Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3590

Appeal PA14-427

Ministry of Community and Social Services

March 24, 2016

Summary: The ministry received a request under the *Act* for gender-based statistical information held by the Family Responsibility Office (FRO), as well as confirmation of the existence of two FRO cases cited in the media. The ministry provided a fee estimate for producing the statistical information and refused to comment on specific FRO cases. In a supplemental decision, the ministry clarified that it was relying on section 21(5) to refuse to confirm or deny the existence of one of the alleged FRO cases and denied a fee waiver requested by the appellant. In this order, the adjudicator upholds the ministry's fee estimate with the exception of a small portion which is disallowed. The adjudicator further upholds the ministry's decision to deny the fee waiver request and to refuse to confirm or deny the existence of certain records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21(1), 21(2)(f), 21(5), 57(1), 57(4) (fee waiver), Regulation 460.

Orders Considered: Order MO-3172

Cases Considered: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.

OVERVIEW:

[1] The Ministry of Community and Social Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA* or the *Act*) for various records, including statistical information held by the Family Responsibility Office (FRO) based on gender, as well as confirmation of the existence of two FRO cases cited in the media. The requester also sought access to his own full FRO file.

[2] The ministry responded to the request in two parts: (i) the request for his own FRO file; and (ii) the request for other records and statistical information. The ministry provided the requester with a decision regarding access to his own FRO file, and that decision is not at issue in this appeal.

[3] Regarding the request for other records and statistical information, the ministry sent a decision letter to the requester which confirmed that he was seeking the following information:

1. Number of male versus female payors for [FRO] cases during the years 2002-2011.

2. Number of male versus female defaulting payors for FRO cases for the years 2002-2011.

3. Number of male versus female defaulting payors where FRO took enforcement measures for years 2002-2011 (specifically, writs of seizure/sale and driver's license suspensions).

4. Confirmation of the existence of two FRO cases suggested by [specific newspaper articles cited by the requester].

[4] With respect to the statistical information sought by the requester in parts 1, 2 and 3 of his access request, the ministry's decision letter stated that it "does not routinely track this data and therefore we [do] not have records responsive to your request." The ministry provided some statistics about the gender of payors (by percentage) and the total number of driver's license suspensions and writs of seizure and sale as of March 2014. Regarding the specific statistical information requested, the ministry indicated that it could produce such records and provided him with a fee estimate of $3,700 for doing so. It provided a breakdown of the fee estimate and indicated that a deposit of 50% of the fee was required in order to begin processing the request. The ministry also indicated that no exemptions would apply to this information.

[5] With respect to part 4 of the request, the ministry's decision letter stated that "we cannot comment on specific FRO cases or clients, as we are bound by the privacy provisions of the *Act* to protect the personal information in our custody."

[6] The requester (now the appellant) appealed the ministry's $3,700 fee estimate for providing access to the statistical information that he is seeking in parts 1, 2 and 3 of his access request, and also its refusal to provide him with records that would be responsive to part 4 of his request.

[7] During mediation, the appellant sent a letter to the ministry, asking that the fee be waived. In response, the ministry sent a supplementary decision letter to the appellant, denying his fee waiver request. It also indicated that its fee estimate could be reduced if the appellant narrowed the information he was seeking, and provided two revised fee estimates based on two samples of narrowed requests.

[8] In addition, the ministry's supplementary decision letter specified that it was denying access to any records that might be responsive to part 4 of the appellant's access request under the mandatory exemption in section 21(1) (personal privacy) of the *Act*, and clarified that it was relying on section 21(5) of the *Act*, which allows an institution to refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[9] The appellant confirmed that he wished to continue with his appeal, and also that he was appealing the ministry's decision not to waive the fee.

[10] Mediation did not resolve this appeal, and the file was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. A Notice of Inquiry was sent to the ministry, initially, and the ministry provided representations in response.

[11] In its representations, the ministry addressed the issues raised in this appeal. In addition, the ministry confirmed that it was no longer relying on section 21(5) to refuse to confirm or deny the existence of one of the records referred to in part 4 of the appellant's request. The ministry provided the appellant with a revised decision letter reflecting this change. The ministry maintained, however, that section 21(5) applied to the other portion of part 4 of the request, and provided representations in support of its position.

[12] I then sent a Notice of Inquiry, along with a complete copy of the ministry's representations, to the appellant. In response, the appellant indicated that he was relying on earlier correspondence sent to this office to support his position, as well as other referenced material. He referred to the specific documentation he was relying on.

[13] In this order, I find that the ministry's fee estimate is reasonable except for a small portion which is disallowed. I uphold the ministry's decision to deny the fee waiver request, as well as its decision to refuse to confirm or deny the remaining information responsive to part 4 of the appellant's request.

ISSUES:

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

B. Should the fee be waived?

C. Would the records, if they exist, contain "personal information" as defined in section 2(1) and, if so, to whom would it relate?

D. Has the ministry properly applied section 21(5) of the *Act* in the circumstances of this appeal?

DISCUSSION:

Issue A: Should the ministry's fee estimate be upheld?

[14] In this appeal the ministry issued a fee estimate decision of $3700. In its decision it stated:

> [As we] do not have records responsive to your request, we consulted with the appropriate internal resources to determine the effort required to produce the information. Production of the data you requested will require considerable effort involving both FRO staff and specialized external resources.
>
> Based on our internal consultations, we estimate it will cost $3,700.00 to complete your request. The fee estimate is based on the following costs, set out in Regulation 460 to the *Act*:
>
> 6 days internal staff computer programming and data analysis (Items 1 & 2 = 2 days internal staff resource; Item 3 = 4 days internal staff resource plus 1 day external resource) =
>
> 7.5 hours/day= 450 minutes/day @ $15/15 minutes computer programming= $ 2,700.00
>
> 1 day external computer programming resource actual cost:
>
> = $ 1,000.00
>
> **Total cost: = $ 3,700.00**

General principles

[15] An institution must advise the requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate, as stipulated by section 57(3) of the *Act*.

[16] Previous IPC orders have established that 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.[1]

[17] 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.[2] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[3] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[4] 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.

[18] 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.

[1] Orders MO-1699 and PO-2299.
[2] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[3] Order MO-1520-I.
[4] Orders P-81 and MO-1614.

[19] More specific provisions regarding fees are found in sections 6, of Regulation 460, which reads:

> 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.

[20] In reviewing the ministry's fee estimate, I must consider whether its fee is reasonable, giving consideration to the content of the appellant's request, the circumstances of the appeal and the provisions set out in section 57(1) of the *Act* and Regulation 460. The burden of establishing the reasonableness of the fee estimate rests with the ministry. To discharge this burden, the ministry must provide me with detailed information as to how the fee estimate was calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.[5]

[21] Previous orders of this office have found that section 57(1)(b) ("the costs of preparing the record for disclosure") includes time for:

- severing a record.[6]
- a person running reports from a computer system.[7]

[5] Orders MO-3013 and MO-3014.
[6] Order P-4.
[7] Order M-1083.

[22] Conversely, previous orders have found that section 57(1)(b) does not include time for:

- deciding whether or not to claim an exemption.[8]
- identifying records requiring severing.[9]
- identifying and preparing records requiring third party notice.[10]
- removing paper clips, tape and staples and packaging records for shipment.[11]
- transporting records to the mailroom or arranging for courier service.[12]
- assembling information and proofing data.[13]
- photocopying.[14]
- preparing an index of records or a decision letter.[15]
- re-filing and re-storing records to their original state after they have been reviewed and copied.[16]
- preparing a record for disclosure that contains the requester's personal information [Regulation 460, section 6.1].

[23] Regarding the "computer and other costs incurred in locating, retrieving, processing and copying a record" under section 57(1)(c), previous orders of this office found that this includes the cost of: (i) photocopies; (ii) computer printouts and/or CD-ROMs; and (iii) developing a computer program. However, this section does not include the time taken for a computer to compile and print information.[17]

[24] Section 57(1)(e) is intended to cover general administrative costs resulting from a request which are similar in nature to those listed in paragraphs (a) through (d), but not specifically mentioned.[18] This section does not include:

- time for responding to the requester.[19]

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[8] Orders P-4, M-376 and P-1536.
[9] Order MO-1380.
[10] Order MO-1380.
[11] Order PO-2574.
[12] Order P-4.
[13] Order M-1083.
[14] Orders P-184 and P-890.
[15] Orders P-741 and P-1536.
[16] Order PO-2574.
[17] Order M-1083.
[18] Order MO-1380.

- time for responding to this office during the course of an appeal.[20]
- legal costs associated with the request.[21]
- comparing records in a request with those in another request for consistency.[22]
- GST.[23]
- costs, even if invoiced, that would not have been incurred had the request been processed by the institution's staff.[24]
- coordinating a search for records.[25]

Representations

[25] The ministry provides substantial representations in support of its position that its fee estimate is reasonable. It begins by confirming that it undertook a two-stage process to respond to the request for statistical information. First, it located records that had already been compiled for a purpose unrelated to the appellant's request, and provided this information free of charge. However, it found that most of the statistical information sought by the appellant had never been compiled.

[26] The ministry then states that it determined that the desired information could be compiled from the online FRO Case Management System (FCMS) and its predecessor Managing Enforcement with Computerized Assistance (MECA) (replaced by FCMS in April 2013). It states that compiling the statistics would require "six days of computer programming and data analysis, and … one day … of external programming". The ministry therefore provided the $3,700 fee estimate set out above.

[27] The ministry states that the $3,700 estimate is "exclusively for the expected cost of computer programming and the processing of the records requested" and that "a new computer program needs to be created to search for (or 'query') the information". It states that, while most of this work could be done internally, it also requires "an external service provider with the expertise to conduct large scale database programming and IT support that the Ministry does not specialize in."

[28] The ministry submits that its calculation of the internal computer programming fee estimate complies with the *Act* and Regulations thereunder, specifically section 6.5

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[19] Order MO-1380.
[20] Order MO-1380
[21] Order MO-1380
[22] Order MO-1532.
[23] Order MO-2274.
[24] Order P-1536.
[25] Order PO-1943.

of the Regulation under which the ministry charged "$15.00 for every 15 minutes spent by any person creating a computer program to compile the records sought". It also states that the fee estimate for the cost of the external service provider's work is reasonable.

[29] In support of its position, the ministry provides two affidavits sworn by staff members. One of the affidavits is sworn by the FIPPA representative employed by FRO. This individual confirms the nature of the information routinely tracked or maintained by FRO, and states that "FRO does not routinely track or maintain data in a manner that would easily support generation of responsive records". She then identifies that she consulted with staff in the ministry's Policy Research and Analysis Branch (PRAB) to determine resource and time requirements to produce the information on which the fee estimate was based.

[30] The second affidavit is sworn by the Manager, Information Policy and Integration Unit within the ministry's PRAB (the manager). In this affidavit, the manager identifies his qualifications and knowledge of the nature of the records containing the requested information. He then states:

> In order to collect the statistics requested in [items 1 to 3], the Ministry must develop a new computer program that can scan the data contained in MECA and FCMS to collect the relevant data. The Ministry has some existing programs, but this request requires coding to develop new 'queries' so that the data collected reflects the information sought. Once compiled, the resulting data must be reviewed to ensure that the information is accurate.
>
> The Ministry must outsource some of the programming work to process this request to an external service provider. The external service provider has expertise to conduct large scale database programming and IT support that is not available within the Ministry.
>
> ... it would take approximately 2 days of work for one person internal to the Ministry to complete [items 1 and 2]. For [item 3], it would take an additional 4 days of work for one person internal to the Ministry and 1 day of work for an external service provider on data management.

[31] The ministry submits that its fee is reasonable in light of the estimated cost to be incurred by the ministry to produce the records and, contrary to the appellant's assertion that the fee estimate is excessive, was made in accordance with the *Act* and should therefore be upheld.

[32] The appellant takes issue with the ministry's position. He states that FRO provided "gender percentage statistics" and therefore gender is already tracked. He states that actual gender numbers should be easy to obtain, and that he received actual

numbers for certain 2012 statistics. He submits that the $3,700 fee is excessive, and based on his own education, training and experience with information requests, he is confident that the retrieval process should not be complex.

Analysis and Findings

[33] The ministry identifies that its internal programming costs would be $2,700, representing 450 minutes per day for six days at a rate of $15.00 per hour.

[34] The fee to be charged under section 6.5 of Regulation 460 is specifically for "developing a computer program or other method of producing a record from machine readable record". In its fairly extensive representations, the ministry has variously described the work for which this fee is being charged, as follows:

> "internal programming" or "internal computer programming"
>
> "internal staff computer programming and data analysis"
>
> "computer programming and the processing of the records requested"
>
> "a new computer program needs to be created to search for (or 'query') the information requested"
>
> "develop a new computer program that can scan the data contained in MECA and FCMS to collect the relevant data"
>
> "coding to develop new 'queries' so that the data collected reflects the information sought. Once compiled, the resulting data must be reviewed to ensure that the information is accurate."

[35] The ministry uses both the phrases "computer programming" and "queries", though it is unclear if they are being used interchangeably. Prior orders of this office have distinguished between a "computer program" and a "database query" and how these activities fit within section 6.5 of Regulation 460 (or its municipal equivalent Regulation 823).[26] However, in the circumstances of this appeal, based on the information provided, regardless of whether the work which must be done to extract the responsive information can be defined as "computer programming" or not, compiling the data would clearly also constitute a "method of producing a record from a machine readable record" as set out in section 6.5.[27]

[36] In this case, I accept the affidavit submissions from the ministry that "FRO does not routinely track or maintain data in a manner which would easily support generation of responsive records" and that "this request requires coding to develop new 'queries'

[26] Orders MO-1456, MO-2071, and MO-2603.
[27] See Order MO-2071.

so that the data collected reflects the information sought." Whether the work to be performed could be described as developing a "computer program" or a "database query", I accept that such work would fall under section 6.5 of Regulation 460 and be charged at "$15 for each 15 minutes".

[37] However, certain other aspects of the work, as rather generally described by the ministry, do not appear to fall under section 6.5 of Regulation 460. For example:

> "computer programming and *data analysis*"
>
> "computer programming and the *processing of the records requested*"
>
> "… Once compiled, the *resulting data must be reviewed to ensure that the information is accurate*."

[38] In my view, "data analysis", "processing of the records" and/or reviewing the resulting data to ensure accuracy would not qualify as "computer programming" under section 6.5 of Regulation 460. I have also considered whether this would qualify as "preparing a record for disclosure" under 6.4 of Regulation 460 and be charged at "$7.50 for each 15 minutes spent", and find that some of these activities (for example, assembling information and proofing data) are not chargeable under the *Act*.[28] As a result, I am not satisfied that the time spent on these activities can be included in the fee estimate.

[39] In the circumstances, I am satisfied that the bulk of the time estimated by the ministry is properly chargeable under section 6.5 of Regulation 460. The ministry has not provided detail about how much time would be spent on "computer programming" and how much time would be spent on subsequent "analysis", "processing" and/or reviewing for accuracy. However, based on the representations and affidavit evidence provided, I am satisfied that only a small percentage of the fee estimate is for activities which cannot be charged, such as "ensuring the information is accurate". In the circumstances, I find that 15% of the fee estimate is for these types of activities, and will deny 15% of the ministry's $2700 estimated fee. Accordingly, for computer programming, I find that a fee estimate of $2295 is reasonable.

[40] Lastly, with respect to the ministry estimated external costs, the ministry's fee estimate refers to a fee of $1000.[29] The ministry states in its representations that it was provided with a specific quote for these services, and also provides affidavit

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[28] Order M-1083.

[29] The ministry has indicated that it has been provided with a quote for $1100 for these services, but erroneously referred to this in the fee estimate as $1000.

evidence in support of this amount. In the circumstances, I am satisfied that the fee estimate of $1000 is reasonable.[30]

[41] In summary, I disallow a 15% portion of the ministry's $2700 fee estimate for internal programming and uphold a fee estimate of $2295 for the internal portion. For the external costs, I uphold a fee estimate of $1000.

Issue B: Should the fee be waived?

General principles

[42] 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.

[30] Clearly, the ultimate fee can only be for the actual amount charged in an invoice – see section 6.6 of Regulation 460.

[43] 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. The appellant bears the onus of establishing the basis for the fee waiver under section 57(4) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances.[31]

[44] There are two parts to my review of the decision by the ministry not to waive the fee under section 57(4) of the *Act*. I must first determine whether the basis for a fee waiver under the criteria listed in section 57(4) has been established. If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived.[32]

Representations, analysis and findings

[45] In the material provided in support of his fee waiver request, the appellant referred to a number of reasons why he believes the fee ought to be waived, in whole or in part. These reasons include some in support of his position that the fee should be waived under sections 57(4)(a) and (c), as well as other, separate, "mitigating factors". The ministry addresses a number of these reasons in its representations. I will review the positions of the parties and make my findings on each of these grounds below.

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

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

[47] In support of his request for a fee waiver under section 57(4)(a), the appellant takes the position that "gender is already tracked at the most basic level" and therefore gender statistics should be readily available. He also submits that any "software program or enhancement" developed in response to his request could be used for future requests for anyone, including within government, and therefore he shouldn't have to pay for "something that will provide ongoing benefit to others, especially since I already pay hefty taxes."

[48] In its representations, the ministry states that it does not track any more information about the gender of support payors than has already been provided to the appellant, which was collected for a purpose unrelated to this request and was provided to the appellant free of charge. It confirms that the specific requested information

[31] Order PO-2726.
[32] Orders MO-1243 and MO-3172.

related to compliance and enforcement divided by gender is not tracked by the ministry, and that its fee estimate represents the cost to produce the records that the appellant has requested.

[49] The ministry also states that there is "no factual basis" to the appellant's assertion that "the creation of a program to track gender-based statistics will provide an ongoing public benefit" as there is no way of knowing whether or not there would be any future similar requests from the public. In addition, the ministry states that section 57(4)(a) does not apply because it has "not yet completed the work and is unable to determine the actual cost".

[50] On my review of the representations of the parties, I find that the basis for the fee waiver in section 57(4)(a) is not satisfied in this appeal. The appellant's claims for a fee waiver under section 57(4)(a) relate to the issue of a proper fee estimate, which is addressed above, and I find that section 57(4)(a) does not apply in this appeal.

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

[51] In support of his position that section 57(4)(c) applies in this appeal, the appellant states that the "health and safety of [payors'] dependent children and other family members can benefit from my requested statistics", on the basis that any statistics that would show that "FRO is unfairly going after males" or "both males and females equally" could lead to an investigation to fix such issues. This, in the appellant's view, "would benefit the public" and the health and safety of both payors and their dependants.

[52] The appellant also refers to specific instances where, in his view, the manner in which FRO pursued enforcement actions resulted in concerns for the health and safety of children. The appellant also refers to newspaper articles which identify certain systemic problems at FRO in past years, and resulted in a review and report by the Ontario Ombudsman.

[53] In its representations, the ministry submits that the appellant "has failed to establish that there is a health or safety concern of a public nature that would be benefitted by the disclosure of the information" and that "the gender based statistics … do not amount to a public health or safety concern." The ministry also states that even if the issue relates to a "public issue" it "does not necessarily … rise to the level of a public health and safety concern" under section 57(4)(c). The ministry submits that the appellant "has failed to identify a benefit to a public health or safety issue from the dissemination of these records."

[54] Previous orders have confirmed that the following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest.
- whether the subject matter of the record relates directly to a public health or safety issue.
- whether the dissemination of the record would yield a public benefit by:
    (a) disclosing a public health or safety concern, or
    (b) contributing meaningfully to the development of understanding of an important public health or safety issue.
- the probability that the requester will disseminate the contents of the record.[33]

[55] 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.[34]

[56] This office has found that dissemination of the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards.[35]
- a proposed landfill site.[36]
- a certificate of approval to discharge air emissions into the natural environment at a specified location.[37]
- environmental concerns associated with the issue of extending cottage leases in provincial parks.[38]
- safety of nuclear generating stations.[39]
- quality of care and service at group homes.[40]

[33] Orders P-2, P-474, PO-1953-F and PO-1962.
[34] Orders MO-1336, MO-2071, PO-2592 and PO-2726.
[35] Order PO-1909.
[36] Order M-408.
[37] Order PO-1688.
[38] Order PO-1953-I.
[39] Orders P-1190 and PO-1805.
[40] Order PO-1962.

[57] On my review of the material submitted by the parties and the FRO statistics provided to the appellant, it is clear that the overwhelming majority of support payors at FRO are male. The appellant's request relates to further detailed information about various enforcement mechanisms used by FRO and a related breakdown by gender and as set out above, he argues that this information "would benefit the public" and the health and safety of both payors and their dependants.

[58] Based on my review of the representations of the parties, I find that the appellant has not established that section 57(4)(c) applies. To begin, I accept the ministry's position that the appellant "has failed to identify a benefit to a public health or safety issue from the dissemination of these records." The appellant identifies his interest in the information and makes reference to this being a "health and safety" concern, but does not identify how this is established. In addition, I note that the appellant's arguments are based on his speculation that the data may reveal that FRO is "unfairly targeting males". Furthermore, I note that he has concerns about the manner in which his own case has been handled. In that respect, although the appellant identifies a "health and safety" concern, it is clear that the appellant himself has or had a private interest in the subject matter of the record.

[59] In the circumstances, I find that the appellant has not established that the fee waiver provision in section 57(4)(c) applies.

Other factors

[60] The appellant also bases his request for a fee waiver on what he describes as "other mitigating factors". He refers to an earlier FOI request he made to the ministry in 2012 which led to an appeal at IPC, and notes that, during the mediation of that appeal, his understanding was that "FRO's information system was supposed to have been updated by the end of 2012" such that "the updated system would readily answer my requested items". The appellant also submits that he reduced his initial request and proposed a "manual sampling compromise". In addition, the appellant refers to the concerns about FRO's handling of his own FRO case file. Lastly, the appellant submits that his requests provide FRO with the opportunity to "show there is no gender or other bias and that Canadian government computer systems are not antiquated."

[61] The ministry did not directly respond to any of the appellant's "other mitigating factors", but instead referred to section 57(4)(d), which restricts the nature of any other factors to "any other matter prescribed in the regulations", and section 8 of the Regulation. The ministry submitted that "none of the bases set out in the appellant's fee waiver request meet the grounds set out in the Regulations", and accordingly the fee should not be waived.

[62] Under section 57(4)(d), "any other matter prescribed in the regulations" is to be considered. Section 8 of Regulation 460 provides two additional factors:

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.

[63] Clearly, the second listed factor (fee of $5 or less) is not relevant. The first listed factor is whether "the person requesting access to the record is to be given access to it." The ministry has indicated that it will compile the requested statistics upon payment of 50% of the fee estimate, and it is not severing the requested statistics. It is expected that the appellant will receive the records (the statistics) upon payment of the fee.

[64] The factor of access to the requested record is typically only relevant if access may be denied or if a decision on access is as yet unknown. For example, in Order MO-3172, I found this to be a factor as follows:

> In this appeal, not only has the appellant not been given access to a record, but the appellant has not even been advised of whether or not a record exists. In these circumstances, I find that the criteria in section 45(4)(d) [the municipal equivalent of 57(4)(d)] have been established.

[65] In the circumstances of this appeal, where the appellant is expected to receive the requested records (statistics) upon payment of the required fee, I agree with the ministry that this is not a factor supporting a fee waiver.

[66] I have also considered the other factors identified by the appellant in support of his fee waiver request, and find that they do not apply to support a finding that the fee ought to be waived. I agree with the ministry that other factors which can be considered are restricted to "any other matter prescribed in the regulations" and that the appellant's other "mitigating factors" do not fall within those set out in the Regulations. In the circumstances, I find that the appellant has not established that the fee waiver provision in section 57(4)(d) applies

[67] I also note that, regarding the appellant's expectation that FRO's information system should have been updated following his earlier 2012 appeal such that it could readily respond to his request, the ministry's supplemental decision in this appeal did provide a response on this issue. It referred to the appellant's earlier 2012 access request and its indication that, at that time, it was not able to provide the information requested. The ministry's supplemental decision then stated:

> FRO did implement a new computer system in 2013 to better support its operations requirements and to assist FRO in executing its primary business with greater efficiency. Part of that implementation process included migration of data from our legacy system. While our data analysis capacity may have improved since 2012, we are still in the early

> stages of expanding the capacity for secondary use(s) of the data, such as research and data analysis.
>
> With respect to your request for access to general information, our office responded that the information requested could be provided, in part because of the modernization of our computer system, as well as our collaboration with specialized resources within the Ministry who can work with FRO data. However, production of the information for secondary purposes outside those required to monitor and support FRO operations is costly, and will be subject to a fee in accordance with ss. 57(1) of the *Act*.
> …
>
> … the information that was not available in 2012 can now be produced with some effort, and only at the cost set out in our fee estimate.

Conclusion

[68] Given my finding that a fee waiver under sections 57(4)(a), (c) and (d) has not been established by the appellant, it is not necessary for me to consider whether it would be fair and equitable to waive the fee.

[69] As a result, I uphold the ministry's decision to deny the fee waiver request.

Issue C: Would the records, if they exist, contain "personal information" as defined in section 2(1)?

[70] As noted above, remaining at issue in this appeal in relation to item 4 of the request is the appellant's request to have the ministry confirm that a named individual (individual A) was a FRO payor in the past. The ministry refused to confirm or deny the existence of a record relating to whether individual A was ever a FRO payor on the basis of the exemption in section 21(5) of the *Act* (invasion of privacy).

[71] In order for section 21(5) to apply, the record, if it exists, must contain "personal information." That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to

> financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[72] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[41] To qualify as personal information, the information must be about the individual in a personal capacity. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[42]

[73] The ministry takes the position that the record, if it exists, would contain the personal information of individual A. It states that the fact that a person has (or had) a case with FRO is personal information because it reveals that the person is (or was) the subject of a support obligation due to the breakdown of a familial relationship. It states that this is personal information under the definition in paragraph (a), "marital or family status", and also information about financial transactions which is personal information under section 2(1)(b). In addition, the ministry states that any such record would contain "the individual's name where it appears with other personal information relating

[41] Order 11.
[42] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

to the individual or where the disclosure of the name would reveal other personal information about the individual."

[74] The appellant does not address this issue.

[75] On my review of this issue, I am satisfied that a responsive record, if it exists, would contain the personal information of individual A, as it would clearly contain personal information of individual A for the purpose of paragraphs 2(1)(a) and (h) of the definition. As a result, I am satisfied that the requested record, if it exists, would contain the "personal information" of individual A as defined in section 2(1) of the *Act*.

[76] I also find that a responsive record, if it exists, would not contain the personal information of the appellant.

Issue D: Has the institution properly applied section 21(5) of the *Act* in the circumstances of this appeal?

Introduction

[77] Section 21(5) reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

[78] Section 21(5) gives an institution the discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[79] A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.[43]

[80] Before an institution may exercise its discretion to invoke section 21(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[43] Order P-339.

[81] The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5) stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.[44]

Part one: disclosure of the record (if it exists) would be an unjustified invasion of privacy

[82] Under part one of the section 21(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. I have found above that a record, if it exists, would contain the personal information of individual A.

[83] With respect to whether disclosure would or would not be an "unjustified invasion of privacy," the factors and presumptions in sections 21(2), (3) and (4) help in making this determination.

[84] If any of paragraphs (a) to (d) of section 21(4) apply to the record, if it exists, disclosure would not be an unjustified invasion of privacy. I find that none of these paragraphs apply in the circumstances of this appeal.

[85] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure is presumed to be an unjustified invasion of privacy. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the public interest override" in section 23 apply.

[86] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[45] The list of factors under section 21(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 21(2).[46]

[87] On my review of the factors listed in section 21(2), I am satisfied that the factor favouring non-disclosure found in section 21(2)(f) is a relevant factor. This section states:

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[44] Orders PO-1809 and PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal to S.C.C. dismissed (May 19, 2005), S.C.C. 30802.
[45] Order P-239.
[46] Order P-99.

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;

[88] I find that disclosure of records (if they exist) containing information about an identified individual's FRO payments and obligations would clearly contain "highly sensitive" information under section 21(2)(f), as disclosure of information of this nature could reasonably be expected to lead to significant personal distress.[47]

[89] The appellant's materials focus on his argument that the ministry ought to confirm or deny that records exist. I address this issue below. The appellant does not provide any material in support of the position that disclosure of actual records (if they exist) would not constitute and unjustified invasion of privacy.

[90] Having found that the factor in section 21(2)(f) applies to the record (if it exists), and in the absence of any factors favouring disclosure of records of this nature, I am satisfied that disclosure of a responsive record (if it exists) would constitute an unjustified invasion of privacy.

Part two: Would disclosure of the fact that the records exist (or do not exist) be an unjustified invasion of personal privacy?

[91] Under part two of the section 21(5) test, the institution must demonstrate that disclosure of the fact that a record exists (or does not exist) would in itself convey information to the appellant, and that the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

Representations, analysis and findings

[92] In this case, the record sought is a confirmation of whether or not a particular individual was a FRO payor in the past. The ministry takes the position that disclosing whether or not a responsive record exists would, in itself, reveal the personal information of individual A and result in an unjustified invasion of individual A's privacy.

[93] I agree with the ministry that confirming whether a responsive record exists would constitute an unjustified invasion of personal privacy. Disclosing or confirming that individual A has or had a case with FRO or is or was subject to or a recipient of a support order would disclose personal information relating to individual A. I agree with the ministry that such a disclosure or confirmation would be an unjustified invasion of privacy under the *Act*, as it would reveal information about individual A that is "highly sensitive" as identified above.

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[47] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[94] In making this finding, I have considered the material provided by the appellant. In support of his positon that he ought to be able to confirm whether individual A is or was a support payor, the appellant may be considered to have implicitly raised the following factors under section 21(2) in favour of disclosure:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (b) access to the personal information may promote public health and safety;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[95] In support of his position that the ministry ought to disclose whether or not individual A is or was a support payor, the appellant argues that the statistical information he seeks (including information about individual A) is necessary to promote public health and safety, and that disclosure would subject the activities of FRO (an agency of the Government of Ontario) to public scrutiny. The appellant identifies his concerns about the gender imbalance at FRO in which the overwhelming majority of payors are male.

[96] The appellant also appears to argue that disclosing this information is relevant to the determination of his rights in his own case with FRO.

[97] I have considered the appellant's arguments, and am not satisfied that any of the factors in section 21(2) support the appellant's position that he ought to know whether individual A is or was a support payor. I find that knowing whether or not individual A had a file with FRO would not contribute to any public discussion of gender imbalance among FRO payors, nor am I satisfied that it would have any relevance to the determination of the appellant's rights in his own case with FRO.

[98] Lastly, the appellant seems to be taking the position that information about whether or not individual A was a support payor is already publicly known. He refers to an article in an online publication which names individual A, and the appellant states that, as a result, he "is not asking for additional information not already published."

[99] I have considered the appellant's position in this regard. I accept that individual A is named in one online article dated in 2010 and provided to me by the appellant. I note that this brief article touches on various aspects of individual A's life including his personal life, personal finances and mental state. The online article also refers to individual A's alleged involvement with FRO. However, on my review of the article and the circumstances of this appeal, I am not satisfied that the existence of this article is a sufficient basis to require the ministry to officially confirm or deny the existence of responsive records relating to individual A. I found above that there were no factors

supporting the disclosure of the personal information of individual A to the appellant. I also note that, although the appellant states that he is not asking for any information "not already published", he in fact is asking the ministry to officially confirm whether records relating to individual A's possible involvement with FRO exist. In the circumstances, and considering the nature of the information contained in the article, I find that this is insufficient to require the ministry to confirm or deny the existence of the requested information.

[100] Accordingly, I find that ministry is able to refuse to confirm or deny whether the requested record exists, as doing so would constitute an unjustified invasion of personal privacy.

[101] I now turn to the question of whether the ministry properly exercised its discretion in invoking section 21(5). As noted above, this office has found that the discretionary power to refuse to confirm or deny the existence of a record should only be exercised in rare cases.[48]

[102] An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. Where an institution has failed to exercise its discretion or has exercised it improperly, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[49] This office may not, however, substitute its own discretion for that of the institution.[50]

[103] In its representations, the ministry states that section 21(5) confers upon it a significant discretionary power that must only be used in rare circumstances. It then takes the position that this is one of those rare circumstances, and refers to the nature of the information sought, the fact that the information does not relate to the appellant, and the other considerations in this appeal in support of its position. It also specifically refers to its statutory obligations to protect the personal information of individuals contained in FRO records.

[104] Based on my review of the ministry's representations, I am satisfied that it properly exercised its discretion to invoke section 21(5) and in doing so, took into account relevant considerations. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into account irrelevant considerations.

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[48] Order P-339.
[49] Order MO-1573.
[50] Section 43(2).

[105] I conclude, therefore, that the ministry properly exercised its discretion in invoking section 21(5) to refuse to confirm or deny the existence of the requested record, and I uphold the ministry's decision.

ORDER:

1. I partially uphold the ministry's fee estimate for internal and external computer programming costs for a total amount of $3295.00.

2. I uphold the ministry's decision to deny the fee waiver request.

3. I uphold the ministry's decision to refuse to confirm or deny the existence of records responsive to part 4 of the request.

Original Signed By: March 24, 2016
Frank DeVries
Senior Adjudicator