Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4177

Appeal PA20-00041

Ministry of the Solicitor General

August 19, 2021

Summary: An individual submitted a request to the Ministry of the Solicitor General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records about various aspects of the Ottawa Carleton Detention Centre's operations and policies. The ministry issued a fee estimate, which the requester appealed. The requester, now appellant, also submitted a fee waiver request to the ministry, citing financial hardship among other considerations. The ministry denied the fee waiver request, and the issue of fee waiver was added to the appeal. The ministry also raised the issue of mootness. In this order, the adjudicator finds that the issues raised by the appeal are not moot. She goes on to find that it is fair and equitable in the circumstances to grant a total fee waiver under section 57(4) and that it is therefore unnecessary to decide whether the ministry's fee estimate is reasonable.

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

Cases Considered: *Borowski v The Attorney General of Canada*, [1989] 1 SCR 324; and *Mann v Ontario (Ministry of the Environment)*, 2017 ONSC 1056.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) received a request from an incarcerated individual under the *Freedom of Information and Protection of Privacy Act* (the *Act*) seeking access to the following:

> [1] All records of any fridge/freezer in [the Ottawa Carleton Detention Centre (OCDC)] kitchen that needed any type of repair between May to July 30, 2019.

> [2] [A named dining service's] cook chill Food Production centre operations manual (newest version).
>
> [3] Protocol/policy on the following, hunger strikes, strip searches, suicide watch. I request the most recent version ie. 2019 or most up to date versions.

[2] The ministry issued a fee estimate of $180.00 and requested a deposit of $90.00 before it would proceed with processing the request. The decision advised the requester that portions of the records would likely be withheld pursuant to the law enforcement exemptions in sections 14(1)(i), 14(1)(j), and 14(1)(k) of the *Act*.

[3] The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC), resulting in the opening of Appeal PA20-00041 and the appointing of a mediator to explore settlement.

[4] During the mediation stage of the appeal process, the appellant submitted a fee waiver request to the ministry, citing financial hardship, public health or safety, and other factors that he maintains are relevant considerations. As evidence of his financial position, the appellant provided a copy of his OCDC trust account statement, showing his transaction history and balance.

[5] The ministry denied the appellant's fee waiver request. The appellant advised the mediator that he wished to proceed to the adjudication stage of the appeal process to challenge both the ministry's fee estimate and its denial of his fee waiver request.

[6] As no further mediation was possible, the file was transferred to the adjudication stage. I decided to conduct an inquiry under the *Act*, during which I invited and received written representations from both the ministry and the appellant. The parties' representations were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*.

[7] During the course of my inquiry, the appellant narrowed the scope of his request by withdrawing part 2 in its entirety, as well as his request for access to strip search protocols or policies under part 3. Accordingly, the narrowed request is for:

> [1] All records of any fridge/freezer in OCDC kitchen that needed any type of repair between May to July 30, 2019.
>
> [3] Protocol/policy on […] hunger strikes [and] suicide watch. I request the most recent version ie. 2019 or most up to date versions.

[8] The appellant maintained that as a result of narrowing the scope of his request, the ministry's fee should be "reduced significantly."

[9] I invited the ministry to provide reply representations explaining how the narrowed scope of the appellant's request would affect its fee estimate. In response, the ministry claimed that the appellant's decision to narrow the scope of his request rendered the appeal moot.

[10] In the analysis that follows, I briefly consider the ministry's claim that the fee

estimate issue is moot. I then address the fee waiver issue. Even if I had upheld the ministry's fee estimate, in whole or in part, and I am not persuaded that the ministry provided sufficient evidence for me to do so, I would order the ministry to grant the appellant's fee waiver request on the basis that it is fair and equitable to do so in the circumstances of this appeal.

DISCUSSION:

Preliminary Issue: The issues raised by the appeal are not moot

[11] In its initial submissions, the ministry provided representations that briefly spoke to the effort required in order to search for and prepare the records responsive to the appellant's access request. For example, the ministry said that it will need to search for different types of records created over different time periods and stored in different locations; that parts 1 and 3 will require searching for more than one record; and that it will need to sever at least some of the records, particularly the record responsive to part 2, which the ministry says "belongs to a vendor and is approximately several hundred pages in length." The ministry advised that it anticipated needing three hours for both search and preparation time. Although the ministry did not provide a detailed breakdown of how the fee was calculated, it said that it would be "pleased to provide further explanations of how [it] prepared the fee estimate, if requested to do so."

[12] As mentioned above, the appellant then narrowed the scope of his request by withdrawing part 2 and limiting the policies or protocols that he sought access to under part 3 to those relating to hunger strikes and suicide watch.

[13] I invited the ministry to provide reply representations detailing how the narrowed scope of the appellant's request would affect its fee estimate. In doing so, I posed specific questions that, if answered, would have enabled me to determine the reasonableness of the ministry's fee for processing the appellant's revised request, based on the framework established under section 57(1) of the *Act* and the relevant sections of Regulation 460.

[14] The ministry declined to revise the fee estimate in response to, or make representations regarding, the narrowed request, and did not offer any additional details that would allow me to review and calculate the fee for the narrowed scope of the request.

[15] Instead, the ministry claimed that the appellant's "unexplained decision […] substantively and significantly narrows the scope of the request, so that it renders the ministry's fee estimate moot." The ministry argued that I should dismiss the appeal on this basis. In support of its position, the ministry maintained that the first requirement of the two-step test for mootness, set out in *Borowski v The Attorney General of Canada*[1] (*Borowski*), is met because the primary issue in the appeal (its fee estimate) "can no longer be challenged, because it no longer applies."

[16] In further support of its position, the ministry said that there is no public interest that justifies continuing the appeal because the appellant "has behaved in a vexatious manner, by changing the scope of the request so late in the adjudication process after the

[1] [1989] 1 SCR 324.

ministry expended significant resources preparing the fee estimate" and participating in the appeal process. The ministry submitted that it is not consistent with good public policy to continue an appeal where the appellant "inexplicably and fundamentally changes the scope of the appeal so late in the appeal process."

[17] In *Borowski*, the leading Canadian case on the subject of mootness, the Supreme Court of Canada described the doctrine as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

[18] The Court went on to devise a two-step test for determining whether the principle of mootness applies. First, the decision maker must decide whether "the required tangible and concrete dispute" between the parties has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the decision maker must decide whether it should nonetheless exercise its discretion to hear the case.

[19] In my view, the issues regarding the amount of the fee and the ministry's denial of the fee waiver request remain the subject of live controversy between the parties, which have not been rendered "hypothetical or abstract" as a result of the appellant's narrowing the scope of his request. Moreover, I am satisfied that my review of, and determination on, these issues will affect the rights of the parties before me. Therefore, I find that the first part of the *Borowski* test is not met, as the real and tangible dispute between the parties has not disappeared.

[20] Accordingly, I do not accept the ministry's claim that the issues in this appeal have been rendered moot as a result of the appellant's narrowing the scope of his request, and I will not dismiss the appeal on this basis.

Should the ministry's fee be waived?

[21] Section 57(1) of the *Act* requires an institution to charge fees for requests under the *Act*.[2] The *Act* requires institutions to advise a requester of the applicable fee where the fee is $25 or less. Where the fee exceeds $25, an institution must provide the requester with a fee estimate.[3] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access,[4] and to

[2] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460.
[3] Section 57(3).
[4] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

assist requesters in deciding whether to narrow the scope of a request in order to reduce the fees.[5]

[22] The fee provisions in the *Act* establish a user-pay principle that 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 referred to in section 57(1) and outlined in 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.[6]

[23] The *Act* requires an institution to waive fees, in whole or in part, if it is fair and equitable to do so. Section 57(4) of the *Act* and section 8 of Regulation 460 set out matters that an institution must 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;
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> > (c) whether dissemination of the record will benefit public health or safety; and
> >
> > (d) any other matter prescribed by the regulations.
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> 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:
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> > 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.

[24] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before the IPC will consider whether a fee waiver should be granted. The IPC 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.[7] In this case, the appellant has asked the ministry to waive its fee pursuant to sections 57(4)(b) and (c), and the ministry decided not to do so.

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[5] Order MO-1520-I.
[6] Order PO-2726.
[7] Orders M-914, P-474, P-1393 and PO-1953-F.

[25] For section 57(4)(b) to apply, the appellant must provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities.[8]

[26] The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
    a. disclosing a public health or safety concern, or
    b. contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record.[9]

[27] 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.[10]

[28] In addition to the factors set out above, other relevant considerations 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

[8] Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.
[9] Orders P-2, P-474, PO-1953-F and PO-1962.
[10] Orders MO-1336, MO-2071, PO-2592 and PO-2726.

- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.[11]

Representations

[29] The ministry maintains that in the circumstances of this appeal, the *Act* does not require it to waive its fee. In support of this position, the ministry claims that the appellant has requested a fee waiver based on financial hardship, but has not provided any information or evidence in support of his request. According to the ministry, the "sole evidence" the appellant provided is a report showing his correctional trust account balance during the last three months of 2019. The ministry notes that at times, the account had over $200 in it, which it says is enough to pay the fee. The ministry submits that the trust account report does not demonstrate that the appellant does not have enough to pay its required fee.

[30] The ministry also submits that the appellant has not provided any evidence regarding his assets outside the correctional institution, which could be used to pay the fee. The ministry claims that the appellant receives financial assistance from a specified government program, and questions whether those funds could be used to pay the access fee.

[31] The ministry also rejects the appellant's assertion that dissemination of the information in the requested records will benefit public health or safety. It maintains that the appellant has not provided any evidence in support of his position, and that there is no evidence to suggest that the responsive records could relate to public health or safety in any way that supports a fee waiver.

[32] Finally, the ministry submits that waiving the fee would unreasonably shift the burden of the cost for searching for and preparing the responsive records for disclosure from the appellant to the ministry and, by extension, the taxpayer. It also claims that the appellant has submitted "numerous other requests" and that waiving the fee in this appeal will "arguably create a precedent" for his other access requests.

[33] The appellant submits that, at the time of preparing his representations, he had been in the care of the ministry for over 35 months. During that time, the appellant claims to have lost over 40 pounds as a result of certain medical conditions that make it "extremely hard for [him] to eat" the food that is provided. He says that he does not have money of his own, but the ministry allows individuals to keep up to $180 in an OCDC trust account, which is to be used "for hygiene and food as there are very limited amount[s] of food and hygiene here." The appellant explains that his family has deposited money into his OCDC trust account in the past, as they know he "struggles with eating." He explains that he relies heavily on these funds to buy food that he can consume from the canteen.

[34] In response to the ministry's submissions regarding his receipt of financial assistance from a specified government program, the appellant submits that when a person is detained pending trial, they do not receive any money from that program.

[35] The appellant also submits that there is a clear health and safety component to his

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

request. He says that taxpayers should know what the policies are relating to "the most vulnerable individuals." He claims that the nature of the records speaks to public health and safety on their face, as there are "several issues […] with food/quality and overall processes" noted in several reports and media articles.

[36] Finally, the appellant maintains that the requested ministry policies should be "available to all clients and [the] public as [it] is a publicly funded institution."

[37] I invited the ministry to respond to the appellant's submissions in support of his request for a fee waiver, but the ministry did not address this issue in its reply representations.

Analysis and findings

[38] As mentioned above, the appellant has requested a fee waiver citing the considerations in sections 57(4)(b) and (c) of the *Act*, and the ministry has refused to waive its fee. For the following reasons, I find that a total fee waiver is appropriate in the circumstances of this appeal.

[39] In *Mann v Ontario (Ministry of the Environment)*,[12] 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)

[40] 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. All relevant considerations must be taken into account.

[41] In this case, the appellant's fee waiver request is based on the application of the factors at sections 57(4)(b) and (c). The appellant has not relied on the considerations at sections 57(4)(a) or (d), and I am satisfied that they are not relevant for determining whether a fee waiver would be fair and equitable in this appeal.

[42] For a finding that section 57(4)(b) applies, the appellant must provide some evidence regarding his financial situation, including information about income, expenses, assets and liabilities.[13] The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship.[14]

[43] The appellant provided a copy of his OCDC trust account statement for a three-month period of time. I note that with the exception of a very limited number of entries,

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[12] 2017 ONSC 1056 (CanLII).
[13] Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.
[14] Order P-1402.

the statement displays a balance of well below the ministry's $180 fee estimate. In addition, I accept the appellant's evidence that since he has been in detention, he has had no income or savings, and the money appearing in his trust account is deposited by his family. I also accept the appellant's evidence that since entering detention, he has not received the government assistance payments identified in the ministry's submissions. Based on my review of the evidence respecting the appellant's financial situation, I am satisfied that payment of the fee of $180 would constitute financial hardship for the appellant as contemplated by section 57(4)(b) of the *Act*.

[44] I am not, however, persuaded by the appellant's arguments regarding the consideration in section 57(4)(c) of the *Act*. For this factor to apply, I must be satisfied that dissemination of the record will benefit public health or safety. I acknowledge that the records – and particularly the hunger strike and suicide watch protocols and policies sought by part 3 of the appellant's request - may speak to health or safety issues within the OCDC, and that these issues may be of interest to both incarcerated individuals and the public more generally. However, based on the evidence before me, I am not satisfied that there is a high probability that the content of the records will be disseminated once the appellant obtains access. In the circumstances, therefore, even if I am persuaded that dissemination would yield a public benefit by either disclosing a public health or safety concern, or contributing meaningfully to the understanding of an important public health or safety issue, this factor does not apply.[15] Accordingly, I am not satisfied that the consideration described in section 57(4)(c) of the *Act* supports the appellant's fee waiver request.

[45] As noted above, in deciding whether it is fair and equitable to waive all or part of a fee, a 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.[16] Therefore, my finding that payment of the fee will cause the appellant financial hardship as contemplated by section 57(4)(b) of the *Act* is not, on its own, determinative of the fee waiver issue. Nor is my finding that the factors in sections 57(4)(a), (c) and (d) are not applicable in the circumstances of this appeal. I must also consider whether there are additional factors relevant to determining whether a fee waiver is "fair and equitable" in the circumstances.

[46] In my view, a relevant consideration is the appellant's willingness to narrow the scope of his request in an effort to minimize the fee charged by the ministry. In abandoning part 2 of his request, he removed the portion of his request that the ministry's representations indicated would be the most onerous to process. He also narrowed part 3 of his request, such that he is now seeking access to the most recent policies or protocols on two specific topics, rather than three. With this in mind, I find that the appellant has advanced a compromise solution, and attempted to work constructively with the ministry, to narrow the scope of his request and thereby minimize costs.

[47] Another relevant consideration is that it does not appear the appellant's request will involve a large number of records. As a result of his narrowed request, he is now only seeking access to records about OCDC refrigerator and freezer repairs for a short timeframe (three months) in 2019, and the most recent protocols or policies on hunger

[15] Orders P-2, P-474, PO-1953-F and PO-1962.
[16] Order PO-4001-R.

strikes and suicide watch. Although these parts of his request will require separate searches, I am not persuaded that searching for and preparing the responsive records for disclosure will amount to an overly onerous task for the ministry.

[48] In addition to the factors or considerations that were within the appellant's control, I also find several that were within the ministry's control that are relevant to my assessment of whether it is fair and equitable to waive the fee in this appeal. In my view, the ministry did not work constructively with the appellant in responding to his request. When presented with the opportunity to explain its fee estimate in detail, and to revise its fee estimate to reflect the revised scope of the appellant's request, the ministry declined to do so. Not only did the ministry decline to do so, it also maintained that the entire appeal should be dismissed as moot. The ministry suggested that the appellant behaved vexatiously by amending his request during adjudication. However, I do not share the ministry's assessment of the circumstances. In refusing to amend its fee estimate in response to the appellant's narrowing of the scope of the request, and instead demanding that the appeal be dismissed as moot to "send an important message" to the appellant, the ministry gave up an opportunity to find a compromise solution.

[49] I do acknowledge the ministry's concern that waiving the fee in this appeal may "create a precedent" for other access requests by the appellant. However, fee waivers are reviewed on a case-by-case basis and consideration of the appellant's financial situation is just one factor in the assessment of whether it is fair and equitable to waive a fee. While the appellant's financial situation may remain unchanged, other considerations, such as the appellant's willingness to revise his request in an effort to lower the fee, the number of records that are likely responsive to the request, and the ministry's response to the appellant's narrowing of the request, are unique to this appeal.

[50] I also acknowledge that the fee provisions in the *Act* establish a user-pay principle, and that care should be taken to avoid unreasonably shifting the burden of the cost for searching for and preparing records for disclosure from a requester to an institution and, by extension, the Ontario public. However, I note that the ministry's initial fee estimate of $180 would likely have been lowered because of the narrowed scope of the appellant's request, had I made a finding on that issue. In the circumstances, I am satisfied that granting a fee waiver in this appeal would not shift "an unreasonable burden" from the appellant onto the ministry.

[51] Therefore, taking into consideration all applicable factors, I conclude that it is fair and equitable to grant a total fee waiver in this appeal. Given this finding, it is not necessary to make a determination regarding the reasonableness of the ministry's $180 fee estimate.

ORDER:

1. I order the ministry to waive its fee, in full.

2. I order the ministry to issue an access decision respecting the records responsive to the portions of the appellant's request that remain at issue, being his request for access to:

> […] all records of any fridge/freezer in OCDC kitchen that needed any type of repair between May to July 30, 2019.
>
> [And the] protocol/policy on […] hunger strikes [and] suicide watch. I request the most recent version ie. 2019 or most up to date versions.

3. I order the ministry to issue its access decision in accordance with the procedural requirements of the *Act*, treating the date of this order as the date of the request.

4. To ensure compliance with this order, the ministry should provide me with a copy of its access decision.

Original signed by: August 19, 2021

Jaime Cardy
Adjudicator