

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3557

Appeals PA14-487, PA14-488 and PA14-489

Cabinet Office

December 4, 2015

Summary: The issues in these appeals are whether Cabinet Office should have granted three fee waivers under section 57(4)(c), and whether Cabinet Office has an obligation to disclose the requested records under section 11(1) of the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the appellant has not established that dissemination of the records will benefit public health or safety. Consequently, Cabinet Office's decision to deny the fee waiver requests is upheld. In addition, the adjudicator finds that section 11(1) is not applicable in these circumstances.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 11(1) and 57(4)(c).

OVERVIEW:

[1] This order disposes of the issues raised in the three appeals of three decisions of Cabinet Office made in response to requests for fee waivers. The issues in these appeals are whether Cabinet Office's decision not to waive the fees should be upheld, and whether Cabinet Office has an obligation to disclose the records under section 11(1) (obligation to disclose) of the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The three access requests are as follows.

Request One

- All correspondence, including memoranda, to or from the Premier, Premier's Office or Cabinet Office, regarding advertising the 2014 Budget, related to both its initial introduction in the 40th Parliament and introduction in the 41st Parliament; and
- Materials produced by or for the Premier, Premier's Office or Cabinet Office, such as emails, memoranda, presentations or any other materials, which discuss the relevance of the budget to the election campaign.

[3] The requester subsequently clarified the scope of the request with Cabinet Office as follows:

For the period January 1, 2014 - July 11, 2014:

- Communication records (internal emails, memos, etc.) related to the budget, procurement and messaging (i.e. themes or narrative) for the advertising of the 2014 Budget – both its initial introduction in the 40th Parliament and its introduction in the 41st Parliament; and
- Records produced by or for the Premier, Premier's Office or Cabinet Office that discuss the relevance of the Budget to the election campaign.

[4] As a result of the narrowed scope of the request, Cabinet Office issued a revised fee estimate advising that it would cost an estimated \$174.00 to process the request.

Request 2

- Any and all studies completed from 2012 to today regarding cost-benefit analyses or social impact analyses of asset sales or partial asset sales or the "unlocking value" for Crown assets described in the 2014 budget; and
- All correspondence, including memoranda, to or from the Premier, Premier's Office or Cabinet Office, regarding the sale, partial sale of Crown assets or the "unlocking value" for Crown assets described in the 2014 budget.

[5] The requester subsequently clarified the scope of the request with Cabinet Office, as follows:

For the period January 1, 2012 - July 11, 2014:

- All studies completed since 2012 regarding cost-benefit analyses or social impact analyses of asset sales or partial asset sales or the

“unlocking value” for Crown assets described in the 2014 Budget;
and

- Communications to or from the Premier, the Premier’s Office or Cabinet Office regarding the sale, partial sale of Crown assets or the “unlocking value” for Crown assets described in the 2014 Budget. For this item, an indication of the volume of that correspondence was sought.

[6] As a result of the narrowed scope of the request, Cabinet Office issued a revised fee estimate advising that it would cost an estimated \$720.00 to process the request.

Request 3

- All communications between any Premier’s Office staff member, whether current or not, and [a named individual] from 2010 until the current date.

[7] After communication between the requester and Cabinet Office, the request was clarified as follows:

- All communications (emails, memos, SMS, BBM, PIN) between any current or former Premier’s Office staff and [a named individual] from January 1, 2010 to August 12, 2014.

[8] In response to the clarified request, Cabinet Office issued an interim fee estimate decision advising that it would cost \$570.00 to process the request.

[9] In response to the three fee estimate decisions, the requester wrote to Cabinet Office requesting fee waivers pursuant to sections 11(1) (obligation to disclose) and 57(4)(c) of the *Act*. The requester provided Cabinet Office with submissions relating to the fee waiver requests. Cabinet Office subsequently issued decisions advising that, following a review of the requests and related case law, it determined that the requester’s submissions were not sufficient to grant the fee waivers.

[10] The requester (now the appellant) appealed the decisions of Cabinet Office to this office and appeal files PA14-487, PA14-488 and PA14-489 were opened.

[11] During the course of mediation of the three appeals, the appellant advised the mediator that he is only appealing Cabinet Office’s fee waiver decisions and not the fee estimate decisions. He also advised the mediator that he was no longer relying on the application of section 11(1)¹ to waive the fees.

[12] The appeals then moved to the adjudication stage of the appeals process, where

¹ The appellant had raised this section of the *Act* in his requests for fee waivers.

an adjudicator conducts an inquiry. I sought and received representations from the appellant and Cabinet Office, which were shared in accordance with this office's *Practice Direction 7*. In his representations, the appellant again raised the application of section 11(1) of the *Act*.

[13] For the reasons that follow, I uphold Cabinet Office's decision to deny the fee waivers and I dismiss the appeals.

ISSUES:

- A. Should the three fees be waived?
- B. Does Cabinet Office have an obligation to disclose the records under section 11(1)?

DISCUSSION:

Issue A: Should the three fees be waived?

[14] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 57(4) states:

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.

[15] 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.²

[16] 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.³

Part 1: basis for fee waiver

[17] The appellant submits that the fee should be waived under section 57(4)(c) of the *Act* because dissemination of the record will benefit public health or safety. The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest;
- whether the subject matter of the record relates directly to a public health or safety issue;
- whether the dissemination of the record would yield a public benefit by
 - (a) disclosing a public health or safety concern, or
 - (b) contributing meaningfully to the development of understanding of an important public health or safety issue; and
- the probability that the requester will disseminate the contents of the record.⁴

[18] 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.⁵

Representations

[19] The appellant submits that the fees should be waived because dissemination of the requested records will benefit public health or safety. In particular, the appellant's position is that:

² Order PO-2726.

³ Orders M-914, P-474, P-1393 and PO-1953-F.

⁴ Orders P-2, P-474, PO-1953-F and PO-1962.

⁵ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

- the Ontario Budget is at the core of health and safety in the province and disclosure of the records would shed light on how decisions were made regarding health care, public safety and education;⁶
- the potential sale of public assets could threaten the government's capacity to pay for services that support public health and safety due to loss of revenue and profits;⁷
- Hydro One and local distribution companies are among the Crown assets commonly believed to be subject to divestment. The management of Ontario's hydroelectric system, especially its transmission and distribution, will have considerable impacts on the reliability of the transmission grid and, therefore, public health and safety;⁸ and
- An individual accessed electronic records in the Premier's Office without security clearance, using software designed for the United States military. Given that the computers in this office were physically protected by security, and that any information on the computers was meant to be password protected, and that only individuals with security clearance were meant to access them, there is clearly sensitive information contained within them which could have impacts to health and safety.⁹

[20] Cabinet Office submits that the appellant has not established any direct links between the contents of the records and specific public health and safety issues, but simply speculates that there may be a link between the records and various public health and safety issues. In addition, Cabinet Office argues that the appellant has not established how the requests (which are broad) or the records relate to an identifiable health and safety concern, or how dissemination of the records would contribute to the public's understanding of that particular health and safety issue.¹⁰

[21] Further, Cabinet Office states that given the nature of the requests, the appellant's arguments imply that any records pertaining to the government's budgeting process, its asset management or its information management, must be disclosed without a fee because they might somehow relate to health and safety issues. In support of its position, Cabinet Office cites Order PO-3206, stating that this office found that while information relating to expense claims made by hospital executives is of great public interest, it does not meet the requirement that it relates directly to a public health and safety issue. Similarly, Cabinet Office submits, the records that are the subject matter of the three requests pertain primarily to the government's management

⁶ The subject matter of request 1.

⁷ The subject matter of request 2.

⁸ *Ibid.*

⁹ The subject matter of request 3.

¹⁰ Cabinet Office cites Order PO-2705 in support of its position.

of Crown assets and provincial finances and not to a specific health or safety issue.

Analysis and findings

[22] As previously stated the appellant's three requests are for access to:

- Communication records (internal emails, memos, etc.) related to the budget, procurement and messaging (i.e. themes or narrative) for the advertising of the 2014 Budget – both its initial introduction in the 40th Parliament and its introduction in the 41st Parliament;
- Records produced by or for the Premier, Premier's Office or Cabinet Office that discuss the relevance of the Budget to the election campaign;
- All studies completed since 2012 regarding cost-benefit analyses or social impact analyses of asset sales or partial asset sales or the "unlocking value" for Crown assets described in the 2014 Budget;
- Communications to or from the Premier, the Premier's Office or Cabinet Office regarding the sale, partial sale of Crown assets or the "unlocking value" for Crown assets described in the 2014 Budget. For this item, an indication of the volume of that correspondence was sought; and
- All communications (emails, memos, SMS, BBM, PIN) between any current or former Premier's Office staff and [a named individual] from January 1, 2010 to August 12, 2014.

[23] The total fee estimate for the three requests is \$1,464.00.

[24] The focus of section 57(4)(c) is "public health or safety." Under this section, the appellant bears the onus of demonstrating that a fee waiver is justified. To discharge this onus, the appellant must establish that the records relate directly to a public health or safety issue.¹¹ Previous orders of this office have established that 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.¹²

[25] I find that the appellant's requests are so broad that I am unable to establish a connection between the three requests and public health and safety issues. In my view, the requests are for records relating to: the messaging and advertising of the 2014 Budget; the relevance of the Budget to the election campaign; the cost-benefit or social impact analysis of the potential sale of Crown assets; the volume of communications to

¹¹ Order PO-1962.

¹² See note 9.

or from the Premier's Office and Cabinet Office regarding the sale of Crown assets; and communications between the Premier's Office and a particular individual. While these records may be of public interest, and while it is likely that the appellant would probably disseminate these records, he has not demonstrated that the subject matter of the records relates directly to a public health or safety issue, and that the dissemination of the records would yield a public benefit by disclosing a public health or safety concern. The appellant has not specifically sought records concerning either of these two items, nor has he provided sufficient details as to how his three access requests are directly related to a public health or safety issue.

[26] Having found that part 1 of the basis for a fee waiver has not been met, it is not necessary for me to consider part 2 of the test, which is whether it would be fair and equitable to grant a fee waiver. Consequently, I find that the appellant has not established the basis for a fee waiver under section 57(4)(c) of the *Act*, and I uphold Cabinet Office's decision to deny the three fee waivers in these circumstances.

Issue B: Does Cabinet Office have an obligation to disclose the records under section 11(1)?

[27] The appellant argues that section 11(1) is applicable in this appeal, obligating Cabinet Office to disclose the records. Section 11(1) of the *Act* states:

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[28] The appellant submits that the records should be disclosed in the public interest so that opposition MPP's can "hold the government to account," as well as develop and promote policy. Further, he argues that the records should be disclosed because there are "potentially grave health and safety impacts."

[29] Cabinet Office submits that past orders of this office have held that the Commissioner does not have the jurisdiction to order the disclosure of records under section 11(1) of the *Act*.¹³ It goes on to argue that although these appeals concern the denial of a fee waiver and not the refusal to disclose records, the principle established by this office applies; an adjudicator does not have the jurisdiction to order the disclosure of records, with or without costs under section 11(1). Further, Cabinet Office submits that the appellant has focused on the public interest aspect of section 11(1), but failed to consider the requirement that the records reveal a grave environmental, health or safety hazard. Cabinet Office states:

¹³ See Order PO-3418.

The IPC has previously held that general assertions about potential health and safety concerns will not warrant disclosure if those concerns are not linked to a specific "grave environmental, health, or safety hazard."¹⁴

[30] Section 11(1) is a mandatory provision which requires the head to disclose records in certain circumstances. In Order 65, former Commissioner Sidney B. Linden found that the duties and responsibilities set out in section 11(1) of the *Act* belong to the head alone. In the circumstances of this appeal, I will not review Cabinet Office's decision not to release the records under section 11(1).¹⁵

ORDER:

1. I uphold Cabinet Office's decision to deny the three fee waivers and I dismiss the appeals.

Original Signed by: _____
Cathy Hamilton
Adjudicator

December 4, 2015 _____

¹⁴ See Order PO-3280.

¹⁵ I also note that the appellant argues that the disclosure of the records is in the public interest and that there are potentially grave health and safety impacts, but he does not refer to a specific "grave environmental, health or safety hazard" that would be captured in the requested records. See also my finding above that there is insufficient evidence to connect the requests to public health and safety issues.