953-F)

The Ministry submits that it has worked closely with the appellants to clarify the specific information requested. The request involved over 1900 pages of records and it has not charged any search processing fees. The Ministry states that it expended time and resources revising its initial response and processing fee to accommodate the appellants wish to obtain the records in an electronic format (which in turn has resulted in a considerable reduction of the processing fee). The Ministry submits that waiving the fee would shift an unreasonable burden of cost from the appellants to the Ministry and defeat the user-pay principle of *FIPPA*. The Ministry also submits that:

Finally, the fact that the [appellants] supplied a signed authorization from the parents of the deceased child suggests that they have alternative means to obtain information in regard to the circumstances of the death of the child thereby eliminating the payment of *FIPPA* processing fees.

The appellants submit that the Ministry failed to respond to their request within 30 days as required by section 26 of *FIPPA* and that it was over four months from the date of the request before the appellants received the initial response from the Ministry. Furthermore, despite providing detailed information supporting their request for a fee waiver, the Ministry, without proper consideration, denied this request. The appellants state that they made several attempts to narrow and clarify the nature of the records being requested and the scope of the request both in consultation with the Ministry and at the mediation stage of this appeal. The appellants also state that:

The Ministry has not provided any records to the appellants free of charge...

In an effort to reduce the costs associated with photocopying of the records, the appellants advised the Ministry that they are willing to accept copies of the records in Adobe PDF format on CD or DVD media.

A waiver of the fees would not shift an unreasonable burden of the cost from the appellants to the Ministry. The appellants and members of the groups they represent are independent advocates for education and public awareness on issues relating to human variation, health, and disability. The appellants do not have any private interest in the records being sought through the request, and the advocacy work they do is completely voluntary. The adjudicator in Order MO-2173 found that in such circumstances, a waiver of fees would be fair and equitable

Analysis/Findings

The appellants have indicated that the Ministry did not respond to their request in a timely manner. The appellant's request was received by the Ministry on June 3, 2009. On June 9, 2009, the Ministry wrote the appellants and sought clarification of the scope of the request. On June 16, 2009, the appellants responded to the Ministry and provided the requested clarification. On July 9, 2009, the Ministry advised the appellants that it could not respond to the request within 30 days, as it had not received the records. It then advised the appellants on July 31, 2009 that it required more time to respond to the request. On August 19, 2009, the Ministry advised the appellants by telephone that it was required to provide notification to various third party organizations whose information may be contained in the records to obtain their position with respect to disclosure of the responsive records.

On August 21, 2009, the appellants provided the Ministry with further clarification of their request. On August 25, 2009, the appellants wrote this office seeking a review of the Ministry's failure to respond to their request within 30 days. On September 23, 2009, the Ministry issued its decision letter to the appellants in which it granted partial access to responsive records and issued a fee decision for \$371.92. In this letter, the Ministry stated that:

... Further to your August 19, 2009, discussion with [the Ministry], at your request extensive consultations were undertaken with a large number of organizations that provided information/records to the Office of the Chief Coroner in relation to the death of the named child. To date, the Ministry has received

responses from only five organizations consenting to the release of records (in full or in part). Due to your deemed refusal appeal to the IPC and the deadline of September 22, 2009 given to the Ministry to issue a decision letter, this office has not had sufficient time to receive responses from fourteen additional consultations...

We note that you have asked to be provided with access to Ministry records on the basis that there is a compelling public interest in disclosure of the records in accordance to section 23 of the *Act*. Before addressing this part of your request, the Ministry requires additional information from you as to why you believe section 23 applies in the circumstances of your request...

Due to delivery problems, the appellants did not receive this decision letter until October 18, 2009. On November 2, 2009, the appellants provided the Ministry with the information requested in the Ministry's September 23, 2009 decision letter and sought a fee waiver. On November 20, 2009, the Ministry responded to the appellant's fee waiver request, as well as to the appellant's submissions on the application of section 23 to the withheld portions of the records. On December 2, 2009, the appellants filed their appeal of the Ministry's November 20, 2009 decision.

Based upon my review of the factors listed above and the circumstances surrounding the appellants' request, I find that the Ministry responded to the request in a cooperative and constructive manner. The appellants' request was comprehensive and involved numerous responsive records and other parties. The request required clarification and the Ministry was required to notify numerous third parties. The Ministry kept the appellants advised of the progress of their request and the timelines required to respond. The appellants advanced a compromise solution that reduced costs by agreeing to the provision of the records in an electronic format. Although the Ministry did not provide the appellants with records free of charge, its fee estimate was reduced from \$371.92 to \$147.79. Therefore, the factors listed above generally weigh in favour of the Ministry. The factor that remains to be considered is whether waiving the fee in the circumstances of this appeal would shift an unreasonable burden of the cost from the appellants to the Ministry.

In this appeal, the parents of the deceased child may already be in possession of some of the records. One of the parents is actively involved with the appellants in their advocacy efforts for which the records have been sought and both parents have provided the appellants with their consent to obtain records in this appeal. The appellants have not attempted to remove from the scope of their request records already in possession of the parents. This would result in a further reduced fee by avoiding duplication of the fee associated with any records readily available to the appellants from the parents of the deceased child. In my view, waiving the fee for responsive records that may already be available to the appellants would shift an unreasonable burden of the cost from the appellants to the Ministry.

The appellants rely on my findings in Order MO-2173 where I determined that it was fair and equitable in the circumstances to grant a fee waiver to the appellant. However, the situation in

this appeal is different. In this appeal, the appellants may be able to obtain some of the records free of charge from the parents of the deceased child.

In summary, the appellants' concerns about the manner in which the Ministry handled the request does not weigh in favour of a fee waiver. I find that the Ministry worked constructively with the appellants to narrow the scope of the request. In considering whether payment of the fee would shift an unreasonable burden of the costs from the appellants to the Ministry, I find that the fact that a member of one of the advocacy groups associated with the appellants already paid any applicable fee and may have already obtained some of the records weighs against a fee waiver.

Having regard to the above, I find that it is not fair and equitable in the circumstances to grant a fee waiver to the appellants.

ORDER:

I uphold the Ministry's decision not to grant the appellants a fee waiver and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ May 20, 2011