

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4005

Appeal PA18-329

Workplace Safety and Insurance Board

November 13, 2019

Summary: The Workplace Safety and Insurance Board (the WSIB) received a request under the *Act* for access to records relating to its former policy on occupational aluminum exposure. The WSIB located responsive records and issued an access decision, which included a fee estimate of \$7,242.95. The requester asked the WSIB to waive the fee in full, which the WSIB denied. The requester was able to pay the fee after obtaining the funds through a public fundraising platform; however, she appealed the WSIB's decision to deny her fee waiver request to this office. In this order, the adjudicator orders that 30% of the WSIB's fee be waived based on the grounds in section 57(4)(c) (benefit to public health or safety) of the *Act*, as well as other relevant considerations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, section 57(4)(c); RRO 1990, Reg 460, section 8.

Cases Considered: *Mann v Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

OVERVIEW:

[1] The Workplace Safety and Insurance Board (WSIB) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

All records relevant to the creation, implementation, review and revocation of the Operational Policy on occupational aluminum exposure (which was first given the number 04-03-13 and later 16-01-10).

[2] The requester indicated that she expected the WSIB's search to include, but not be limited to, records such as:

- Memoranda;
- Research reports;
- Administrative and executive reports;
- Minutes and other records of meetings;
- Internal communications among WSIB staff and/to the Board of Directors, including letters, emails and other forms of paper and electronic communication; and
- Incoming and outgoing communications between the WSIB and external people and organizations, including letters, emails and other forms of paper and electronic communication with government officials, the staff of ministries and public agencies, and persons and organizations in the private sector.

[3] In an effort to assist the WSIB with its search, the requester specified the records and categories of records that she believes may exist. Specifically, the requester mentioned 21 items relating to the creation of the policy, four items relating to the implementation and review of the policy, and 23 items relating to the revocation of the policy.

[4] The WSIB initially issued a fee estimate in the amount of \$7,967.95, which was based on search and preparation time (225 hours @ \$30/hour), photocopies (6,075 pages @ \$.20/page), and postage (\$2.95). A further breakdown was provided in an appendix to the fee estimate. The WSIB advised that it would be willing to work with the requester to refine or reduce the scope of the request, which might result in a reduction of the fee estimate.

[5] The requester advised that she did not wish to revise the request, as she believes all records may be relevant to her work. The requester said that she could not afford the fee, but would begin public fundraising efforts to cover the cost.

[6] The requester was able to raise the required funds through a public fundraising platform. The requester paid the fee deposit and asked to receive a CD rather than paper copies, to reduce cost. The requester also sought a fee waiver under section 57(4)(c) of the *Act*, asserting that the dissemination of the information would be of benefit to public health and safety.

[7] The WSIB responded with a revised fee estimate of \$7,242.95, which was based on search and preparation time (241 hours @\$30/hour); a CD (\$10); and postage (\$2.95). The WSIB denied the fee waiver request, stating it would not be fair and equitable to waive the fee. The WSIB noted the volume of records requested and

disagreed with the requester's suggestion that disseminating the records would benefit public health or safety or disclose a public health or safety concern. The WSIB advised that upon payment of the fee balance, it would start disclosing the records in stages.

[8] The requester, now the appellant, paid the fee balance and then filed an appeal with this office objecting to the WSIB's fee and denial of fee waiver.¹

[9] During the mediation stage of the appeal process, the WSIB explained how it reached its final fee of \$7,242.95, and confirmed that it would not waive the fee. The appellant was satisfied with the WSIB's explanation of how the fee was calculated, and withdrew her appeal with respect to the fee quantum; however, she wished to pursue the appeal with respect to the WSIB's denial of her fee waiver request under section 57(4)(c) of the *Act*.

[10] A mediated resolution was not achieved and the appeal was moved to the adjudication stage for an adjudicator to conduct an inquiry under the *Act*. During my inquiry, I invited the parties to provide written representations addressing the issue of fee waiver. The parties' submissions were shared in accordance with *Practice Direction Number 7* and section 7 of the IPC's *Code of Procedure*.

[11] For the reasons that follow, I order a waiver of 30% of the WSIB's fee, for a total fee of \$5070.07.

DISCUSSION:

Should the \$7,242.95 fee be waived?

[12] 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. These 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);

¹ The appellant also filed appeals relating to the WSIB's access decisions; the access issues raised in those appeals are not considered in this order.

(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.

[13] The fee provisions in the *Act* establish a user-pay principle, which is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so. The fees prescribed under the *Act* and 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.²

[14] 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. In this case, the appellant has asked the WSIB to waive fees pursuant to section 57(4)(c), and the WSIB has declined to do so.

[15] 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.³

[16] 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;

² Order PO-2726.

³ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

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

Representations

[17] Both parties provided lengthy representations setting out background information about, for example, the role of the WSIB, the history of occupational inhalable aluminum, the appellant's personal connection to the issues, and the McIntyre Powder Project.⁵ I have considered the entirety of the parties' submissions but, in the interest of concision, will summarize only the portions directly relevant to the issues below.

The WSIB's representations

[18] The WSIB notes that the fees prescribed in section 57(1) of the *Act* are mandatory unless a requester can present a persuasive argument in favour of fee waiver. In this case, the WSIB maintains that the appellant has not established that it would be fair and equitable to waive the fee under section 57(4)(c), or for any other reason.

[19] The WSIB maintains that the factors relevant in determining whether dissemination of the records will benefit public health or safety under section 57(4)(c) have not been established. In particular, the WSIB submits that the subject matter of the records is not a matter of public interest. The WSIB states that the appellant is a "private individual who advocates the position that occupational aluminum exposure was the cause of her father's Parkinson's disease, and that the WSIB should not have denied her father's WSIB claim for benefits." The WSIB notes that the appellant has

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

⁵ As described by the appellant, the McIntyre Powder Project is "a voluntary registry to document health issues in miners and other workers who were exposed to McIntyre Powder aluminum dust in their workplaces," aimed at providing "a centralized place to gather information [...] for the purposes of establishing the need for further research into the long-term health impacts of aluminum dust exposure, and to seek compensation for those workers who suffered health issues related to their occupational exposure."

established an advocacy group, the McIntyre Powder Project,⁶ to further promote this position.

[20] In further support of its position that the records relate to matters of a private rather than public interest, the WSIB submits that occupational aluminum exposure accounts for only a small subset of the claims that it receives. To illustrate this point, the WSIB states that it received 96 of these claims between 2015 and 2017, which accounts for only 0.000137% of all claims received during that time.

[21] The WSIB also submits that the responsive records do not relate directly to a public health or safety issue. Rather, the WSIB claims that the records are “mainly repetitive and benign internal communication on contract negotiations, emails, and newspaper articles.”

[22] Given its assertion that there is no public health or safety concern highlighted in the records, the WSIB maintains that their dissemination would not yield a public benefit or contribute meaningfully to the development or the understanding of a public health or safety issue.

[23] Further, the WSIB maintains that it has already undertaken efforts to disseminate information on occupational aluminum exposure. Such efforts include: participating in a McIntyre Powder Project clinic that was run by the Occupational Health Clinics for Ontario Workers Inc.; rescinding its former Occupational Aluminum Exposure Policy relating to the neurologic effects of aluminum exposure;⁷ engaging a company to review existing evidence in order to determine whether occupational aluminum exposure is associated with an increased risk of adverse health conditions; posting the results of that review, which “did not find a link” to adverse health conditions in general, on its website; engaging the Occupational Cancer Research Centre, based out of Cancer Care Ontario, to conduct a new, independent study on the issue of occupational aluminum exposure; and employing nurses and case managers to handle claims related to aluminum exposure.

[24] Finally, the WSIB submits that waiving the fee in this case would disproportionately divert limited resources to one individual’s freedom of information request, rather than dividing the resources proportionately, as would be in the public interest.

[25] Regarding the other considerations enumerated in sections 57(4)(a), (b), and (d) of the *Act*, the WSIB maintains that the actual cost of the request “far surpassed” the fee charged; the appellant did not provide any evidence demonstrating financial

⁶ The appellant was consulted, and consented, to this information about her being included in the order.

⁷ Policy 16-01-10, which was in effect until June 16, 2017.

hardship; and that the matters prescribed in the regulation are not relevant in the context of this appeal.

The appellant's representations

[26] The appellant maintains that each of the four factors relevant for assessing a fee waiver request under section 57(4)(c) of the *Act* are present in this case. In brief, the appellant submits that her request encompasses two matters of public interest relating to a public health issue, which are: (a) the neurological effects of occupational aluminum exposure, and (b) the WSIB's policy-making process. The appellant intends to disseminate the records, which she maintains will contribute meaningfully to the understanding of the issues, thereby benefiting public health or safety as contemplated by section 57(4)(c) of the *Act*.

[27] To support her position that there is a public interest in understanding the neurological health effects of occupational aluminum exposure, the appellant notes that the WSIB itself is committed to researching these effects, as evidenced by it commissioning two external parties to research the issue at a cost of \$110,040 and \$178,285 per study. She also submits that the Ministry of Labour has committed \$1,000,000 to establishing a team of occupational medical health professionals in order to determine whether the health issues of former miners relate to the use of inhalable aluminum powder;⁸ several universities are conducting independent research into the matter; and there has been widespread media coverage of the issue.

[28] While the appellant acknowledges a personal connection to the matter, she objects to the WSIB's classification of the issue as a matter of private interest. In response to the WSIB's submission regarding the relatively low number of occupational aluminum exposure-related claims, the appellant submits that metrics alone do not determine whether an issue is of private or public interest. Rather, the appellant maintains, it is the nature of the claims, relating to serious and sometimes terminal diseases, that gives rise to a public interest.

[29] To support her position that the WSIB's policy-making process is a matter of public interest, the appellant points out that the WSIB's policies affect workers' legal rights to coverage for occupational injuries and diseases. She maintains, "the development of any law, regulation, or government policy that affects peoples' legal rights is a matter of public interest."

[30] The appellant explains that under the Workplace Safety and Insurance Act, 1997

⁸ Ontario Ministry of Labour, "Ontario Providing Funding to Review Impact of McIntyre Powder on Worker Health" <online: <https://news.ontario.ca/mol/en/2017/10/ontario-providing-funding-to-review-impact-of-mcintyre-powder-on-worker-health.html>> (October 11, 2017).

(WSIA),⁹ injured workers must seek compensation for workplace-related injuries and disease through the WSIB rather than through the courts.¹⁰ She submits that as a result of section 126 of the *WSIA*,¹¹ the WSIB's policies have the "force of law" because they are binding on the Workplace Safety and Insurance Appeals Tribunal (WSIAT), which is the final level of appeal for workers seeking compensation for their injuries. Accordingly, the appellant takes the position that the operational policies of the WSIB are a matter of interest to the thousands of individual workers whose claims the WSIB or WSIAT are adjudicating at any given time, and to workers in general, who are bound to the WSIB as their insurer by virtue of the *WSIA*.

[31] In support of her position that the neurological health effects of occupational aluminum exposure are a public health issue, the appellant summarizes the history of inhalable aluminum powder use among miners in Ontario. She explains that an inhalable aluminum powder was developed in the 1930s as a prophylactic treatment against the development of silicosis. She says that employers in Ontario's mining industry required employees to inhale the powder prior to each shift. As a result of this practice, the appellant explains that approximately 27,500 miners were exposed to inhalable aluminum powder on a regular basis up until 1979, when "investigative journalism by *The Fifth Estate* [...] exposed the lack of a proper scientific foundation and the possibility of serious health consequences." The appellant notes that a decade later, in 1990, the *Lancet* published a study, which found a "robust association between exposure to the powder and cognitive deficits." Given the number of miners exposed, the appellant maintains that the question of whether occupational exposure to aluminum has neurological health effects is a "classic public health issue."

[32] To further support her position on this matter, the appellant maintains that "a number of individual claims [have been] granted to McIntyre [powder] exposed workers or their survivors, and hundreds of thousands of dollars in compensation benefits [have been] paid out by the WSIB." The appellant cites successful claims by "at least eight" individuals (or their survivors) with Chronic Obstructive Pulmonary Disease, as well as by individuals with silicosis, pulmonary fibrosis, and cancers of the thyroid, pancreas, and bladder.

[33] In support of her position that the WSIB's policy-making process is a public health issue, the appellant notes that one of the four core purposes of the WSIB is to "promote health and safety in workplaces."¹² She maintains that two of the WSIB's statutory responsibilities for achieving this purpose are relevant to the issue of fee

⁹ SO 1997, c 16, Sched A (*WSIA*).

¹⁰ *WSIA*, section 28.

¹¹ Section 126(1) of the *WSIA* states, "If there is an applicable Board policy with respect to the subject-matter of an appeal, the Appeals Tribunal shall apply it when making its decision."

¹² *WSIA*, section 1.

waiver. First, she refers to the WSIB's "experience rating programs,"¹³ which she says incentivize employers to reduce occupational injuries and diseases through means such as paying back rebates on insurance premiums based on the frequency and cost of an employer's claims. Second, she points to the WSIB's responsibility to monitor developments in scientific and other evidence regarding occupational injuries and diseases, and to incorporate them into its "benefits, services, programs and policies."¹⁴

[34] The appellant explains that for nearly two decades, the WSIB had an "exclusionary aluminum policy,"¹⁵ which prohibited all claims for neurological diseases arising from exposure to aluminum. The appellant submits that the policy is "exceptional" because it is the only negative occupational policy in the WSIB's 100-year history; that is, it is the only policy prohibiting a claim for a specific disease or exposure, as compared to other policies, which set out the grounds for establishing a claim. The appellant maintains that the effect of the policy was to ensure that no worker could make a successful claim for neurological diseases arising from aluminum exposure, regardless of the evidence about exposure history or causation.

[35] Furthermore, the appellant submits that because the policy protected employers from any cost consequences resulting from the experience rating programs, it "eliminated the most important incentive under the *WSIA* for employers to mitigate their workers' exposure to aluminum." In turn, the appellant submits, the policy "led the WSIB to neglect its statutory duty to monitor the scientific evidence about occupational aluminum exposure for almost twenty years." The appellant states that the WSIB's internal communications, which she received as a result of her request, show that the WSIB "did absolutely no monitoring of the scientific evidence about the health effects of aluminum between 1997 and 2015." The appellant states that "subsequent events have shown that the WSIB's failure to 'monitor developments' in accordance with its duty under section 161(3) of the *WSIA* for two decades was a dereliction."

[36] The appellant objects to the WSIB's position that the majority of the records are "benign" communications on contract negotiations, emails, and media coverage, which are not related to a public health matter. She maintains, for example, that internal communications provide "revelatory insights" into the WSIB's policy-making process, such as evidence suggesting that the WSIB did not monitor scientific evidence regarding the health effects of occupational aluminum exposure between 1997, when it established the negative policy, and 2015. Another revelatory insight, the appellant maintains, is that the WSIB adopted a negative policy despite "not one of the many staff communications [describing] the state of the science as supporting a definitive

¹³ *WSIA*, section 83.

¹⁴ *WSIA*, section 161(3).

¹⁵ WSIB Operational Policy 04-03-12, *Occupational Aluminum Exposure, Dementia, Alzheimer's Disease and Other Neurological Effects* (later renumbered 16-01-10)

exclusionary rule.” She also maintains that records relating to contracts between the WSIB and external researchers are within the scope of the public health issues, because the WSIB has relied on the researchers’ reports in making policy decisions and adjudicating claims.

[37] Based on the above, the appellant believes that records evidencing the scientific evidence that the WSIB had when developing the policy, and records relating to the policy’s publication, relate directly to a public health issue.

[38] Finally, the appellant notes that she has an established track record of outreach to northern communities, workers’ groups, academics, and the media. She says that she intends to disseminate the information obtained through her request, and that doing so will contribute meaningfully to the understanding of the two public health issues at the heart of her request.

[39] As evidence of the public benefit that dissemination would yield, the appellant submits that the work of the McIntyre Powder Project has already helped raise awareness about the issues of aluminum powder exposure and sparked independent research initiatives, which will further the understanding of this issue. She maintains that the Project has also generated public pressure, which contributed to the WSIB rescinding policy 16-01-10 and engaging external researchers to examine the link between occupational aluminum exposure and neurological conditions.

[40] In response to the WSIB’s position that disseminating these records would not yield any further public benefit because the WSIB itself has engaged external researchers and disseminated their findings, the appellant states, “the completion of a new research project on a subject hardly renders all previous scientific research meaningless.” Having reviewed the records disclosed by the WSIB, the appellant maintains that they include unpublished scientific evidence that directly addresses the issue of neurological health effects of aluminum exposure. She states that obtaining such evidence again is unlikely, “as many participants have likely died.”

[41] The appellant also submits that the records contain “insights” into the WSIB’s policy-making process, which other workers’ groups or communities may find useful. For example, the appellant says that the records demonstrate that, at times, it may take community mobilization and widespread media coverage to get the WSIB to use the resources it has available to it to investigate occupational diseases. She also submits that the records show the need for the WSIB’s worker stakeholders to avoid negative occupational disease policies, as such policies lead the WSIB to neglect its “crucial duty” under section 163 of the *WSIA* to monitor scientific evidence.

The WSIB’s reply representations

[42] In response to the appellant’s submissions, the WSIB maintains that in relying only on the ground for fee waiver set out in section 57(4)(c), the appellant has not adequately satisfied the test for fee waiver. The WSIB submits that all parts of section

57(4) must be considered in determining whether a fee waiver would be fair and equitable in the circumstances. The WSIB submits that it did take all of the factors into consideration before determining that granting a fee waiver would not be fair and equitable in this case.

[43] With respect to the ground in section 57(4)(c) in particular, the WSIB maintains that past orders have held that the subject matter of a record is not sufficient to justify a fee waiver. Rather, disclosure of the records should be expected to contribute to public development and understanding of the subject matter. The WSIB says that even if the subject matter of the records was of critical importance, a large percentage of the records are administrative in nature and are not about "science and health."

[44] The WSIB objects to the appellant's assertion that the nature of the WSIB's mandate lends itself to a finding that its records will be a matter of public interest, and also objects to her characterization of its statutory obligations, particularly with respect to developing policy and monitoring scientific developments. The WSIB questions how dissemination of the records could achieve a public benefit by disclosing a public health concern or contributing meaningfully to the understanding of that concern, given that its decision to rescind policy 16-01-10 was made before receiving the appellant's request.

The appellant's sur-reply representations

[45] The appellant acknowledges that policy 16-01-10 was rescinded prior to her request; however, she explains that she requested documents relating to media coverage of the McIntyre Powder Project because she suspected that the media attention was an "important driver of the WSIB's actions." She says that the records she obtained confirm that this was the case. For example, she says that the internal communications reveal that the WSIB's "cursory review" of the scientific evidence in 2015 was prompted by an inquiry by a CBC journalist, while its decision to engage external researchers came after the CBC's *Fifth Estate* coverage relating to the McIntyre Powder Project.

[46] The appellant also reiterates her position on how dissemination of the records will benefit the public understanding of an important public health issue (the WSIB's policy-making, in particular). She maintains that the documents she obtained reveal that community mobilization and media coverage "are necessary" to prompt meaningful action from the WSIB. She also submits that it is important for groups seeking justice for occupational exposure to understand "how the WSIB works if they are to motivate the WSIB to take their situation seriously and give them the help they need."

Analysis and findings

[47] Section 57(4) of the *Act* makes it mandatory for the head of an institution to waive payment of "all or any part" of a fee if the head determines that it is fair and equitable to do so after considering relevant factors, including certain prescribed

matters.¹⁶ This office may review an institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify that decision.¹⁷ In addition, an adjudicator may decide that only a portion of the fee should be waived.¹⁸

[48] In *Mann v Ontario (Ministry of the Environment)*,¹⁹ the Divisional Court indicated that each of the factors in section 57(4) must be considered; however, if only one applies, or even if none of the enumerated considerations apply, a fee waiver may still be granted if it is fair and equitable to do so. Specifically, the Court stated:

There is only one requirement in the subsection for waiver of all or part of a fee and that is whether, in the opinion of the head, it is fair and equitable to do so. The head is guided in that determination by the factors set out in the subsection, but it remains the fact that *the sole test is whether any fee waiver would be fair and equitable.* (emphasis added)

[49] Accordingly, it is possible for a fee waiver to be fair and equitable in the circumstances where only one, or even none, of the section 57(4) factors is made out. Conversely, it is possible for a fee waiver not to be fair and equitable even if one or more of the section 57(4) factors apply.

[50] In this case, the appellant's fee waiver request relies on the potential application of the factor at section 57(4)(c). The appellant has not relied on the considerations at sections 57(4)(a), (b), or (d), and the WSIB has specifically maintained that they do not apply in the circumstances. Having considered the evidence before me, including the fact that the appellant was, through crowdfunding efforts, able to pay the fee required, I am satisfied that the considerations in sections 57(4)(a), (b), and (d) are not relevant for determining whether a fee waiver would be fair and equitable in this appeal.

[51] For a finding that section 57(4)(c) applies, the appellant must establish that the dissemination of the records would benefit public health or safety.²⁰ 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.²¹ A requester's intention to disseminate the record, and the likelihood that such dissemination would yield a public benefit by revealing a public health or safety concern or contributing to the understanding of a public health or safety issue,

¹⁶ Sections 57(4) and section 8 of Regulation 460 under the *Act*.

¹⁷ Orders M-914, P-474, P-1393 and PO-1953-F.

¹⁸ Order MO-1243.

¹⁹ 2017 ONSC 1056 (CanLII).

²⁰ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

²¹ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

may also be relevant.²²

[52] The records are not before me, but the appellant's submissions include references to and excerpts from some of the records that were disclosed to her by the WSIB in response to her request. Based on this evidence, as well as the totality of the parties' submissions, I am satisfied that at least some of the records relate to matters of public health or safety, and that the dissemination of those records would contribute meaningfully to furthering the understanding of those matters.

[53] In particular, I accept the appellant's position that records relating to the effect of occupational aluminum exposure and the WSIB's occupational aluminum exposure policy-making process are matters of public interest. I am not persuaded by the WSIB's submissions to the contrary, which were premised on the appellant's personal interest in these matters and the relatively low number of claims that it receives related to occupational aluminum exposure. Given that the records relate to a potential workplace hazard that was, at one point, widely used in the mining industry across the province, and to which thousands of individuals were exposed, I am satisfied that they relate to a matter of public interest.

[54] Moreover, in my view, the fact that the WSIB has not, to date, received a large number of aluminum exposure-related claims is not determinative of whether the matter is of public interest. In part, this is because the low number of claims could stem from the fact that until quite recently, there was an exclusionary policy in place at the WSIB with respect to such claims. Another explanation for the relatively low number of claims could be the lack of publicly available scientific evidence examining the issue. I am more persuaded by the appellant's position that it is the nature of the claims, relating to serious and sometimes terminal diseases, that gives rise to a public interest.

[55] In addition to relating to a matter of public interest, I am satisfied that some of the records would relate directly to a public health or safety issue. In particular, I find that records demonstrating (a) the evolution of scientific evidence on the effect of occupational aluminum exposure, and (b) the development of the WSIB's policies on occupational aluminium exposure relate directly to a public health or safety issue. This is because, in both cases, the records relate to the ability of potentially thousands of individuals to seek compensation from the WSIB for injuries or illnesses related to their occupational aluminum exposure.

[56] Finally, I note the appellant's track record of advocating on behalf of individuals who were exposed to inhalable aluminum powder. I am satisfied that she will disseminate the records, and that, in doing so, she will help advance the understanding of the potential negative health outcomes associated with occupational aluminum

²² Orders P-2, P-474, PO-1953-F and PO-1962.

exposure, as well as exposed individuals' ability to seek compensation from the WSIB.

[57] I am not, however, persuaded that dissemination of *all* of the records responsive to the appellant's request would satisfy the requirements of section 57(4)(c). First, I accept the WSIB's submission that, as a result of the broad scope of the request, some of the responsive records are relatively benign in nature and would not serve to identify or further advance the understanding of a public health or safety concern, or otherwise benefit public health or safety. I also accept that some of the expected public health or safety benefits may have already been realized as a result of the WSIB's own efforts to disseminate information on occupational aluminum exposure.

[58] I am also not prepared to find the public health or safety interests envisioned by section 57(4)(c) are broad enough to encompass the WSIB's policy-making processes, in general. As noted in both parties' submissions, the WSIB is mandated to administer the province's no-fault workplace compensation system under the *WSIA*. In doing so, the WSIB will, at times, be required to create, amend, and rescind its policies. The WSIB's policies may impact workers' legal right to coverage for occupational diseases and injuries; however, I am not persuaded that the evidence supports a finding that disseminating any record relating to the WSIB's policy-making process will benefit public health or safety.

[59] Based on the facts before me, I have found that dissemination of records relating to the creation, implementation, review, and revocation of the WSIB's former occupational aluminum policy would benefit public health or safety. However, I note that another adjudicator, in another case, may reach a similar or opposite conclusion with respect to a different WSIB policy. In my view, making a broad fee waiver finding in this appeal relating to all WSIB policy-making activities could serve to undermine the user-pay principle set out in the *Act*.

[60] Accordingly, in the circumstances, I conclude that dissemination of some of the records will benefit public health or safety. I will take this factor into account when deciding whether a fee waiver is fair and equitable in this case.

Other relevant considerations

[61] In addition to the factors that must be considered under section 57(4), there are other relevant factors that must be considered when deciding whether or not a fee waiver is "fair and equitable." Those factors 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.²³

Representations

[62] The WSIB submits that the appellant's request is the "largest, single Freedom of Information [...] request with the most voluminous responsive records in the history of the WSIB." In support of this submission, the WSIB notes that the appellant's request was eight pages long and sought access to "broad swaths" of information, including, for example, minutes and records of meetings, administrative records, and internal and external communications relating to the creation, implementation, review, and revocation of policy 16-01-10. The WSIB maintains that if the appellant only sought access to policy or scientific records, it would have "been pleased to work with [her] to narrow the request."

[63] The WSIB states that despite being invited to do so, the appellant did not attempt to refine the scope of her request in order to reduce the costs. Although the appellant was willing to accept the records electronically, the WSIB submits that this concession did not substantially reduce the amount of work required in order to respond to the request. The WSIB maintains that the cost to process the request was significantly higher than the fees paid, and that waiving those fees would shift an unreasonable burden onto the WSIB due to the disproportionate amount of resources that were required to respond to this one request.

[64] The appellant maintains that the *Act* does not require a requester to reduce the scope of their request to receive a fee waiver. She submits that the broad scope of her request has been justified by the records that the WSIB has released, which she says, "contain a great deal of information that is relevant to the two public health issues" [the effect of occupational aluminum exposure and the WSIB policy-making process] at the heart of her request.

Analysis and findings

[65] In deciding whether it is fair and equitable to waive all or part of a fee, a

²³ Orders M-166, M-408 and PO-1953-F.

decision-maker will have regard not only to the prescribed considerations, but also to the fairness of shifting some or all of the burden of the cost of the request from the requester to the institution and, by extension, to the Ontario public.²⁴ Therefore, my finding that dissemination of some of the records will benefit public health or safety as contemplated by section 57(4)(c) of the *Act* is not, on its own, determinative of the fee waiver issue. I must also consider whether there are additional factors relevant to determining whether a fee waiver is “fair and equitable” in the circumstances.

[66] Having regard to the evidence before me, I agree with the WSIB that relevant factors in this case include the large number of responsive records, the appellant’s decision not to narrow the scope of the request, and the effort required to respond to the request. I also accept the WSIB’s submission that the cost to process the entirety of the request was higher than the fees paid, and that a full fee waiver would shift an unreasonable burden of the cost from the appellant to the WSIB. In my view, the appellant has not provided a sufficiently persuasive explanation for why the WSIB ought to bear the full cost of processing her request while she should bear none. These considerations weigh against finding that a full fee waiver would be fair and equitable in these circumstances; therefore, I conclude that a partial fee waiver would be appropriate.

[67] The *Act* does not prescribe a particular formula for arriving at a determination of what part of a fee ought to be waived.²⁵ In every case, a fee waiver determination is based on the particular facts before the decision-maker. In some cases, for example, this office has ordered a partial waiver of only certain components of the fee charged by an institution,²⁶ or has imposed a maximum allowable cost as a component of the fee in ordering a partial fee waiver.²⁷ In other cases, this office has ordered a percentage reduction (of the total fee) that, in the decision-maker’s view, reflects a reasonable allocation of the costs of the request in the particular circumstances under review.²⁸

[68] Taking into consideration all applicable factors, including the user-pay principle reflected in the *Act*’s fee provisions; my finding that disseminating some of the records will benefit public health or safety; the breadth of the request; and the discrepancy between the cost to process the request and the fees paid, I conclude that a 30% fee waiver represents a reasonable allocation of the burden of the cost between the appellant and the WSIB. This results in a revised fee payable of \$5070.07. The WSIB will have to refund the difference to the appellant.

²⁴ Order PO-4001-R.

²⁵ Order PO-4001-R.

²⁶ See, for example, Orders PO-3602 and MO-3441 (partial fee waiver finding upheld on reconsideration in MO-3555-R).

²⁷ Order PO-3351.

²⁸ See, for example, Orders PO-3727 and MO-3627.

ORDER:

1. I order the WSIB to waive 30% of its fee and permit it to charge the appellant \$5070.07.
2. I order the WSIB to issue a refund to the appellant in the amount of \$2,172.88.

Original signed by: _____

Jaime Cardy
Adjudicator

November 13, 2019 _____