Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3773

Appeal PA14-637

Ministry of Children and Youth Services

September 29, 2017

Summary: The issues in this appeal are whether the withheld portions of serious occurrence reports qualify as the personal information of children in group homes in Toronto and/or involved with the Children's Aid Society of Toronto, and whether that information is exempt under section 21(1) of the *Freedom of Information and Protection of Privacy Act*. Also at issue is the fee estimate charged by the ministry and its denial of the appellant's request for a fee waiver. In this order, the adjudicator finds that the withheld information identified by the appellant as remaining at issue qualifies as the personal information of numerous children, because its disclosure could lead to the identification of those children. The withheld information is found to be exempt from disclosure under section 21(1). With respect to the fee estimate, the adjudicator upholds the fee, in part. She reduces the fee charged for the preparation of the records that were disclosed to the appellant and orders the ministry to reimburse the appellant for part of the fee. Lastly, the denial of a fee waiver is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 21(1), 57(1)(a), 57(1)(b) and 57(4)(c); *Regulation 460*, sections 6, 7 and 8.

Orders and Investigation Reports Considered: PO-2278 and PO-3189.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of Children and Youth Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for Serious Occurrence Reports sent by the Children's Aid Society of Toronto and group

homes in Toronto to the ministry during a specified year.

[2] The ministry issued an interim decision and fee estimate of $6,143.40 to the requester. The ministry also advised the requester that some information in the records would be withheld, claiming the mandatory exemption in section 21(1) (personal privacy).

[3] The requester (now the appellant) appealed the ministry's decision to this office. During the mediation of the appeal, the appellant paid 50% of the fee as a deposit so that the ministry would continue to process the request.

[4] The file was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. Prior to the commencement of the inquiry, the appellant requested a fee waiver from the ministry on the basis that dissemination of the records will benefit public health or safety (section 57(4)(c)). The ministry responded by declining the fee waiver, advising the appellant that it would not be fair or equitable in the circumstances to do so. However, the ministry also advised the appellant that it would reduce its fee by $1,003.40 to $5,140.00, taking into consideration that the records would be provided electronically rather than in hard copy.

[5] The adjudicator assigned to the file sought and received representations from the ministry and the appellant on the issues of fee and fee waiver. In the appellant's representations, he requested that the issue of the application of the mandatory exemption in section 21(1) be added to the appeal, and he advised that he was seeking the ages, placements and medications of the children that are the subject matter of the records. The ministry subsequently provided a copy of the records to the appellant, withholding the information at issue.

[6] The adjudicator then sought further representations from the ministry and the appellant on the application of the exemption in section 21(1). The ministry provided representations on that issue.

[7] The file was then transferred to me for final disposition. For the reasons that follow, I find that the ages, placements and medications of the children qualifies as their personal information because the disclosure of that information could lead to the identification of those children. I also find that this information is exempt from disclosure under section 21(1). With respect to the fee estimate, I uphold the fee, in part. I reduce the fee charged for the preparation of the records that were disclosed to the appellant and order the ministry to reimburse the appellant for part of the fee. Lastly, the denial of a fee waiver is upheld.

RECORDS:

[8] The records at issue consist of the withheld portions of Serious Occurrence Reports. There are 5,457 pages of records.

[9] The ministry advises that Serious Occurrence Reports involve the reporting of incidents of a serious nature to it. All service providers that are funded, licensed or operated by the ministry, including Children's Aid Societies and group homes, are required to submit these reports under the *Child and Family Services Act*.[1] These reports are one of the tools used by the ministry and service providers to monitor the appropriateness and quality of service.

ISSUES:

A. Do the records contain personal information as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption in section 21(1) apply to the information at issue?

C. Should the fee estimate be upheld?

D. Should the fee be waived?

DISCUSSION:

Issue A. Do the records contain personal information as defined in section 2(1) and, if so, to whom does it relate?

[10] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain personal information and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> Personal information means recorded information about an identifiable individual, including,
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> > (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,

[1] R.S.O., 1990, c. C.11.

> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution that is implicitly or explicitly of a private and confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
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> (g) the views or opinions of another individual about the individual, and
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> (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.

[11] Sections 2(3) and 2(4) also relate to the definition of personal information and state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
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> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be about the individual.[2] Even if the information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[3]

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

[14] The ministry states that the type of incidents that are reported to it in the records include:

- The death of a client while participating in a service;
- Serious injury to a client while participating in service;

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[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

- Alleged, witnessed or suspected abuse;
- Situations in which a client is missing;
- A disaster on the premises, such as a fire, flood or power outage;
- A complaint about the operational, physical or safety standards of the service;
- A complaint made by or about a client; and
- The use of a restraint on a client.[5]

[15] The ministry submits that the records contain the personal information of clients of the Children's Aid Society (CAS) or group homes. Service providers are required by the guidelines to complete the records in a manner that restricts the provision of personal information to the ministry. However, it argues that the broad scope of personal information within the meaning of the *Act* means that a record may still contain personal information, even if it does not contain readily identifying information, such as an individual's name.

[16] The ministry further submits that the disclosure of the information in the records would allow for the identification of the respective children, particularly by those familiar with the particular circumstances or events contained in the records. The ministry goes on to argue that if there is a reasonable expectation that an individual can be identified from the information, then that information qualifies as personal information under section 2(1) of the *Act*.[6]

[17] The appellant advises that he is not seeking the names of any of the children in the records, but argues that three types of information that was withheld is not personal information, and that the disclosure of this information would not lead to the identification of the children. The appellant identifies the three types of information as:

- Any medication given to the children;
- The age of the children; and
- The placement of the child, that is, the type of care the child is in.

[18] In reply, the ministry states:

> . . . [T]he inclusion of any one of the elements that have been redacted would allow individuals familiar with the particular circumstances or events contained in the record to identify the particular child to whom the information relates given the level of detail contained in the records that

[5] Serious and Enhanced Serious Occurrence Reporting Guidelines, Ministry of Community and Social Services/Ministry of Children and Youth Services, March 2013 (the guidelines).
[6] Order P-230. See also *Ontario (Attorney General) v. Pascoe*, 2001 CanLII 32755 (ON SCDC).

> relate to specific incidents. For example, it is apparent that those individuals providing care and support to these children would be aware of their ages, medication taken by the child or the nature of the child's placement (which would also provide further indicia of the exact location of the occurrence). Accordingly, revealing this information would result in the identification of the child by individuals familiar with the particular circumstances or events contained in the record, leading to the conclusion that the information constitutes personal information within the meaning of the Act.
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> Accordingly, the ministry submits that the information constitutes personal information should any one of the medications, ages or placement information be released to the requester.
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> [emphasis added]

[19] The ministry also submits that section 45(8) of the *Child and Family Services Act* places a general prohibition on the publishing or making public information that has the effect of identifying a child who is a witness or a participant in a child protection hearing or the subject of a child protection proceeding, or the child's parent or foster parent or a member of the child's family. The ministry argues that many of the children subject to the serious occurrence reports may have been the subject of a proceeding and, accordingly, any information that could reasonably identify those children may also identify a child who should otherwise be protected by section 45(8) of the *Child and Family Services Act*.[7] The ministry also notes that section 67(2) of the *Act* provides that section 45(8) of the *Child and Family Services Act* prevails over the *Act*.

[20] As set out above, information is personal information only if it is associated with an identifiable individual. This office has said that to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed[8] and that each decision on this question is based on its own facts. The Divisional Court has explained the relationship between personal information and identification in the following terms:

> The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the records. [See Order P-316; and Order P-651].9

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[7] The ministry cites Order PO-3236 in support of its position.
[8] See, for example, Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[9] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 4987, affirmed in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300.

[21] The information at issue consists of the age, any medication and type of placement of the children that are the subject matter of the serious occurrence reports. In particular, the type of placement information was detailed in some of the serious occurrence reports provided by the CAS to the ministry, and identifies a variety of placements. The serious occurrence reports provided by group homes identifies the group home in question, and this information was disclosed to the appellant. I note that, on my review of a number of the serious occurrence reports, most of them include the age of the child by their date of birth. Only some of the placement types were withheld from the CAS serious occurrence reports; for example, whether the child was in foster care, with family members identified by relationship, in adoption placement, or living independently.[10] Further, only a limited number of reports include details about the types of medications administered (only the ones where this occurred).

[22] The ministry has already disclosed extensive information contained in these reports to the appellant, which includes extremely detailed information about incidents involving children in care in Toronto during a specific year. Applying the approach set out above to the circumstances of this request, I am satisfied that the disclosure of the ages, medication and type of placement could lead to the identification of these children when combined with the information that has already been disclosed, despite the fact that their names have been severed from the records.

[23] To begin, I note that the information already disclosed in the serious occurrence reports is very detailed with regards to the incidents and the actions of the parties during the incidents. It sets out the specific dates of each incident, the gender of the child involved, and specific information in narrative about the nature of the incidents including what happened, how it was responded to, and what consequences resulted from the incident. In some circumstances, information about local responders is also included – for example – which police division was involved and/or which local hospital was attended. In addition, as noted above, where a group home is involved, the name of the group home has been disclosed.

[24] In light of the information already disclosed in the serious occurrence reports, I am satisfied that there is a reasonable expectation that, in a number of the reports which I have reviewed, the disclosure of the information at issue could result in the child being identified. The disclosure of the child's date of birth could lead to the identification of the particular child. In some of the incident reports where the type of medication the child is receiving is identified, disclosure of this information could reveal their medical diagnosis, and could lead to the identification of the child. In addition, the type of placement in some of the CAS serious occurrence reports is extremely detailed, such as identifying the relationship between the child and who the child is residing with. I find that this information, if disclosed, in combination with the detailed information that has already been disclosed in the reports, could lead to the identification of particular children.

[25] I note that a similar analysis was conducted by Assistant Commissioner Sherry

[10] The names of the foster parents and family members are not identified in the records.

Liang in Order PO-3189, which involved a request for access to inspection reports arising out of incidents at long-term care homes in Ontario. Although that order involved a determination of what is *reasonably foreseeable* under the *Personal Health Information Protection Act*, Assistant Commissioner Liang stated that this analysis was comparable to a conclusion under the *Act* about what constitutes personal information. She stated:

> In considering this issue, I have reviewed the information in each record and the severances made by the ministry. I have also considered what information is already publicly available about the incidents. The public reports about these incidents provide various levels of detail about them, but they contain, at a minimum, the name of the homes, the date of the inspection, the name of the inspector, a summary of the inspector's findings, and orders issued, if any. Some of the public summaries give the dates of the incidents and describe the residents involved, their medical condition, plan of care, and describe the incident . . .
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> . . . the more data elements are disclosed about the incidents, the greater the possibility that the residents involved will be identified. I also agree that one of the factors that may be relevant to an assessment of whether it is reasonably foreseeable in the circumstances that an individual resident sill be identified is the nature of the resources available to this appellant and his ability to access other data. It is no secret that this appellant is a reporter with a large newspaper that has researched and published articles on abuses at long-term care homes and has a variety of sources from which it has obtained information about those homes and the residents in them.
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> But even if the appellant is not an individual who is particularly well-positioned to gather data, this office has described disclosure under the Act as amounting to disclosure to the world, in the sense that the information disclosed would be in the public domain. In this appeal, this is not a hypothetical scenario. The appellant has made submissions about the public interest in the disclosure of this information that candidly reveal his intent to report on the contents of the licensee reports. He states that the licensee reports contain information that residents and their families, as well as prospective residents of these homes, should know. Thus, in deciding whether it is reasonably foreseeable in the circumstances that the severed information could be used to identify the residents involved, I must also consider whether the dissemination of the information to the general public, including to other residents or their families, or members of the communities in which the homes are located, could enable identification of these residents.
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> I find persuasive in this regard the ministry's submissions that, where other details such as the name of the home and date of the inspection is

> known, the detailed description of the incident could enable other residents in the home, their families or staff to identify the residents involved in the incident. I find it reasonably foreseeable in the circumstances that the descriptions of the incidents could be used, despite the removal of names, genders and room numbers, to identify the residents involved . . .

[26] Applying the approach taken by Assistant Commissioner Liang, I note that in this appeal, similar to the appeal in Order PO-3189, the appellant is from a large media outlet, has written extensively articles on the child protection system in Ontario and intends to disseminate the information at issue.

[27] In making this finding, I have treated the records as a whole, and not conducted an analysis of each specific item of information for each incident and each child. However, I am satisfied that the risk of identification of the children meets the standard of a *reasonable likelihood* with respect to a significant number of the incident reports.

[28] Consequently, I find that the ages, medications and type of placement constitutes the personal information of the children in the records, falling within paragraphs a) and b) of the definition of personal information. I will now determine whether this personal information is exempt from disclosure under section 21(1).

Issue B. Does the mandatory exemption in section 21(1) apply to the information at issue?

[29] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of the paragraphs (a) to (e), it is not exempt from disclosure under section 21(1).

[30] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. The section 21(1)(f) exception requires a consideration of additional parts of section 21(1).

[31] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[32] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1). 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 applies.[11]

[33] The ministry submits that the disclosure of the medication, ages and placements

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[11] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

would constitute an unjustified invasion of personal privacy. In particular, the ministry submits that the disclosure of the type of medication taken by individual children is presumed to be an unjustified invasion of personal privacy because the presumption in section 21(3)(a) applies. The medication taken relates to medical treatment and permits a reasonable assumption as to the underlying condition.

[34] Concerning the age and placement information, the ministry submits that the factor in section 21(2)(f) applies, because the information is highly sensitive by its very nature in that it relates to children who are in care for a variety of reasons, such as having been at risk in a previous family situation or having complex medical needs. The ministry also submits that none of the other factors in section 21(2) are applicable in the circumstances.[12]

[35] The appellant's position is that the disclosure of the medications, ages and placements would not invade the personal privacy of the individuals to whom the records relate.

[36] I find that the presumption in section 21(3)(a) applies to some of the personal information at issue. Section 21(3)(a) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information, relates to a medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation.

[37] In particular, I find that the identification of the medication given to the children falls within the ambit of the presumption in section 21(3)(a).

[38] With respect to the age and type of placement of the children under care, I find that the factor in section 21(2)(f), which favours non-disclosure, applies, as this information is highly sensitive. I also find that this factor weighs heavily in favour of non-disclosure.

[39] The appellant did not raise any of the factors in section 21(2) that favour disclosure of the personal information at issue. Although it is possible that the factor in section 21(2)(a) (public scrutiny) may be relevant, I find that it does not outweigh the factor in favour of protecting the personal privacy of the children that are the subject matter of the serious occurrence reports. Consequently, I find that the disclosure of the personal information remaining at issue would constitute an unjustified invasion of the personal privacy of the children, and that this personal information is exempt from disclosure under section 21(1) of the *Act*.

Issue C. Should the fee estimate be upheld?

[40] Where a fee exceeds $25, a institution must provide the requester with a fee

[12] The ministry cites Order PO-2194 to support its position on this issue.

estimate.[13] Where the fee estimate is $100 or more, the fee estimate may be based on either the actual work done 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.[14]

[41] The purpose of the 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.[15] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[16]

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

[43] 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. 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 amount prescribed by the regulations for,
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> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and
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> (e) any other costs incurred in responding to a request for access to a record.

[44] More specific provisions regarding fees are found in sections 6 and 7 of Regulation 460. Those sections state:

> 6. The following are the fees that shall be charged for the purpose of subsection 57(1) of the Act for access to a record:
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> 1. For photocopies and computer printouts, 20 cents per page.
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> 2. For records provided on CD-ROMs, $10 for each CD-ROM.

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[13] See section 57(3).
[14] Order MO-1699.
[15] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[16] Order MO-1520-I.
[17] Orders P-81 and MO-1614.

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.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

Search – Section 57(1)(a)

[45] The ministry states that its fee estimate was based on a representative sample of records, which was subsequently confirmed by the actual work done to locate and prepare the records.

[46] The ministry advises that in order to locate responsive records, a policy analyst in the ministry's FIPP Unit worked with staff at the ministry's regional office in Toronto. The records at issue are sent to the ministry from Children's Aid Societies and group homes via a dedicated fax line or by email to a dedicated email account. The records that are emailed are done so in PDF format and saved in a database. To conduct the search for responsive records, the following steps were taken:

- Program staff accessed the ministry's serious occurrence database to retrieve the requested occurrence reports;
- Program staff created an Excel spreadsheet of serious occurrence reports for each agency that met the search criteria;
- Program staff reviewed the serious occurrence reports to ensure that they were responsive to the request;
- The Excel spreadsheet contained a hyperlink for each serious occurrence report that linked back to the database in the client display section;

- In the client display section of an individual serious occurrence report, the program staff clicked the hyperlink to access attachments saved as PDF documents; and

- The individual PDF documents were then separated into agency folders and transferred to the FIPP Unit for review and severing.

[47] The ministry states that the above steps took eight hours, but that it only charged the appellant two hours of search time at the rate of $30.00 dollars per hour, for a total of $60.00. The ministry submits that there are 5,457 pages of records and that the fee for search is conservative as it relates to the actual amount of time required to manually search for the records.

[48] I accept the ministry's assertion that its search for the records was more than two hours. I find that charging the appellant for a two-hour search for over 5,000 pages of records is reasonable and I, therefore uphold the ministry's fee for searching for records under section 57(1)(a).

Preparation for disclosure – Section 57(1)(b)

[49] Section 57(1)(b) includes time for severing a record[18] and for a person running reports from a computer system.[19] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[20]

[50] Section 57(1)(b) does not include the time for deciding whether or not to claim an exemption[21] or identifying records requiring severing.[22]

[51] The ministry submits that the records had to be carefully reviewed for the purposes of making appropriate severances under section 21(1). It states that nearly every single page of the 5,000 plus records needed to be reviewed to assess the possible application of section 21(1) and to make the severances to ensure the protection of individuals' personal information. The ministry states that it followed the generally accepted practice of two minutes per page.

[52] The ministry goes on to state:

> Where there were occasional blank pages in the records (where a form carried over or additional space to provide relevant detail), the ministry estimated when preparing its fee estimate that most of the records required redactions.

[53] The ministry then advises that it severed approximately 5,067 pages at two

[18] Order P-4.
[19] Order M-1083.
[20] Orders MO-1169, PO-1721, PO-1834 and PO-1990.
[21] Orders P-4, M-376 and P-1536.
[22] Order MO-1380.

minutes per page, which is 10,368 minutes or approximately 170 hours of preparation time.[23] The ministry charged the appellant for 169 hours of preparation time at the rate of $30.00 per hour, which totals $5,070.00.

[54] The appellant submits that most of the serious occurrence reports are two to three pages in length and that almost all of them contain a blank page requiring no redactions or time for preparation. The appellant argues that the ministry's position that 5,067 pages required two minutes of preparation time is considerably off the mark. The appellant also states that while it appreciates the efforts to fulfill the request, it does not know if the fee estimate is conservative.

[55] As previously stated, past orders of this office have interpreted section 57(1)(b) as allowing two minutes per page for actual severing of information from records, but that the time taken to determine whether to claim an exemption or to identify records requiring severing is not chargeable.

[56] On my review of the records I find that, overall, 25 percent of the pages were not severed, either because they did not contain personal information or because they were blank. As a result, I find that the ministry has overestimated the number of pages it actually severed. Based on my calculations, only 4,093 pages were actually severed. Taking into account that it takes two minutes per page to sever, that equates to 136.4 hours in time that was spent severing the records. At the rate of $30.00 per hour, the cost to sever the records is $4,092.00.

[57] As previously stated, the ministry charged the appellant $5,070.00 to sever the records. I find, therefore, that $978.00 of the fee charged for the preparation of the records is not allowed, and I will order the ministry to reimburse the appellant that amount.

Issue D. Should the fee be waived?

[58] 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;

[23] I note that the figures should read 10,134 minutes and 168.9 hours.

> (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 the payment.

[59] 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.[24]

[60] 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.[25]

[61] The institution or this office may decide that only a portion of the fee should be waived.[26]

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

[62] The appellant submits that the fee should be waived under section 57(4)(c). 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

[24] Order PO-2726.
[25] Orders M-914, P-474, P-1393 and PO-1953-F.
[26] Order MO-1243.

- 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 or understanding of an important public health or safety issue

- the probability that the requester will disseminate the contents of the record.[27]

[63] 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.[28]

[64] The appellant submits that the records are in the public interest and relate to the health and safety of Ontario's most vulnerable children; namely children who are in care. The appellant goes on to state:

> . . . Knowing how these children fare is of utmost importance. It is our position that by shedding light on serious incidents and how they are handled will either instill confidence in Ontario's child protection system or highlight areas for improvement. Either way, the release, analysis and dissemination of the results speaks directly to issues of public health and safety.
>
> In 2012, a government-appointed commission concluded that the child protection system does not provide value for money, and described services as *fragmented, confused and siloed.* It criticized both the government and children's aid societies for failing to keep province-wide data on how children are faring in key outcome areas.

[65] The appellant notes that it is a newspaper that has run a series of articles on the child protection system, which have broken new ground and generated intense interest in the child protection system. Much of the information it has relied on was obtained through freedom of information requests, and many of the news stories used, for the first time, government data to reveal a child protection system that deals with children differently, depending on where they live and the agency that brings them into care.

[66] The appellant further submits that doing the type of comparative analysis with government-held data is both in the public interest and a benefit to public health and safety.

[67] The appellant advises that it intends to disseminate the results of an analysis of the released information that identifies trends and any concerns, just as it has done in the past with previous information received from the ministry through freedom of

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[27] Orders P-2, P-474, PO-1953-F and PO-1962.
[28] Orders MO-1336, MO-2071, PO-2592 and PO-2726.

information requests. The appellant also relies on Order PO-1962 to support its position, arguing that it was also a media request for access to serious occurrence reports in which the fee waiver decision was successfully appealed.

[68] Concerning whether it is fair and equitable to grant a fee waiver, the appellant submits that the government and Ontario's 46 children's aid societies should be doing what the appellant has done, which is analyzing the serious occurrence reports to gauge how well Ontario's children in care are faring and comparing practices from various jurisdictions. The appellant goes on to argue that the government has not thought to look at the data the same way that it does, and that this is another example of the appellant doing what the government should be doing.

[69] The appellant also states that newsroom budgets continue to shrink and that pay this amount of money for government-held records is no small matter.

[70] With respect to the processing of the request, the appellant states that it appreciates the efforts of the ministry's freedom of information staff, and that they are a pleasure to work with.

[71] On this basis, taking into consideration all of the above factors, the appellant submits that it would be fair and equitable to waive the fee.

[72] The ministry submits that all of the considerations set out in section 57(4) must be considered by the head in forming his or her opinion as to whether it is fair and equitable to grant a fee waiver. The ministry then argues that the appellant appears to rely solely on one of the considerations, namely s. 57(4)(c), but that this is not the appropriate legal test and all considerations must be assessed and weighed, as per the language of the provision.

[73] The ministry further submits that the dissemination of the records would not benefit public health or safety under section 57(4)(c). First, the ministry submits that the subject matter of the serious occurrence reports relates to specific incidents that are of a private nature, as they relate to individual, rather than public, circumstances. The ministry also states that it is unaware of any specific proposal of the appellant to disseminate the information.

[74] The ministry also raises the application of section 57(4)(d) of the *Act* and section 8 of *Regulation 460* and that the factor set out in section 8 weighs in favour of the decision not to waive the fee. In particular, the ministry states that the appellant received access to the responsive records with portions redacted.

[75] The ministry further submits that it would not be fair and equitable to waive the fee, and that a fee waiver would unduly shift the cost from the appellant to it. The ministry goes on to state:

> The ministry submits that the user-pay principle of the Act should apply unless specific elements of a request raise issues of fairness and equity

> that justify either a partial or complete fee waiver. Given the ministry's mandate in overseeing a system of services for children and youth in Ontario, it may have a number of records in its custody or control that arguably relate to the health and safety of children. However, the ministry's mandate should not serve to undermine the user-pay principle of the Act. The ministry submits that the circumstances of this appeal are not extraordinary to justify a fee waiver. This request essentially consists of a request from a member of the media for records kept by the ministry in the ordinary course of its business.[29]
>
> [emphasis added]

[76] Concerning Order PO-1962, on which the appellant relies, the ministry submits that it can be distinguished from the circumstances of this appeal. In particular, it argues that the adjudicator in that order found that the ministry was *not particularly helpful* to the appellant, whereas that is not the case in the circumstances of this request.

[77] In addition, the ministry states that the only factor in section 57(4) that was considered in Order PO-1962 was section 57(4)(c). The ministry submits that all of the factors must be considered.

[78] Concerning section 57(4)(a), the ministry submits that the actual search time exceeded the fee estimate for search and that the time spent on preparing the records for disclosure was accurate.

[79] With respect to section 57(4)(b), which considers the financial position of the appellant, the ministry argues that it is *arguably the most germaine consideration in determining whether a fee waiver is appropriate*, and that the appellant has provided only *vague assertions* that payment will cause financial hardship.

[80] Lastly, turning to section 57(4)(d) and section 8 of *Regulation 460*, the ministry states:

> The requester received access to the responsive records with redactions that protect the personal information and privacy of third parties, the majority of them children and youth in the care of ministry funded or licensed programs.
>
> The ministry submits that this factor weighs in favour of its decision not to waive the fee.

[81] In Order PO-2278, Assistant Commissioner Liang considered whether records relating to complaints made about nursing homes were matters of public concern for the purposes of section 57(4). She noted that prior orders of this office recognized that

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[29] In support of its position, the ministry relies on Order PO-2278.

the quality of care and service at institutions funded by the government are matters of public concern.[30] Although she noted that private interests were reflected in the records, taken as a whole, without personal information, the records were more a matter of public, rather than private, interest.

[82] She went further, and found that not only were the records of a public interest, but that they also related directly to a public health or safety interest, stating:

> I am satisfied that, to the extent that nursing homes have responsibilities for the health and safety of their residents, and their discharge of these responsibilities is overseen by the Ministry, complaints about conditions at nursing homes relate directly to issues of public health or safety. My finding here is consistent with that in Order PO-1962, in which serious occurrence reports arising out of incidents at agencies serving individuals with developmental disabilities were found to relate directly to a public health or safety issue.
>
> [emphasis added]

[83] Adopting the approach taken by Assistant Commissioner Liang, I find that the serious occurrence reports at issue in this appeal, which relate to equally vulnerable citizens of this province, namely children under care, are of a public interest and also relate directly to a public health or safety issue.

[84] I also find, based on the appellant's representations, that there is a high probability that the content of the records will be disseminated through newspaper articles, and that this dissemination would yield a public benefit by either disclosing a public health or safety concern in child protection or contributing meaningfully to understanding (as the appellant puts it) how well Ontario's children in care are faring, and to comparing practices from various jurisdictions.

[85] Accordingly, I am satisfied that the dissemination of the records will benefit public health or safety. I will now consider whether it is fair and equitable to require the ministry to waive the fee.

[86] For a fee waiver to be granted under section 57(4), it must be *fair and equitable* in the circumstances. Relevant factors in deciding whether or not a fee waiver is fair and equitable may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;

[30] Orders P-754 and PO-1962.

- 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 had 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.[31]

[87] The ministry also argues that sections 57(4)(a), (b) and (d) must also be considered in determining whether it is fair and equitable to waive the fee.

[88] In the circumstances of this appeal, I find that there are considerations favouring a fee waiver, while other considerations do not. I find that section 57(4)(a) does favour waiving the fee, as based on my findings regarding the fee for the preparation of the records, the actual cost of providing access was less than what the ministry charged the appellant. I also accept that the appellant advanced a compromise solution to reduce costs, that is, that the records could be provided in electronic format, although this was reflected by the ministry's fee reduction.

[89] Conversely, I am satisfied that the fee did not cause a financial hardship. The appellant is a member of a large media organization, and this is not a circumstance where the decision on the fee waiver may determine the appellant's ability to access the records. The appellant paid the fee and obtained the records. In addition, this is not a situation where the appellant was required to pay a large sum, but was given minimal disclosure. The ministry provided access to all of the voluminous records, with only minimal personal information withheld.

[90] In addition, I accept from the parties' representations that the ministry worked constructively with the appellant, and I have no evidence before me that the appellant worked to narrow the request.

[91] Lastly, in considering whether waiver of the remaining fee would shift an unreasonable burden of the cost from the appellant to the ministry, the fee waiver provisions in the *Act* are not intended to undermine the user-pay principles of the *Act*. I agree with the ministry that the circumstances of this request are not so extraordinary as to justify a fee waiver. The request, in essence, is one made by a member of the media for records kept by the ministry in the ordinary course of its overseeing a system of services for children and youth in Toronto. I accept that waiving the fee in this circumstance would make it difficult for the ministry to deny a fee waiver in many other cases.

[92] Consequently, and taking into consideration the fact that I have already reduced

[31] Orders M-166, M-408 and PO-1953-F.

the fee estimate for the cost of preparing the records for disclosure, and taking into account all of the circumstances,[32] I uphold the ministry's decision to decline to waive the fee.

ORDER:

1. I uphold the application of the mandatory exemption in section 21(1) to the withheld portions of the records.

2. I uphold the ministry's fee for search time.

3. I uphold the ministry's fee for preparing the records, in part. I order the ministry to reduce its fee for preparation time by $978.00 to $4,092.00 and to reimburse the appellant $978.00.

4. I uphold the ministry's decision to deny a fee waiver.

Original Signed By: September 29, 2017
Cathy Hamilton
Adjudicator

[32] See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056 (CanLII) (Div. Ct.).