

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3602

Appeal PA14-423

Ministry of the Environment and Climate Change

April 29, 2016

Summary: The appellant made a request to the ministry for records relating to a power generation station project. The ministry responded with an interim access decision and fee estimate. The appellant then requested a fee waiver, which was denied. The appellant filed an appeal of the fee estimate and the denial of the fee waiver. This order upholds the ministry's fee estimate but orders the ministry to grant the appellant's fee waiver request, in part.

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

Orders and Investigation Reports Considered: Order 1953-F.

BACKGROUND:

[1] The appellant, the editor of an online newspaper, submitted a request to the Ministry of the Environment and Climate Change (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...any and all records in any format whatsoever concerning the project by [two named companies] to create a head pond and dam at [a named town] Ontario to increase power generation and to build an extended power generation station. This request includes but is not limited to any

memos, correspondence, studies or environmental impact documentation concerning this project and created by any party including the Ministry.

[2] The appellant also requested a waiver of fees for the records.

[3] The ministry identified responsive records and issued an interim access decision granting partial access to them, with a fee estimate of \$968.00 broken down as follows:

- Search Time 3 hours @ \$30/hour = \$90.00
- Copying 4000 pages of records @ \$0.20/page = \$800.00
- Preparation Time 2.5 hours @ \$30/hour = \$75.00
- Delivery = \$3.00

[4] The ministry further advised that, in light of the large volume of material to be reviewed and prepared for disclosure, the time limit for responding to the request was being extended for an additional 150 days following receipt of a deposit of \$484.00.¹ In its letter, the ministry also invited the appellant to contact it if she wished to discuss how to minimize the processing costs.

[5] The ministry also acknowledged the appellant's request for a fee waiver and asked her to resubmit the request if she had any specific evidence to support her request in light of the ministry's fee estimate.

[6] The appellant filed an appeal of the fee estimate outlined in the ministry's interim access decision and asked that the fee be waived or reduced. She also objected to the 150-day extension of time for the ministry to respond to her request.

[7] During mediation, the appellant revised the scope of her request so as not to include documents that are available in the public viewing file. The ministry issued a revised fee estimate of \$580.50 and provided the appellant with the following list of the types of records that were included in the revised estimate:

- Draft reports, community meeting "Q & A"s and consultation plans
- Correspondence with First Nation communities
- Coordination team meeting agenda/minutes
- Correspondence between the ministry and the proponent related to the project

[8] Based on this list, the appellant advised the ministry that she was not pursuing

¹ See Regulation 460, sections 7 and 9.

access to the draft reports, community meeting "Q & As", consultation plans, or correspondence with First Nations communities. In response to this narrowed request, on November 21, 2014 the ministry issued yet another revised fee estimate of \$478.00, broken down as follows:

- Search Time 3 hours @ \$30/hour = \$90.00
- Copying 1775 pages of records @ \$0.20/page = \$355.00
- Preparation Time 1 hour @ \$30/hour = \$30.00
- Delivery = \$3.00

[9] The ministry also indicated that this narrowed request resulted in a reduction of the time extension from 150 days to 90 days. The appellant confirmed that she does not take issue with the time extension of 90 days. The time extension is therefore no longer an issue on appeal.

[10] The appellant indicated that she is appealing the revised fee estimate of \$478.00 and also asked the ministry to consider her request for a fee waiver. The ministry subsequently issued a decision in which it denied the appellant's request for a fee waiver on the basis that it did not satisfy the criteria set out in section 57(4) of the *Act*, particularly section 57(4)(b) (financial hardship to the requester) and section 57(4)(c) (benefit to public health or safety).

[11] As the parties did not reach a mediated resolution, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I began my inquiry by seeking representations from the ministry. In accordance with this office's *Practice Direction 7*, the ministry's representations were then shared with the appellant, who also made representations. The ministry made representations in reply.

[12] In this order, I uphold the ministry's amended fee estimate dated November 21, 2014. However, I order the ministry to waive the fee, in part, by reducing the fee for photocopies and computer printouts by 25%.

ISSUES:

- A. Should the amended fee estimate of \$478 be upheld?
- B. Should the fee be waived?

DISCUSSION:

Issue A: Should the amended fee estimate of \$478 be upheld?

[13] 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.

[14] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 460. The relevant portions of those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

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

[15] Where the fee for access to a record exceeds \$25, an institution must provide the requester with a fee estimate.² 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.³

² See section 57(3) of the *Act*.

³ Order MO-1699.

[16] 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.⁴ The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees, as the requester did during mediation in this case.⁵

[17] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.⁶

[18] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

Representations

[19] The ministry's representations confirm its understanding that the fees at issue are those associated with the appellant's revised request, detailed in the fee estimate of November 21, 2014:

- Search Time of 3 hours @ \$30/hour = \$90.00
- Copying approximately 1,775 pages @ \$0.20/page = \$355.00
- Preparation Time approximately 1 hour @ \$30/hour = \$30.00
- Delivery = \$3.00
- Total = \$478.00

Search time

[20] The ministry submits that the fee related to search time was calculated cumulatively based on the individual search times recorded by the ministry's Environmental Approvals Branch, as well as the Eastern Regional Office and Ottawa District Office. It submits that in accordance with Section 6 of Regulation 460, the search times recorded were based on the number of hours spent manually locating responsive records in file folders and electronic repositories related to the head pond and dam construction project.

[21] The ministry submits that the search time for its fee estimate is based on the appellant's initial request received June 30, 2014. While the ministry amended its copy and preparation costs based on the revised request confirmed on November 20, 2014, the amount of time spent searching for responsive records could not be retroactively revised along with the request parameters.

⁴ Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

⁵ Order MO-1520-I.

⁶ Orders P-81 and MO-1614.

[22] The ministry also explains, however, that it has not added any additional search time to the revised fee estimate, despite the additional amount of time spent by the relevant program areas to re-identify responsive records subsequent to the revision of the request.

[23] The ministry submits that its Environmental Approvals Branch provided the FOI Office with the following summary of the actions undertaken to conduct the search, totaling 2.5 hours, and an estimate of the time it took to perform each task:

- (a) Receipt of FOI request: Approximately 0.25 hours. Upon receipt of the FOI request from the FOI Office, the Technical Lead examined the FOI request to identify the potential sources of records.
- (b) The Technical Lead then determined appropriate staff members within both the Environmental Approvals Branch and the Environmental Approvals Access and Service Integration Branch who were likely to have responsive records, and requested a search of all records related to the project in question.
- (c) Search for responsive records: Approximately 2 hours for all staff members. The staff members conducting the search were required to:
 - Manually read through all hard copy folders/files/papers
 - Read through all e-mails related to the project (approximately 673 e-mails)
 - Perform searches in the shared and personal computer drives and read through the electronic files
 - Perform searches of their personal notes
- (d) Review of responsive records: Approximately 0.25 hours. Once responsive records were identified, the Technical Lead reviewed all the documents to ensure there was no duplication of records and to ensure that the records were responsive to the request.

[24] The ministry submits that its Ottawa District Office and Eastern Regional Office, too, provided the FOI Office with a summary of the actions undertaken to conduct a search, totaling 4.5 hours. The following steps were undertaken:

- (a) The FOI Liaison staff of the Ottawa District Office and Eastern Regional Office conducted a preliminary search for records through two ministry electronic databases: the Integrated Divisional System (IDS), and the Centralized Records Tracking System (CRTS), as well as through e-mails, memos and letters of staff who were involved in the file. This required entering multiple words into the

search functions and reviewing the "hits" by opening the email or file and reading/scanning for responsiveness.

- (b) For each electronic records search, ministry staff members were required to track the electronic search results for all records related to the project in question in order to locate the paper records.
- (c) Based on the electronic records search results, additional records were then located in hard copy folders in the District and Regional Office's file rooms. In the course of locating these records, District and Regional Office staff estimated the overall number of pages based on a representative sample of the records found responsive. The search of these folders was primarily conducted by a Regional Environmental Planner, a Junior Environmental Officer, a Senior Environmental Officer (these individuals also searched their own personal files) and a summer student.
- (d) The FOI Liaison staff also conducted a search of the shared network drive that is used by all District Office and Regional Office staff members to file, store and retain files electronically.
- (e) A supervisor coordinated the search and reviewed the estimates supplied by the FOI staff to ensure that they were as accurate and comprehensive as possible.

[25] The ministry notes that the 2.5 hours of search time recorded by the Environmental Approvals Branch, and the 4.5 hours of search time recorded by the Ottawa District Office and Eastern Regional Office amount to a total of 7 hours of search time. However, for the purpose of the interim decision/fee estimate letter, the ministry reduced the chargeable search time from 7 hours to 3 hours in order to account for any margin of error in the recording of the search time received from the program areas, and in order to ensure that the records are accessible to the requester given the large photocopying cost associated with the large page count. The ministry submits that it has been committed to ensuring that the fees charged to the appellant are accurate and equitable.

[26] The appellant submits that the ministry could have saved search time if it had advised her at the outset that it is not obliged to provide her with records that are available to the public. She submits that the ministry could also have informed her what kinds of records existed, and the appellant would have limited her request, thus cutting back on search and review time. She points out that the ministry did neither of these things until after the appellant appealed and the appeal was in mediation.

[27] In reply, the ministry points out that it cannot advise of the types of records that exist until it has conducted a search based on the parameters of the request, because records pertaining to a specific request are generally not stored in a central file and staff are required to manually search through e-mails of individual staff members,

Environmental Officers' notebooks, paper and other electronic files.

[28] The ministry also points out that the appellant did not contact it following receipt of its interim decision letter inviting her to contact the ministry to discuss ways of reducing costs. Instead, the appellant chose to directly file an appeal.

[29] The ministry's representations relating to copying, preparation and shipping fees are referred to as necessary below.

Analysis and findings

[30] In deciding whether or not to uphold the ministry's fee estimate under section 57(3), I must assess whether the estimate is in accordance with the *Act* and Regulation 460.

[31] Because the fee is over \$100, it was open to the ministry to base its estimate on the review of a representative sample of the records or the advice of an individual who is familiar with the type and content of the records.⁷

[32] I find the ministry's revised estimate dated November 21, 2014 to be clear. The ministry set out the estimated times for each component of the request, and applied the fees set out in section 6 of Regulation 460. It distinguished between search and preparation time. The estimate met the objectives of providing the appellant with enough information to decide whether or not to pay the estimated fee, and whether to narrow the scope of the request, as she had done in response to the two previous estimates.

[33] The ministry's description in its representations of the time spent searching for records in response to the initial request is detailed and persuasive. Given the breadth of the appellant's request, I find that the steps taken by the ministry to search for responsive records were reasonable and necessary. From the titles of the personnel involved in conducting the searches, I conclude that they would be expected to be familiar with the type and contents of the requested records and would, therefore, be in a position to conduct an efficient search.

[34] I have taken into consideration that at the time the ministry conducted its search, the request had not yet been narrowed. However, I accept the ministry's explanation that it could not have advised the appellant of the kinds of records that existed until after its search. Moreover, to address the appellant's concern that the ministry could have saved on search time if it had advised her that it is not obliged to provide records available to the public, I note that documents that are available to the public remain responsive records under the *Act*. The ministry was obliged to identify them as responsive records, regardless of the fact that, in addition to identifying them

⁷ Order MO-1699.

as responsive records, it could have chosen to claim that they are exempt from disclosure pursuant to the discretionary exemption at section 22 of the *Act* for information available to the public. I also consider it reasonable to expect that the time spent locating publicly available records is small in relation to the time spent locating the remainder of the records.

[35] Moreover, despite the fact that ministry personnel spent a total of 7 hours searching for responsive records, it charged the appellant for only 3 hours of search time to account for the possibility of any duplication of effort. Further, the ministry did not add any additional search time to the revised fee estimate, despite the additional amount of time spent re-identifying responsive records subsequent to the appellant's narrowed request. I find that three hours is a modest amount of time to spend searching for the large volume of records located in different ministry offices, and I find that it is reasonable. The fees for search are calculated in accordance with the amount prescribed under item 3 in section 6 of Regulation 460. I therefore uphold the estimate of \$90 for search time.

[36] I also find the ministry's explanation of its preparation time fee to be reasonable. It applied the guideline of two minutes per page, approved in several orders of this office,⁸ to the severing of 30 pages of records, for a total of one hour of preparation time. Applying item 4 in section 6 of Regulation 460, this translates to \$30 for preparation time. Accordingly, I uphold the estimate of \$30 for preparation time. In the event that the actual preparation time turns out to be lower than this estimate, however, I would expect the ministry to charge the appellant the lower amount.⁹

[37] For photocopies and printouts, the ministry charged the amount of 20 cents per page to an estimate of 1,775 pages of records, for a total of \$335. This is the amount prescribed by item 1 of section 6 of Regulation 460. Accordingly, I uphold the estimate of \$335 for photocopies, again with the expectation that in the event that the number of pages disclosed is lower than the estimated number of 1,775, I would expect the ministry to charge the appellant for the lower number of pages.

[38] The ministry's fee estimate includes a \$3.00 shipping charge to deliver records to the appellant's residence. To calculate this fee, the ministry obtained a quote from its vendor in the amount of \$4.35. The ministry advises that it reduced the estimated shipping cost to \$3.00 and I find that this charge is reasonable.

[39] In sum, I uphold the fee estimate in the total amount of \$478.

[40] I will now determine whether the ministry's fee should be waived, in whole or in part.

⁸ Orders MO-1169, PO-1721, PO-1834 and PO-1990.

⁹ See section 57(4)(a) of the *Act* and section 7(2) of Regulation 460.

Issue B: Should the fee be waived?

[41] 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.

[42] 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.¹⁰ The institution or this office may decide that only a portion of the fee should be waived.¹¹

[43] The appellant argues that payment of the fee will cause a financial hardship, and that dissemination of the records will benefit public health or safety. I will consider each of these factors in turn.

¹⁰ Orders M-914, P-474, P-1393 and PO-1953-F.

¹¹ Order MO-1243.

Section 57(4)(b): financial hardship

[44] The fact that a fee is large does not necessarily mean that payment of the fee will cause financial hardship.¹² For section 57(4)(b) to apply, the requester must provide some evidence regarding his or her financial situation, including information about income, expenses, assets and liabilities.¹³

Representations

[45] The appellant submits that she is the editor of a small online newspaper serving the community where the project that is the subject of this appeal will take place. She submits:

The on-line newspaper is three years old and run entirely by volunteers, most of whom have retired from other professions... We do not accept paid advertising and are a purely public interest and public service publication. Our assets consist of a website and approximately \$500 in capital. The requirement to pay a fee for access to documents which may be released pursuant to this request may prevent us from accessing documents which, according to law, should be made available to the public.

[46] The appellant submits, further, that the online newspaper has its own dedicated bank account which had a balance of \$600 at the time of the request and just over \$1000 at the time she prepared her representations. She submits that she and the other volunteer have not yet reimbursed themselves for their expenses such as the cost of maintaining the website.

[47] Following receipt of this submission, I asked the appellant for further representations on the relevance of her personal finances and those of the other volunteers, and whether the newspaper's ability to raise funds is a relevant factor. I also asked for more information about whether payment of the fee would impose a financial burden on the appellant or the other volunteers personally.

[48] In response, the appellant submitted:

In the case of an unincorporated company..., it may be that the personal finances of the owner of the company are relevant to a determination of financial hardship. If one were to start a company for the sole purpose of making sure that the company has very little income and to hide personal income, that could be a relevant factor in the determination.

¹² Order P-1402.

¹³ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

[49] The appellant goes on to submit that payment of the fee would impose financial hardship on her personally and on the other volunteer who operates the newspaper. She submits that she personally funds the website and runs it as a public service. She submits that she and her husband are on fixed incomes, while the other volunteer has a full time job but is nearing retirement and cannot spare funds for extra expenses.

[50] The appellant also points out that she has made freedom of information requests to a number of government departments, each of which imposes fees, and submits that if she and the other volunteer pay even \$100 per request, they cannot afford the hundreds of dollars that this would amount to.

[51] The appellant advises that the newspaper's website has a donation button, but does not accept paid advertising. She goes on to submit that the newspaper might be able to pay a nominal sum from its donation base, but cannot raise substantial funds. She submits that the newspaper raises less than \$1,000 per year which goes to expenses including the payment for a domain, web server and other expenses. She submits that these expenses are not fully covered by donations and the rest come out of her personal income. She does not think it appropriate that a large government department should require payment from a small organization such as the newspaper.

[52] The ministry submits that in order to demonstrate financial hardship, an appellant is expected to provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities,¹⁴ and submits that the appellant has not demonstrated how payment of the fee would result in financial hardship. Specifically, while the appellant has indicated that she is on a fixed income, she has not advised what that income is. It submits that the fact that the newspaper may be a public service is not a factor demonstrating financial hardship. It also points out that the appellant has not provided information about the newspaper's ability to raise funds for special purposes such as freedom of information requests.

Analysis and findings

[53] I find that the appellant has not demonstrated the existence of financial hardship if the fee is paid in this case. The appellant has provided few details of her own personal financial situation. While she has submitted that she is on a fixed income, she has not provided evidence of the amount of that income, and little evidence of her personal expenses, assets and liabilities.

[54] The appellant has focussed instead on the financial situation of the newspaper, stating that it raises less than \$1,000 per year through donations from the community. With her representations, she submitted a bank statement indicating that the newspaper has just over \$1,000 in its account. She stresses that the paper is run as a public service to the community and that the community in question is concerned about

¹⁴ See Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

the project that is the subject of her access request.

[55] I do not accept, however, that the newspaper's current bank account balance is evidence of financial hardship. While the appellant states that some of the paper's expenses remain to be paid, she has not identified how much those expenses are. Additionally, through the newspaper's ability to raise funds, I find that it is not unreasonable to expect that money could be raised from the approximately 13,000 readers that the appellant indicates the newspaper reaches. It is reasonable to expect that some funds could be raised from the members of the community who will be affected by the project.

[56] I also note the appellant's submission that she has made additional freedom of information requests in addition to this one, and that the cumulative cost of all of them exceeds the newspaper's funds. However, the appellant has not provided any details of the other requests or the fees imposed in respect of them. In the circumstances, I cannot find that this is evidence of financial hardship.

[57] I find, therefore, that the appellant has not demonstrated that payment of the fee will cause financial hardship to either her personally or to the newspaper.

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

[58] Previous orders of this office have established 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.¹⁵

[59] 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

¹⁵ Orders P-2, P-474, PO-1953-F and PO-1962.

safety issue.¹⁶

Representations

[60] The appellant submits that the project is of great concern to the community that is the proposed site of the project. She states that the proponents intend to remove a substantial portion of the river bottom at the head of the local river falls, which are in the residential and business core of the town, create a head pond, and add a generator and building to house it at the site. She states that the generator raises noise issues in the core of the town, noting that the proponent has applied for an amendment to the noise bylaw, thus giving rise to concerns that the ongoing noise of the generators may exceed a healthy limit. She states that the building will jut out into the river to cover 2/5 of its width, and that the local citizens are concerned about environmental damage to the river. Additionally, they are concerned about the safety of the project which will see blasting or hoe ramming, which the appellant states may damage the homes or business properties adjacent to the river. She relies on Order PO-1953-F, which she submits stands for the proposition that "public health" includes a healthy environment, and she argues that the project will irreversibly alter the river which is a centrepiece of the town, recreationally, aesthetically and environmentally.

[61] The appellant refers to the factors set out above that are relevant in determining whether dissemination of a record will benefit public health or safety. She submits that the subject matter of the records is a matter of public rather than private interest. Further, she submits that the construction of a large two-storey power building housing a noisy generator in the middle of a river in the core of a small town, close to businesses and residences, would damage the quality of life of its citizens, in addition to causing environmental damage upriver where there is damage to the natural environment of a protected wetland. The appellant also states that she will make the records public to an audience of approximately 13,000 through the online newspaper.

[62] The ministry concedes that the subject matter of the records, relating to projects that concern a community of residents, is of public rather than private interest. The ministry also accepts that the appellant intends to make the records available to the community.

[63] The ministry states that in order to determine whether the subject matter of the record relates directly to a public health or safety issue, and whether the dissemination of the record would yield a public benefit, it conducted a review of a representative sample of the responsive records and considered whether the contents of the records related to a public health or safety issue. From its review of the representative sample, it concluded that the majority of the records consist of project descriptions, agency consultations, noise screenings, and engineering designs. The remaining records consist

¹⁶ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

of internal ministry correspondence involving project documentation and clarification, and communications between the ministry and the project proponent regarding status updates.

[64] The ministry submits that the records do not contain any information directly related to public health or safety concerns. It also submits that the records do not contain substantive project information that has not previously been made available to the public in the proponent's posted documentation. It submits that disclosure of the records at issue would not meaningfully add to the public discourse on the subject of the project. As a result, the ministry submits that the dissemination of the records would not yield a public benefit by either disclosing a public health or safety concern, or contributing meaningfully to the development of an understanding of an important public health or safety issue.

[65] The ministry submits that its review confirmed that other documents, such as a heritage impact assessment, Potential Project Effects and Mitigation Measures, and project description, among others are publicly available on the proponent's website and may address public health and safety concerns.

Analysis and findings

[66] Although I do not have the records before me, I am satisfied, based on the representations of the ministry and of the appellant, for the following reasons, that the dissemination of at least some of the records will benefit public health or safety.

[67] First, it is common ground between the parties that the subject matter of the records is a matter of public interest, and that the appellant intends to disseminate the records.

[68] I turn now to whether the subject matter of the record relates directly to a public health or safety issue; and whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern, or by contributing meaningfully to the development of understanding of an important public health or safety issue.

[69] In Order PO-1953-F, Adjudicator Irena Pascoe found that the dissemination of records relating to soil and water safety would benefit public health or safety. After reviewing previous orders that concluded that certain matters relating to the environment also raise public health and/or safety issues, Adjudicator Pascoe stated:

Based on the above-mentioned orders, it is clear that matters concerning the environment and those concerning public health and safety are not necessarily mutually exclusive and that there is clearly a significant overlap between them. As illustrated above, very often matters concerning the environment, by their very nature, raise important public health or safety concerns. Having said that however, I am not persuaded that every issue concerning the environment would automatically be

considered a public health or safety issue, as contemplated by section 57(4)(c).

In my view, each case must be considered individually and a determination made as to whether the identified factors raise public health or safety issues within the meaning of section 57(4)(c).

[70] Adjudicator Pascoe went on to state:

[W]hat is common to all these cases is that the records at issue concern environmental matters with the potential to affect the health and safety of the public....

While I am not in a position to assess the merits of the health concerns as outlined by the appellant, and ultimately these concerns may or may not be determined to be valid or significant, I am satisfied that disclosure of the records would benefit public health by assisting the public in participating in any consultation on the subject of extending the leases and would meaningfully contribute to the development of understanding of the public health and safety issues surrounding this matter.

[71] I agree with this approach and will apply it here. While section 57(4) does not extend to environmental considerations taken on their own, environmental concerns that also raise public health and safety concerns would fall within that section.

[72] The ministry has indicated that the records at issue in this appeal include information on noise screenings, and the appellant cites noise as one of the concerns of the residents in the area surrounding the project. I do not consider it contentious that excessive noise is a health or safety issue. I find, therefore, that the records relate directly to a public health or safety issue.

[73] I am also satisfied that disclosure of the records would benefit public health by leading to an informed citizenry who can meaningfully participate in any discussions around the project and the noise it will generate. While I am not in a position to assess the merits of the appellant's concern that the noise from the project will exceed acceptable limits, I find that disclosure of the records will lead to a more informed discussion around the issue.

[74] The ministry submits that the records do not contain substantive project information that has not previously been made available to the public in the proponent's posted documentation. The public documents referred to by the ministry are a heritage impact assessment, Potential Project Effects and Mitigation Measures, and a project description. On the other hand, the ministry has advised that the records at issue in this appeal consist of project descriptions, agency consultations, noise screenings, and engineering designs. Although none of the records are before me, based on the ministry's description of the records, I find that it is unlikely that all of the information in

the records at issue in this appeal is already in the public domain. For example, it is not clear that the public documents address noise issues, or if they do, that all of the information on that subject found in the records at issue is already in the public documents. I find it likely, therefore, that disclosure of the records at issue in this appeal would add to the public's understanding of the noise issue and thus contribute in a meaningful way to the development of an understanding of an important public health or safety issue.

[75] The other concerns raised by the appellant relate to possible environmental damage to the river and damage to the homes or business properties adjacent to the river, as well as aesthetic and recreational concerns. While these may all be valid concerns, I do not find that they are matters of public health or safety within the meaning of section 57(4)(c).

[76] I conclude that dissemination of at least a portion of the records (those that relate to noise issues) will benefit public health or safety under section 57(4)(c).

Fair and equitable

[77] For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. In addition to the factors that must be considered under section 57(4), other 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.¹⁷

¹⁷ Orders M-166, M-408 and PO-1953-F.

Representations

[78] The ministry submits that it upheld its commitment to cooperatively narrow the scope of the request in the mediation stage by providing the appellant with a list of the types of records located in its search. Further, it notes that, as set out above, it did not charge for the additional search time it expended after the search was narrowed. It states that it did this so that the records would remain accessible to the appellant.

[79] The ministry submits, further, that while the appellant worked constructively with the ministry to narrow the scope of the request in the mediation stage of the appeal, she did not advance any compromise solution to reduce fees at any point in the request stage, prior to appealing. It also notes that an offer was put forward to the appellant to have her review records that are available in the public viewing file.

[80] The ministry also submits that it has expended a considerable amount of resources responding to the request, well beyond the chargeable fees detailed in its fee estimates. For example, in addition to its search time (which exceeded the 3 hours charged to the appellant), it also conducted a review of a representative sample of over 120 pages of records in order to respond to the fee waiver request.

[81] The ministry submits that it committed to the process of revision, compromise and ongoing mediation, reducing the initial cost of \$968 to the current \$478 (subject to further reduction of the copy cost). It submits that it would be unreasonable and inequitable to now waive this fee and transfer the cost of the processing from the appellant to the ministry.

[82] The appellant submits that the fee effectively denies her and the public access to the records and subverts the operation of the legislation. She submits that she demonstrated full cooperation in limiting the scope of her request and agreeing to an extension of time.

[83] The appellant submits that, as she will make the records public to an audience of approximately 13,000 people through her newspaper, she may spare the ministry from responding to a number of requests from other citizens of the area and from environmental groups. She submits that the information affects the health, safety and integrity of the community and will be widely disseminated. She requests that the fee be entirely waived, or failing that, that it be reduced to a nominal sum of \$100 or less.

Analysis and findings

[84] My finding above that payment of the fee will not cause financial hardship is a factor in favour of not granting a fee waiver. On the other hand, my finding that dissemination of the records will benefit public health or safety is a factor in favour of granting a fee waiver.

[85] Another factor that a head (and, on appeal, the Commissioner) is required to

consider in entertaining a request for a fee waiver under section 57(4) is the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the fee estimate. While I have not considered this as separate factor above, I have taken it into account. I accept that the ministry spent time over and above the amount it could charge in its fee estimate. For example, the ministry spent a total of 7 hours on its search but reduced that amount to 3 hours. Also, it did not charge for the time it spent re-identifying responsive records following the appellant's narrowing of the request.

[86] Both parties cooperated in clarifying and narrowing the request, albeit during mediation, and I have found above that earlier efforts in this regard would not have reduced the fees below \$478. The parties' cooperation, therefore, is a neutral factor that does not weigh in favour of, nor against a fee waiver.

[87] Another important factor to consider is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the ministry. I am mindful of the legislature's intention to include a user-pay principle in the *Act*. The user-pay system 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) are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.¹⁸

[88] Considering the time and effort spent by the ministry in responding to this request, the fact that it has already reduced its search time from 7 hours to 3 hours, and the fact that it did not charge for the additional time spent re-identifying responsive records after the appellant narrowed her request, I find that it would not be fair and equitable to waive any of the fees related to search or preparation. In my view, this would shift an unreasonable burden of the cost of searching from the appellant to the ministry. I also see no reason to waive the shipping fees.

[89] However, given the public safety aspect of at least some portion of the records, including the fact that the appellant intends to disseminate them to the affected community, I find that it is fair and equitable under the circumstances to partially waive the fees for photocopies and computer printouts. I will order, therefore, that the ministry reduce its fees for photocopies and computer printouts by 25%. In my view, this respects the user-pay principle of the *Act*, while making the records more accessible to the appellant and the community affected by the project, without shifting an unreasonable burden to the ministry.

¹⁸ Order PO-2726.

ORDER:

1. I uphold the ministry's fee estimate of \$478.
2. I order that the appellant be granted a partial fee waiver. The ministry is to reduce its fees for photocopies and computer printouts by 25%.

Original Signed by: _____

Gillian Shaw
Adjudicator

April 29, 2016