Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3027

Appeal PA10-148

Ministry of the Environment

December 21, 2011

Summary: The appellant is an environmental organization. It requested records relating to the release of material into the environment from the Darlington Nuclear Station on December 21, 2009. The ministry issued a fee estimate and the appellant requested a fee waiver on the basis of sections 57(4)(b) and (c). I upheld the ministry's fee estimate. Although I found that dissemination of the information in the records would benefit public health or safety [section 57(4)(c)], I found that it would not be fair and equitable in the circumstances of this appeal to waive the fee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1),(3) and (4) and O. Reg. 460, sections 6, 7 and 9.

Orders and Investigation Reports Considered: Orders P-270 and PO-1909

OVERVIEW:

[1] The appellant represents an environmental organization, and he submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Environment (the ministry) for access to:

> [A]ll documents and information in possession or in control of the Ministry of the Environment related to the release of material, including demineralised light water containing tritium and hydrazine, to the environment from the Darlington Nuclear Station on December 21, 2009.

> This includes all records, correspondence and sampling results related to the spill produced anytime between December 20, 2009 and [March 29, 2010].

[2] In his request letter, the appellant noted that his organization will use the requested information in the public interest, and requested that fees associated with this request be waived or reduced.

[3] The ministry issued an interim access decision in which it stated that it had determined that responsive records would be held in 14 ministry offices, and that it is expected that partial access would be granted (with severances made under sections 21 and 17). The ministry also stated that the estimated fee would be $2,859.30, and requested a deposit of 50% of the fee estimate to continue processing the request.

[4] The ministry also advised that the time for responding to the request had been extended for an additional 180 days after receipt of the deposit, due to the extremely large volume of material to be retrieved reviewed and prepared for disclosure.

[5] In addressing the appellant's request for a fee waiver, the ministry pointed out that it had offered to work with the appellant to identify records of particular interest or to narrow the request to those offices or staff who were likely to hold the key records relating to the spill. The ministry then denied the request for a fee waiver.

[6] The appellant appealed this decision.

[7] During mediation, the appellant clarified that he was not appealing the time extension. No other mediation was possible, and this file is forwarded to the adjudication stage of the appeal process. The issues on appeal are fee and fee waiver.

[8] During the inquiry into the appeal, I sought, and received, representations from the ministry and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In this order, I have upheld the fee charged by the ministry. I also found that dissemination of the records would benefit public health or safety. However, in the circumstances of this appeal, I found that none of the factors that support a finding that a fee waiver would be fair and equitable apply, and that some of the factors support a finding that a fee waiver would not be fair and equitable. Accordingly, I found that it would not be fair and equitable to waive the fee charged by the ministry in the circumstances of this appeal.

ISSUES:

Issue A: Should the fee estimate be upheld?

Issue B: Should the fee be waived?

DISCUSSION:

A: Should the fee estimate be upheld?

[9] An institution must advise the requester of the applicable fee where the fee is $25 or less.

[10] Where the fee exceeds $25, an institution must provide the requester with a fee estimate [Section 57(3)].

[11] Where the fee is $100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records [Order MO-1699].

[12] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699].

[13] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

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

[15] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

[16] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (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.

[17] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. Those sections read:

> 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 records provided on CD-ROMs, $10 for each CD-ROM.
>
> 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.
>
> 6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD-ROM.

3. 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.

4. 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.

The ministry's representations

[18] The ministry indicates that after reviewing the wording of the request, the Freedom of Information office consulted with staff who were familiar with the spill at the Darlington Nuclear Plant, and determined that fourteen ministry offices may have responsive records. The ministry indicates that in some offices, the search was completed in full, whereas in others, an estimate of the search time was provided, based on a search of representative samples of records by knowledgeable staff.

[19] The ministry then provides detailed representations on the nature of the searches it conducted. It identifies the specific fourteen offices (located in three divisions) where searches were conducted, and indicates the time that was spent searching for responsive records and, where further searches are to be conducted, the estimated time to conduct those searches. This information is summarized as follows:

Operations Division

1) Spills Action Centre

After 6 hours of preliminary searching, an estimated 1,000 pages of records and an estimated 125 audio recordings were identified. An estimated total of 26 hours (12 hrs. for pages; 14 hrs. for audio) will be required to search for records in this location.

2) York-Durham District Office

After 2 hours of search time, 175 pages of records were located.

3) Central Regional Office

After 1 hour of search time, 300 pages of records were located.

4) Assistant Deputy Minister's Office - Drinking Water Management Division

After 30 minutes of search time, 78 pages of records were located.

5) Drinking Water Programs Branch

After 2.5 hours of search time, 200 pages of records were located.

6) York-Durham District Office

After 30 minutes of search time, 100 pages of records were located.

7) Assistant Deputy Minister's Office

After 1 hour of search time, 150 pages of records were located.

Environmental Sciences and Standards Division

8) Environmental Monitoring and Reporting Branch

After 2 hours of preliminary searching, an estimated 1,245 pages of records were identified. An estimated total of 4.5 hours will be required to search for these records.

9) Laboratory Services Branch

After 0.5 hours of search time, 5 pages of records were located.

10) Standards Development Branch

After 4 hours of search time, 600 pages of records were located.

11) Assistant Deputy Minister's Office

After 3 hours of search time, 439 pages of records were located.

Executive Offices

12) Communications Branch

After 45 minutes of search time, 33 pages of records were located.

13) Deputy Minister's Office

After 30 minutes of search time, 44 pages of records were located.

14) Minister's Office

After 30 minutes of search time, no records were located.

[20] The ministry then provides extensive representations reviewing the nature of the searches conducted in the three separate divisions, including who in the various divisions and offices conducted the searches, and the results of the searches. In addition, it provides detailed representations on the two areas where fee estimates are included (the Spills Action Centre and the Environmental Monitoring and Reporting Branch). It identifies the searches which were conducted, and reviews in detail the basis for the estimated additional time required to conduct searches.

[21] In addition, the ministry provides representations on the preparation costs. It estimates that the preparation cost to sever exempt information from hardcopies is 3.5 hours (2.5 for paper records from the Spills Action Centre and 1 hour to sever records which may contain exempt information from other areas). Furthermore, the ministry indicates that, since sending the initial fee estimate, the estimated time required to redact audio files has been changed, and that now, based on quotes received from outside vendors, the fee to redact and prepare the audio files from the Spills Action Centre is $750.00. The ministry attaches the quotes from outside vendors as attachments to its representations. The ministry also states that "As with all the other

estimated amounts, the ultimate charge to the requester would be based on actual costs."

[22] The ministry therefore states that its fee estimate is now $3,134.30 instead of the initial fee estimate of $2,859.30. It provides the following breakdown of the fee estimate:

Search Time 47.25 hours @ $30/hour	$1,417.50
Copying 4,369 pages @ $0.20/page	$873.80
Preparation Time 3.5 hours @ $30/hour	$105.00
CD-ROM	$10.00
Invoiced Costs (redaction of audio files)	$725.00
Delivery	$3.00
Total	**$3,134.30**

The appellant's representations

[23] The appellant notes that, after submitting its request, the ministry had invited the appellant to narrow the request. The appellant states that, based on its previous experience with Freedom of Information requests, narrowing has in the past led to the exclusion of important documents. It then states that it suggested to the ministry that, instead, the Ministry could provide the appellant with a list of responsive records so that the appellant could make an informed decision regarding "scoping." The ministry's response to that suggestion was that the Ministry's record-keeping system would not allow it to provide the appellant with a list or index.

[24] The appellant takes the position that the fee estimate is unreasonable and should not be upheld. It states that, based on its previous experience, "… it is common practice for [the ministry] to justify high fees or non-disclosure of documents on the basis of an inefficient filing system." It also states that "[j]ustifying high disclosure fees based on complicated filing systems fails to ensure that information is 'available' to the public and provides an incentive to government officials to manage their records in ways that make it more difficult for the public to obtain important information." In addition, it states that, without a clear understanding of which documents will be released and which documents will be withheld, it is unreasonable to require the appellant "to pay more than a thousand dollars in fees."

[25] The appellant then states that "the barrier created by the ministry's filing system" could have been addressed if the ministry had provided a detailed list or index of records as a first response to the request. The appellant states that it had requested such an index of records early on in the process, but that the ministry's response had been that its recordkeeping systems were not designed to generate lists of records, and that therefore that option was not available at that time. The appellant provides copies of the email correspondence reflecting these communications.

[26] The appellant also indicates that the provision of an index of records would greatly assist it in identifying the records it is interested in, and in resolving some of the issues in this appeal. The appellant refers to Order MO-2282-I, which confirmed that although there is no specific statutory requirement for the creation of an Index, "a complete and effective Index of Records can be an extremely useful tool in mediating or resolving the issues in an appeal."

[27] The appellant then states:

> While the Ministry refused [the appellant's] request for an Index of Records, the Ministry's … representations … contain much of the information [the appellant] sought in [earlier correspondence]. The detailed information provided by the Ministry includes which offices have records, how many pages each office has, and the nature of the information at each location. This is exactly the kind of information that [the appellant sought earlier].

[28] The appellant also states that now that it has this information, it will be able to identify where the records it needs are located. It also states that if the fees are upheld, it could now resubmit its request as a number of smaller, targeted requests. In addition, the appellant states that this index will also allow it to "scope" or "narrow" the request, and similar indexes would be of great assistance in future requests.

The ministry's reply representations

[29] In its reply representations the ministry addresses the appellant's statements regarding the provision of an index. It refers to the appellant's request, early in the process, for a "detailed list or index of records, including which office is in possession of which information," and states that this request by the appellant only refers to how this list could be provided "so that we can eliminate any duplication in that way." It also states that, since the ministry has provided a fee estimate and interim decision without conducting a complete search for all records, there was no "detailed list or index," as requested. In addition, the ministry states that the fee estimate and interim decision letter specifically identified the 14 offices that were contacted in response to the request. It then states:

> The names of these program areas are quite revealing as to the types of records that one might expect to find. As a frequent requester and an organization that has numerous contacts with the Ministry, the … noted program areas are reasonably self explanatory.

Analysis and findings

[30] Based on the information provided, I make the following findings regarding the fee estimate in this appeal.

Search time

[31] The ministry provides detailed representations on the nature of the searches it conducted. It identifies the specific fourteen offices (located in three divisions) where searches were conducted, and indicates the time that was spent searching for responsive records and, where further searches are to be conducted, the estimated time to conduct those searches. Specifically, the ministry has already spent 24.75 hours searching for the records, and estimates that it will take another 22.5 hours of search time to complete the searches.

[32] The appellant's representations on the fee estimate appear to acknowledge that the estimate provides details about the nature of the searches conducted. Its primary concerns regarding the fee estimate relate to its position that 1) the ministry's filing system is inefficient, and this contributed to the high search fees and 2) the ministry ought to have provided the appellant with a detailed index to allow it to scope its request.

[33] Based on the material provided by the parties in this appeal, and particularly the detailed representations provided by the ministry, I am satisfied that the ministry's fee estimate for search time is appropriate, and I uphold the search time. I note that much of the fee estimate for search time is based on the actual time it took to conduct the searches in the various departments. I also note that, with respect to the fee estimates for the searches to be conducted in the Spills Action Centre and the Environmental Monitoring and Reporting Branch, these estimates are based on the time it has already taken to conduct searches for some of the records in these departments, and the estimated time to complete those searches in those departments.

[34] With respect to the appellant's concern that the ministry's filing system is inefficient, and that this has contributed to the high search fees, I will begin by noting that, due to the broad scope of the request, I accept the ministry's position that it was required to conduct searches in each of the departments where responsive records might be located. I also note that several previous orders confirm that institutions under the *Act* are not required to modify existing information storage facilities or

systems in order to accommodate the needs of requesters [see, for example, Orders M-166, M-546, M-549 and M-555].

[35] With respect to the appellant's position that the ministry ought to have provided the appellant with a detailed index to allow it to scope its request, I note that the ministry has now provided detailed information about the number of records located in a number of the departments, but also note that this information is now available because the ministry has actually completed its searches in 12 of the 14 departments. The detailed index referred to by the appellant was not producible until searches had been conducted.

[36] I also note that the appellant's interest in obtaining a detailed listing of the actual records is still not available, as the full searches have not been completed and a final access decision has not been made. In the circumstances, it is not possible to produce a detailed index of the actual responsive records without completing the searches.

Preparation time

[37] Previous orders have addressed the issue of what types of activities can be included in "preparation time." This includes time for severing a record [Order P-4] and, generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [Orders MO-1169, PO-1721, PO-1834, PO-1990].

[38] In its representations, the ministry identifies that the preparation costs to sever exempt information from hardcopies is 3.5 hours (2.5 for paper records from the Spills Action Centre and 1 hour to sever records which may contain exempt information from other areas). It also provides more detailed information about how it calculated the estimated number of pages to be redacted.

[39] The appellant does not address the issue of the preparation time in its representations.

[40] Based on my review of the ministry's representations, I am satisfied that it properly estimated the time required to prepare the records. Accordingly, I uphold the fee estimate of $105.00.

Photocopying

[41] The photocopying charges set out in the ministry's decision are calculated at the rate of $0.20 per page, in accordance with item 1 of section 6 of Regulation 460 made under the *Act*. Therefore, I uphold the photocopy charges.

Costs specified in an invoice

[42] The ministry provided representations in which it confirms that it does not posses the software to redact the audio files, and that its revised fee estimate to redact these files is based on a fee estimate from an outside vendor. The ministry indicates that it asked for quotes to redact the audio files from outside vendors, and that the least expensive of the two quotes is $250.00 to redact a specified record size. The ministry then states that, using the base quote, the estimated cost of removing exempt information in the estimated 10% of records in this request is $725.00. The ministry attaches the two quotes it received from the two vendors as attachments to its representations. It also confirms that, as with other estimated costs, the ultimate charge would be based on actual amounts.

[43] The appellant does not address this issue in its representations.

[44] Based on my review of the ministry's representations, I am satisfied that the estimated costs for redacting the audio files, based on the fee estimate contained in the invoice provided by an outside vendor, is reasonable, and I uphold this fee estimate.

Other costs

[45] The ministry also states that additional costs of $10 for the CD ROM and $3 for shipping are estimated. The appellant does not address these costs. In the circumstances and based on paragraph 2 of section 6.1 of Regulation 460 made under the *Act*, I uphold these additional costs.

Summary

[46] In conclusion, I am satisfied that the ministry's fee estimate is appropriate, and I uphold the fee estimate of $3,134.30.

B: Should the fee be waived?

[47] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section 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,
>
> (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.

[48] Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee:

> 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.

[49] 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 standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

Whether the payment will cause a financial hardship for the person requesting the record

[50] For section 57(4)(b) to apply, the requester must provide some evidence 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 and P-1393].

[51] The appellant has provided material in support of its position that payment of the fee will cause it financial hardship. In its earlier material provided to this office, the appellant refers to the fact that it is a not-for-profit charitable organization working in the public interest. It stated:

> As a charity, [the appellant] has a very limited source of funding and is very restricted in access to funds for unforeseen costs like information requests. This particular information request is a good case in point, as it

> relates directly to an unforeseen spill at a nuclear facility. There is no way [the appellant] could have anticipated this spill and the associated thousands of dollars that would be required to report fully on it to the public when drafting our charitable budget. Even if [the appellant] set aside certain budgetary funds to apply for and pay for information requests, we could [not?] have anticipated or obtained Board of Directors approval for such a large cost [as is estimated in this case].

[52] In its representations the appellant also states:

> … the relationship between the fee and the potential for financial hardship should be considered in context. [The appellant] is a charity and cannot afford to spend [the identified fee amount] on an information request. … Unlike the Ministry, [the appellant] does not have dedicated staff working on information requests.
>
> The Ministry has based much of its decision on the "user pay" premise. What the Ministry fails to convey, however, is the cumulative financial effects that such fees have on research organizations. In the last year alone, this Ministry has asked [the appellant] to pay thousands of dollars in fees for access to information that should be available to the general public. The Information and Privacy Commissioner of Ontario may only learn about one or two information requests, those where the fee estimates are egregious enough to warrant spending time and resources on an appeal. The others continue to compound and act as a powerful deterrent to using the FOI process.

[53] Later in its representations the appellant states that, in this appeal, without a clear understanding of which documents will be released and which documents will be withheld, it is unreasonable to require the appellant to pay more than a thousand dollars in fees.

[54] The ministry takes the position that the appellant has provided no substantive evidence in support of the financial hardship the estimated fee would cause. It refers to its earlier submissions in which it stated that although the appellant is a charitable organization, the *Act* does not stipulate that charitable organizations should be exempt from paying fees or automatically qualify for a fee reduction. It also refers to the appellant's Registered Charity Information Return on the Canada Revenue Agency website, which indicates that in 2009 its total annual revenues were close to $900,000, and its assets were valued at $750,000. In addition, the ministry disputes the appellant's assertion that it is a "grassroots" organization, and refers to the large number of prominent individuals who are identified as its board of directors and trustees.

[55] In response the ministry's submissions, the appellant maintains that its charitable purpose is to work on behalf of and with local communities to protect, restore, and celebrate Lake Ontario, and that the work it does is directed by the needs of communities trying to protect, restore, and make use of the lake.

Analysis and finding

[56] Based on my review of the appellant's submissions and the documents submitted as evidence of his organization's financial status, I find that the appellant has not established the criteria for fee waiver found in section 57(4)(b). The appellant's main argument is that it is a charitable organization and therefore requiring the payment of the fee will cause financial hardship. Although the appellant refers generally to other requests it has made and fees it has paid, it has not provided any substantial evidence that the payment of this fee would result in financial hardship to it. Although I accept that it may be difficult for an organization such as the appellant to anticipate when it will want to make requests for access to information and how much those requests might cost, in the absence of any additional evidence I am not satisfied that section 57(4)(b) applies in the circumstances of this appeal. I also accept the ministry's position that the *Act* does not stipulate that charitable organizations should be exempt from paying fees or automatically qualify for a fee reduction. Although their status as a charity may impact other aspects of the fee waiver decision, they do not automatically trigger the application of section 57(4)(b).

Whether dissemination will benefit public health or safety

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

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

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

- whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern, or 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]

Representations

[58] The appellant takes the position that the matter relates to health and safety. It states:

> The subject matter of the request will help the public understand two very important health and safety issues. First, the documents will help us to understand what contaminants were released into the environment, where they were released, in what concentrations they were released, and what [the] fate of these contaminants was once they entered the natural environment. This information is absolutely vital, given that the location of the spill (Lake Ontario) is also the drinking water supply for approximately seven million people and home to a variety of key species.
>
> Second, the documents contribute meaningfully to our understanding of important policy issues. What happens when there is a spill at a power plant on Lake Ontario? What actions were taken by the company? What actions were taken by the government? What provisions were made for the protection of human health and the environment? Such information is especially important in light of two facts. There is a new nuclear power plant under consideration for the same location. The potential risks associated with the facility and potential accidents on-site are currently under review by government departments as well as members of the public. Also, this is one of the first industrial spills to occur following the passage of the *Environmental Enforcement Statute Law Amendment Act* and its associated regulations. The facility where the spill occurred is in one of the sectors that is supposed to take special action under the new legislation. The documents requested by [the appellant] will help us to understand how the company and the Ministry officials acted in light of this new regulatory regime.

[59] The appellant also argues that the documents relate to a public interest, and not a private one. It states:

> The documents … requested are unambiguously related to the public interest. Specifically, they contain facts related to the spill of contaminants into a public water supply and the natural environment as well as the response to this spill by the company responsible and by the government regulator….

[60] Lastly, the appellant states that the records will be disseminated:

> The sole purpose for this information request is to obtain the documents that explain what contaminants were spilled and what subsequent

> actions were taken so that this information can be shared with members of the public. The relevant documents and accompanying analysis would be published on the internet and disseminated as broadly as is possible and appropriate.

[61] The ministry submits that the appellant has not met the burden of proof to show that the release of the records would "benefit public health or safety." It states that the records will not "disclose" or "reveal" a public health or safety concern, and refers to the fact that the spill in question occurred on a specified date and was reported to the public by Ontario Power Generation (OPG) on that same date. It also states that OPG has released periodic updates on the spill since that time.

[62] The ministry then states:

> Radiological testing undertaken at [the plant] and local water supply plants as a result of the spill showed that levels of tritium in the water did not exceed the Ontario drinking water standard after the spill. Further, levels of hydrazine (the other compound released in the spill) were below detectable levels in both the water and the air. This information was also made available on the OPG website (previously provided to the IPC), and was reported in area newspaper articles, a number of which were posted on the appellant's website at the time….
>
> The ministry acknowledges that public interest in nuclear facilities may be higher than for some other industries. While that may be the case, the contaminants released and their concentrations have already been publicly provided by OPG, thereby addressing the public health or safety interest associated with the spill.
>
> Further, as previously stated the effect of the spill was negligible and did not put public health or safety at risk.
>
> Finally, it is the legislated role of Medical Officers of Health to respond regarding health issues facing the public, not the Ministry of the Environment.

[63] The ministry also addresses the appellant's argument that disclosure will allow the appellant to understand how the company and the ministry officials acted in light of this new regulatory regime under the *Environmental Enforcement Statute Law Amendment Act* and its associated regulations. It states:

> The appellant has put forward an additional public health or safety argument that fees should be waived as "the documents ... will help us to

> understand how the company and the Ministry officials acted in light of [Bill 133 -the *Environmental Enforcement Statute Law Amendment Act*]."
>
> Bill 133 was enacted in 2005 to amend the *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act* (OWRA). The amendments are intended to strengthen the acts, primarily by adding "environmental penalties" to the abatement tools already available under the legislations.
>
> As a ministry with a mandate to develop and enforce a regulatory regime, MOE has access to a broad suite of tools to promote companies' compliance with the legislation(s) that govern(s) their activities. These tools include voluntary abatement, tickets, orders, suspensions, prosecutions, and, since 2005, environmental penalties.
>
> The ministry's decision to apply a particular abatement tool in response to a given event is an administrative function of the ministry. While there may be a public interest in the ministry's choice of an abatement tool, the appellant has not illustrated how an administrative decision is in and of itself an issue of public health or safety.
>
> In addition, the ministry has built in transparency around environmental penalty orders by legislating the publication of an annual report of such orders on its website…. In addition, any settlement agreement between the ministry and a company regarding an environmental penalty is to be posted on the ministry's public Environmental Registry….

[64] In addition, the ministry challenges the appellant's statement that it will post the information on the internet and disseminate it broadly, although it acknowledges that the appellant does have the means to publish or disseminate such materials.

[65] In its reply representations, the appellant refutes a number of the ministry's statements.

Findings regarding public benefit

[66] Previous orders of this office have generally established that matters relating to the safety of Ontario's water, as well as matters concerned with the nuclear industry, by their very nature, raise a public safety concern (see, for example, Orders P-270 and PO-1909]. The representations of both parties are consistent with and support this position. Accordingly, because the records requested relate to a spill into the environment from a nuclear station, I am satisfied that the subject matter of the records is a matter of public rather than private interest, and that it relates directly to a public health or safety issue.

[670] Both parties have also provided representations on whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue. The appellant's position is that, due to the subject matter of the records, disclosure would necessarily meet this requirement. The ministry's position is that it and others are already required to provide significant information to the public on the spill, and that the disclosure of this additional information would not disclose a public health or safety concern, or contribute meaningfully to the development of understanding of an important public health or safety issue.

[68] Without having viewed the records responsive to the request, it is difficult to determine definitively whether their disclosure would yield a public benefit by disclosing a public health or safety concern. However, based on the fact that the public is already aware of the spill, and based on the ministry's representations about the nature and content of the information already disclosed to the public, and the amount of information required to be made public, I am not satisfied that disclosure would yield a public benefit by disclosing a public health or safety concern.

[69] With respect to whether disclosure would contribute meaningfully to the development of understanding of an important public health or safety issue, it is again difficult to make a definitive determination without having viewed the records. However, in this case, because of the nature of the information requested and the ongoing interest in records of this nature, I find that the disclosure of the information contained in the records would be reasonably likely to contribute meaningfully to the development of understanding of an important public health or safety issue. In addition, based on the appellant's representations, I am also satisfied that disclosure of the records would be reasonably likely to result in the dissemination of information by the appellant.

[70] Accordingly, I am satisfied that dissemination of the record will benefit public health or safety. I must now decide whether it would be fair and equitable to require the ministry to waive the fee.

Whether it would be fair and equitable to waive the fee

[71] 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]

[72] Concerning the manner in which the institution responded to the request, and whether it worked constructively with the requester to narrow and/or clarify the request, I find that the ministry did properly respond to the request, and offered to work with the requester to scope the request. In its initial response it also identified the 14 offices where records might exist, and later suggested specific offices where the majority of the records would likely be kept. In contact with the appellant after the initial request it also suggested that, if the appellant could provide information about "the types of things [the appellant] is interested in seeking, [the ministry] may be able to focus the search more easily."

[73] With respect to whether the ministry provided records to the appellant free of charge, the appellant argues that the ministry could have offered to provide documents in electronic format in order to avoid the photocopying fee, and did not do so. In response, the ministry states that this decision is not as straightforward as suggested by the appellant. The ministry states:

> Many of the record formats associated with this request come from proprietary software (e.g. the IDS database used by the ministry's Operations Division; data modeling software used by the Environmental Assessment and Approvals Branch; laboratory analysis tools used by the Laboratory Services Branch). This information cannot be provided without the interim step of preparation or copying, as it is required to be extracted from the system (by printing either to paper or to an electronic file). This step is needed to make the information readable, both so that the FOI Office can redact exempt material where necessary, and so that it can be viewed and analyzed by the FOI requesters who receive it.
>
> From experience, the FOI Office estimates that the preparation time associated with extracting such a large number of records (including documents containing multiple formats, such as e-mails with attachments) would equal or exceed the costs associated with providing copies.
>
> For large, complex requests such as these, the ministry has found it most beneficial for both the requester and the ministry to have staff undertake

> an integrated search and print where each responsive document is copied or printed and collated as it is identified. This minimizes time and cost to the requester, as well as the ministry.
>
> Finally, many records associated with this request were created and/or received in paper, such as field tests and faxes, and therefore must be photocopied.

[74] In the circumstances, and based primarily on the ministry's representations on this issue, which I accept, I find that the issue of whether the institution provided any records to the appellant free of charge is not a factor favouring a fee waiver in this appeal.

[75] With respect to whether the appellant worked constructively with the institution to narrow the scope of the request, I find that it did not. In response to the suggestion to narrow or scope the request, the appellant's response was, essentially, "no" and confirmed that it was interested in "all aspects of the spill." It also stated that it was interested in all aspects of the Ministry's records on the spill, including the facts surrounding the incident and the administrative review or decision-making that followed." The appellant's one concession seems to be its willingness to work with the ministry to avoid duplication, asking the ministry to provide a list of records which the appellant could then review to eliminate duplicates. As identified above, producing a list of responsive records in this appeal would require the searches to be conducted.

[76] I also note that the ministry, in its initial decision letter, indicated the specific 14 offices where records might be located. In its representations the ministry states:

> … it provided the requester details of the types of records likely to be found by listing in the fee estimate letter the ministry offices at which responsive records reside. Descriptions of the responsibilities of these offices are publicly available for the appellant's review from [identified government websites].

[77] In the circumstances, I find that the appellant did not work constructively with the ministry to narrow the scope of the request.

[78] With respect to whether the request involves a large number of records, I find that it does.

[79] With respect to whether the appellant has advanced a compromise solution which would reduce costs, other than the suggestion to avoid duplicates or to receive records electronically, both referred to above, I find that it has not.

[80] With respect to whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution, I have considered all of the circumstances of this appeal including the amount of time and effort that the ministry has already dedicated to this search, the detailed review of the results of the searches that were conducted, the broad nature of the request and the appellant's unwillingness to narrow its scope, as well as my finding above that the payment will not cause a financial hardship for the appellant. In the circumstances, I find that the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the ministry.

Conclusion

[81] As noted above, I have found that the only basis for a fee waiver is that dissemination of the record will benefit public health or safety, because the disclosure of the information contained in the records would be reasonably likely to contribute meaningfully to the development of understanding of an important public health or safety issue. However, after considering the factors that are relevant in deciding whether granting a fee waiver would be "fair and equitable," I have concluded that the factors that weigh against doing so outweigh any factors in favour. Accordingly, given that the *Act* is based on a user pay principle, it is not reasonable in the circumstances for the appellant to expect the ministry (and, by extension, other taxpayers) to cover the costs for the requested records. As a result, I find the ministry's decision not to grant the appellant a fee waiver is fair and equitable in the circumstances.

ORDER:

1. I uphold the ministry's fee estimate of $3,134.30.

2. I dismiss the appellant's request for a fee waiver.

Original signed by: December 21, 2011
Laurel Cropley
Adjudicator