

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3220

Appeal PA11-486

Ministry of Natural Resources

June 24, 2013

**Summary:** The appellant submitted an access request to the Ministry of Natural Resources for records relating to black oak trees at Ojibway Prairie Provincial Nature Reserve. The issues to be resolved in this order are whether a fee estimate issued by the ministry for providing the appellant with access to records is reasonable and whether its refusal to grant him a fee waiver should be upheld. The adjudicator upholds the ministry's fee estimate and fee waiver decisions. He orders the ministry to issue a revised decision letter with respect to the appellant's claim that there are pictures of burns in an old wooden maintenance building in Wheatley Provincial Park but finds that the appellant will be required to pay the fees set out in section 57(1) of the *Act* and section 6 of Regulation 460 for being provided with access to any pictures that may exist that are responsive to his request.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 57(1) and 57(4)(b) and s. 6 of Regulation 460.

### OVERVIEW:

[1] This order addresses whether a fee estimate issued by the Ministry of Natural Resources (the ministry) for providing the appellant with access to records is reasonable and whether its refusal to grant him a fee waiver should be upheld.

[2] The appellant had submitted an access request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to

black oak trees at Ojibway Prairie Provincial Nature Reserve (OPPNR). In particular, he asked for the following:

. . . hard photocopies of OPPNR information, files and records, and photographs of original and subsequent surveys of the OPPNR Black Oaks – especially the original survey of these metal-tagged lettered numbered trees, done in the early 1980's, I think, and, info, files, records, and photographs of all the prescribed burns and surveys done in the OPPNR.

[3] The appellant stated that he was seeking records covering a 36-year time period from January 1, 1975 to August 2, 2011.

[4] In response, the ministry issued a fee estimate and interim access decision to the appellant. It estimated that there are approximately 11,600 pages of responsive records, including emails, letters, notes to file, burn applications, burn plans, burn reports, photographs, research documents and spreadsheets. It further stated that the following exemptions in the *Act* may apply to some of the information in these records: sections 13(1) (advice and recommendations), 17(1) (third party information), 21(1) (personal information) and 21.1 (species at risk).

[5] The ministry stated that the estimated fee that the appellant would be required to pay to obtain these records under the *Act* is \$4,300. It provided the following breakdown of this estimated fee:

Search time (30 hours x \$30 per hour)	\$ 900.00
Record preparation (36 hours x \$30 per hour)	\$1,080.00
Photocopies (11,600 pages x \$0.20 per page)	\$2,320.00
Total	\$4,300.00

[6] The ministry further stated that it could, as an alternative, provide the records to the appellant on CDs, which would eliminate the photocopying costs. It estimated that providing the records on three CDs would reduce the total cost for processing his request to \$2010. It requested that the appellant pay a 50% deposit of \$2,150 for hard copies of the records or \$1,005 for CDs before it would fully process his request.

[7] The ministry also advised the appellant that he could submit a fee waiver request. The appellant submitted a fee waiver request to the ministry and claimed that paying the fee would cause financial hardship for him. In its fee waiver decision, the ministry stated that it was satisfied that payment would cause him financial hardship but decided that it would not be fair and equitable to waive the fee. In reaching this decision, it considered the fact that his request involved a large number of records, that he did not narrow the scope of his request to reduce the fee, and that he had not advanced a compromise solution which would reduce the costs of processing his

request. It stated that waiving the fee would shift an unreasonable burden of the cost from him to the ministry, which would not be fair and equitable.

[8] The appellant appealed the ministry's fee estimate and fee waiver decisions to the Information and Privacy Commissioner of Ontario (IPC).

[9] During the mediation stage of the appeal process, the appellant informed the mediator that he was particularly interested in obtaining information about the dates of all of the burns that were done in the OPPNR, a copy of the original survey, a copy of pictures taken of the trees prior to the initial burn, and the pictures taken 30 years after the initial burn. The mediator relayed this information to the ministry.

[10] In response, the ministry stated that it would provide the appellant with a list of burns done on the OPPNR and the records of the original survey, including any pictures in the same box as the survey. It further stated that the search time required to locate these records was two hours but it would waive the search fee and disclose the records to the appellant on a CD for free. The appellant agreed to this and the ministry disclosed 487 pages of records to him on a CD.

[11] However, the appellant stated that he is not satisfied with the records that he received because they do not include the specific pictures that he is seeking. He asked that the ministry narrow its search to locate only those records. The ministry declined to conduct such a search and asked that this appeal proceed to adjudication.

[12] The appellant advised the mediator that he wants to proceed to adjudication on the issue of the reasonableness of the ministry's fee estimate and its refusal to grant him a fee waiver. He confirmed that he is now only seeking access to the pictures taken of the trees prior to the initial burn, the pictures of the initial burn and the pictures taken 30 days after the initial burn.

[13] This appeal was then moved to adjudication for an inquiry. An adjudicator sought and received representations from both the ministry and the appellant and shared the parties' representations in accordance with section 7.07 of the IPC's *Code of Procedure* and *Practice Direction Number 7*. This appeal was then transferred to me for a decision.

[14] The parties' representations reflect the impasse that occurred at the end of mediation. In particular, the ministry provides evidence to support its fee estimate and fee waiver decisions and submits that the appellant has not worked constructively with the ministry to narrow his broad request. The appellant submits that the ministry has been "non-cooperative" and provides evidence to suggest that this entire appeal could be resolved if the ministry simply conducted a search of boxes in a specific building in Wheatley Provincial Park for the photographs he is seeking.

[15] I would emphasize that the only issues before me are whether the ministry's fee estimate is reasonable and whether its refusal to grant him a fee waiver should be upheld. However, I will address the appellant's argument that the ministry should conduct a search of boxes in a specific building in my analysis of whether the ministry's fee waiver decision should be upheld.

## **ISSUES:**

- A. Should the ministry's fee estimate be upheld?
- B. Should the ministry's refusal to provide a fee waiver be upheld?

## **DISCUSSION:**

### **A. Should the ministry's fee estimate be upheld?**

#### ***Mandatory fee requirements***

[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. In particular, section 6 reads:

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.

***Fee estimate***

[18] Where the fee exceeds \$25, an institution must provide the requester with a fee estimate.<sup>1</sup>

[19] 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.<sup>2</sup>

[20] 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.<sup>3</sup>

[21] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.<sup>4</sup>

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<sup>1</sup> Section 57(3) of the *Act*.

<sup>2</sup> Order MO-1699.

<sup>3</sup> Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

<sup>4</sup> Order MO-1520-I.

[22] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.<sup>5</sup>

***Ministry's decision letter***

[23] In response to the appellant's request for records, the ministry issued a fee estimate and interim access decision to him "because it would be unduly expensive to review the large volume of records in order to make a decision regarding disclosure."

[24] As noted above, the ministry stated that the estimated fee that he would be required to pay for receiving access to the records he requested is \$4,300. It provided the following breakdown of this fee:

Search time (30 hours x \$30 per hour)	\$ 900.00
Record preparation (36 hours x \$30 per hour)	\$1,080.00
Photocopies (11,600 pages x \$0.20 per page)	\$2,320.00
Total	\$4,300.00

[25] The ministry further stated that it could, as an alternative, provide the records to the appellant on CDs, which would eliminate the photocopying costs. It estimated that providing the records on three CDs would reduce the total cost for processing his request to \$2010.

[26] I will now examine the ministry's fee estimate and determine whether it is reasonable. In his representations, the appellant does not provide specific evidence to challenge whether the ministry's search, preparation and photocopying/CD fees are reasonable. Consequently, I will base my decision on the evidence provided by the ministry and the requirements of the *Act*.

***Search time***

[27] The *Act* requires the ministry to charge the appellant for the costs of every hour of manual search required to locate a record.<sup>6</sup> In particular, it must charge him \$7.50 for each 15 minutes spent by any person for manually searching for a record.<sup>7</sup>

[28] The ministry's representations include an affidavit from the southwest zone manager for Ontario Parks, who provided evidence about the estimated search time that would be required to locate records responsive to the appellant's request.

[29] The southwest zone manager states that upon reviewing the appellant's request for records, he determined that a search would have to be conducted of the Wheatley

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<sup>5</sup> Orders P-81 and MO-1614.

<sup>6</sup> Section 57(1)(a).

<sup>7</sup> Item 3 of section 6 of Regulation 460.

Provincial Park hard copy files, computer files, the Southwest Zone PVIS shared drive, the Southwest Zone Library and two locations of the ministry's Aviation, Forest Fire and Emergency Services Branch. Moreover, because the request covered a time period of more than 36 years, he determined that a search would have to be extended to archived paper files.

[30] He further states that he contacted four individuals who are knowledgeable about the types of records sought by the appellant: the acting park superintendent of the Wheatley Cluster (including the OPPNR), the park clerk at Wheatley Provincial Park, the zone ecologist for the Southwest Zone, and the fire advisor with the Aviation, Forest Fire and Emergency Services Branch.

[31] He submits that based on the information that he received from these individuals and the representative samples of records that they took, he concludes that it would take approximately 30 hours to conduct a full search for records responsive to the appellant's request, which include 9,000 pages of paper records and 2,600 photographs.

[32] The ministry has provided an estimated search fee of \$900 (30 hours x \$30 per hour). Based on the evidence before me and the requirements in section 57(1)(a) of the *Act* and item 3 of section 6 of Regulation 460, I am satisfied that this estimated search fee has been properly calculated and is reasonable.

### ***Preparation for disclosure***

[33] The *Act* requires the ministry to charge the appellant for the costs of preparing the records for disclosure.<sup>8</sup> In particular, it must charge him \$7.50 for each 15 minutes spent by any person preparing a record for disclosure, including severing a part of the record.<sup>9</sup>

[34] Section 57(1)(b) includes time for:

- severing a record;<sup>10</sup> and
- a person running reports from a computer system.<sup>11</sup>

[35] Generally, the IPC has accepted that it takes two minutes to sever a page that requires multiple severances.<sup>12</sup>

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<sup>8</sup> Section 57(1)(b).

<sup>9</sup> Item 4 of section 6 of Regulation 460

<sup>10</sup> Order P-4.

<sup>11</sup> Order M-1083.

<sup>12</sup> Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[36] In his affidavit, the southwest zone manager states that he was informed by the four individuals cited above that of the 9,000 pages of paper records, approximately 1,700 would require severances under the exemptions in sections 13(1), 17(1), 21(1) and 21.1 of the *Act*. In addition, they informed him that approximately 500 of the 2,600 photographs would require severances under section 21(1) of the *Act*. In other words, a total of 2,200 records (1,700 pages of paper records + 500 photographs) would require severances.

[37] The ministry states that its staff would expend one minute per page and photograph to sever the 2,200 records, which would result in a total of 36.6 hours of preparation time, which it rounded down to 36 hours. Consequently, the estimated preparation fee is \$1,080 (36 hours x \$30/hour).

[38] Based on the evidence before me and the requirements in section 57(1)(b) of the *Act* and item 4 of section 6 of Regulation 460, I am satisfied that this estimated preparation fee has been properly calculated and is reasonable.

### ***Photocopying/CD costs***

[39] The *Act* requires the ministry to charge the appellant for computer and other costs incurred in locating, retrieving, processing and copying a record.<sup>13</sup> In particular, it must charge him 20 cents per page for photocopies and \$10 for each CD-ROM.<sup>14</sup>

[40] The ministry points out that its decision letter to the appellant provided an estimated photocopying fee of \$2,320 (11,600 pages x \$0.20 per page). It further advised him that it could, as an alternative, provide the records to him on CDs, which would eliminate the photocopying costs. It estimated that providing the records on three CDs would reduce the total cost for processing his request to \$2010.

[41] Based on the evidence before me and the requirements in section 57(1)(c) of the *Act* and items 1 and 2 of section 6 of Regulation 460, I am satisfied that the estimated photocopying/CD fees have been properly calculated and are reasonable.

### ***Conclusion***

[42] The appellant submitted a broad request to the ministry for multiple records that cover a 36-year period. I find that the ministry's total fee estimate is reasonable and in accordance with the rules in section 57(1) of the *Act* and section 6 of Regulation 460. Consequently, I uphold the ministry's fee estimate.

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<sup>13</sup> Section 57(1)(c).

<sup>14</sup> Items 1 and 2 of section 6 of Regulation 460.



**B. Should the ministry's refusal to provide a fee waiver be upheld?**

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

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

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety; and
- (d) any other matter prescribed by the regulations.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

- 1. Whether the person requesting access to the record is given access to it.
- 2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

[44] 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.<sup>15</sup>

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<sup>15</sup> Order PO-2726.

***Part 1: basis for fee waiver***

[45] The appellant submitted a fee waiver request to the ministry on the basis of financial hardship. In its fee waiver decision, the ministry stated that it was satisfied that payment would cause him a financial hardship but decided that it would not be fair and equitable to waive the fee. I accept the ministry's conclusion, based on the documents that it received from the appellant, that payment of the fee would cause him a financial hardship, as stipulated in section 57(4)(b) of the *Act*.

***Part 2: fair and equitable***

[46] 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.<sup>16</sup>

[47] After considering the grounds set out in sections 57(4) and section 8 of Regulation 460, the ministry decided that although paying the fee would cause the appellant financial hardship, it would not be fair and equitable to waive the fee for a number of reasons. It considered the fact that the appellant's request involved a very large number of records, that he did not narrow the scope of his request to reduce the fee, and that he had not advanced a compromise solution which would reduce the costs of processing his request. It stated that waiving the fee would shift an unreasonable burden of the cost from him to the ministry, which would not be fair and equitable.

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<sup>16</sup> Orders M-166, M-408 and PO-1953-F.

[48] The ministry further submits that it has taken significant steps to assist the appellant and understand his concerns about the black oak trees. In his affidavit, the southwest zone manager states that he has spoken to the appellant on many occasions in an attempt to help him, including "travelling . . . to Windsor and spending 3 hours walking through the reserve with [him] at his request."

[49] The ministry states that it has attempted to work constructively with him to find a compromise that would reduce the estimated fee that he would be required to pay to access the records. It points out that it disclosed 487 pages of records to him on a CD for free and created and disclosed a list of prescribed burns, but the appellant was not satisfied with this disclosure. It submits that he ignored repeated requests from the ministry to narrow the scope of his broad request.

[50] The appellant states that he is displeased with the ministry's "non-cooperation" in processing his access request. He insists that he has, in fact, narrowed his request and is now only seeking access to pictures of the burns that were done in the OPPNR. He states:

I received the CD-ROM of the original tree surveys and a list of the burn years – but no pictures. The colour copies of the pics of the first year burn have not been provided to me as per the [agreement with the ministry during mediation] to supply them.

[51] He further states that he spoke to a former ministry employee who advised him that the developed colour pictures are "in bookcase picture albums stored in the top of the old wooden maintenance building in Wheatly Provincial Park." He states that these pictures are in the same place that the acting park superintendent of the Wheatley Cluster found the survey documents but claims that they are in other boxes. He submits that this same individual should be asked to search for these pictures in that building and that colour photocopies then be made and mailed to him.

[52] For the reasons that follow, I find that it would not be fair and equitable in these particular circumstances to grant the appellant a fee waiver.

[53] First, the appellant submitted a very broad request for records to the ministry that would require a significant amount of staff time and resources to locate and prepare the responsive records for disclosure. A typical access request received by an institution might involve 10 or 20 pages of records. In this particular case, however, the appellant submitted a request covering a 36-year time period. Ultimately, the ministry determined there are approximately 11,600 pages of responsive records, including emails, letters, notes to file, burn applications, burn plans, burn reports, photographs, research documents and spreadsheets. Simply locating and retrieving these records would require at least 30 hours of staff time.

[54] Second, the ministry worked constructively with the appellant to narrow his request, it created and disclosed a "burn list" to him, and it provided him with 487 pages of records free of charge. In my view, the ministry's decision to provide these records to him at no charge amounts to a partial fee waiver.

[55] Third, the appellant's displeasure with the ministry's alleged "non-cooperation" with his access request is unfounded. In a good faith effort to address the appellant's concerns about the black oak trees, the southwest zone manager travelled to Windsor and spent three hours walking through the OPPNR with him. Moreover, it is evident from the southwest zone manager's affidavit that he and other staff have spent considerable time and resources attempting to locate the types of records that are responsive to the appellant's request. Consequently, I find that ministry staff responded to his access request in a diligent manner and have made significant efforts to cooperate with him.

[56] I accept that the appellant attempted to work constructively with the ministry during mediation to narrow the scope of his request. In particular, he now appears to have narrowed his request to pictures of burns that may be found in "bookcase picture albums stored in the top of the old wooden maintenance building in Wheatley Provincial Park." He has asked the ministry make and disclose colour photocopies of these pictures to him.

[57] Although payment would cause financial hardship for the appellant and he narrowed his request during this appeal, I find that it would not be fair and equitable to grant him a further fee waiver. I am particularly swayed by the fact that the ministry disclosed 487 pages of records to him for free. In my view, providing the appellant with a further fee waiver would shift an unreasonable burden of the cost from the appellant to the ministry and, by extension, to other taxpayers. The *Act* contemplates a user-pay principle, and the appellant cannot expect other taxpayers to foot the bill for providing him with access to other records that are responsive to his broad access request, including the pictures of burns. In short, I have decided to uphold the ministry's fee waiver decision.

[58] I will order the ministry to issue a revised decision letter to the appellant with respect to any pictures of burns that may be found in the old wooden maintenance building in Wheatley Provincial Park. To assist the ministry, I am providing it with a copy of the appellant's representations, which contain further details about the possible location of these pictures. However, given that I have upheld both the ministry's fee estimate and fee waiver decisions, the appellant will be required to pay the fees set out in section 57(1) of the *Act* and section 6 of Regulation 460 prior to being provided with access to any responsive pictures that may exist.

**ORDER:**

1. I uphold the ministry's fee estimate and fee waiver decisions.
2. I order the ministry to issue a revised decision letter to the appellant, treating the date of this order as the date of the request, with respect to his claim that there are pictures of burns in "in bookcase picture albums stored in the top of the old wooden maintenance building in Wheatley Provincial Park." This decision letter should include the fee or an estimate of the fee that the appellant would be required to pay to access any responsive pictures that may exist, as stipulated in the fee provisions in section 57(1) of the *Act* and section 6 of Regulation 460.

Original Signed By: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

\_\_\_\_\_ June 24, 2013