Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4476

Appeal PA23-00195

Ministry of Municipal Affairs and Housing

January 12, 2024

Summary: The Ministry of Municipal Affairs and Housing (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the decision of the Government of Ontario to make changes to the Ontario Greenbelt. The ministry issued the requester a fee estimate of $232.50. The requester asked for a fee waiver on the basis that dissemination of the records would benefit public health and safety, under section 57(4)(c) of the *Act*. The ministry denied the fee waiver request. In this order, the adjudicator upholds the ministry's decision to do so, and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 57(1) and 57(4); Regulation 460 under the *Freedom of Information and Protection of Privacy Act* (R.R.O. 1990, Reg 460), sections 6 and 8.

Orders Considered: Orders PO-1953-F, PO-2464, PO-2592, PO-2726, PO-4244, PO-4286, and MO-1336.

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

OVERVIEW:

[1] This order addresses the question of whether it would be fair and equitable to waive the fee charged for records related to the decision of the Government of Ontario (the government) to make changes to the Ontario Greenbelt.

[2] The request was made by a journalist to the Ministry of Municipal Affairs and

Housing (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was as follows:

> I would like to request all draft versions of changes to the Greenbelt Plan, proposed amendments to the Greenbelt Area boundary, the proposed re designation of land under the Oak Ridges Moraine Plan, and changes to laws and policies affecting the Duffins Rouge Agricultural Preserve.
>
> Time period: From June 03, 2022 to November 17, 2022.

[3] The ministry issued a fee estimate of $232.50 and an interim decision to the requester.[1]

[4] After receiving the fee estimate, the requester asked the ministry for a fee waiver on the basis that the records would benefit public health or safety, as contemplated by section 57(4)(c) of the *Act*.

[5] The ministry considered the appellant's request for a fee waiver but denied it. The requester (now the appellant) appealed that decision to the Information and Privacy Commissioner of Ontario (IPC).

[6] The IPC appointed a mediator to explore resolution. During mediation, the appellant offered to amend the request by shortening the timeframe of the request by two months[2] to reduce the amount of effort required to process the request. The ministry advised that the proposed amended request would not markedly reduce the amount of effort required to process the request, and that the record search had already been completed. The ministry confirmed its decision to deny the fee waiver request. The appellant advised that she wished to move to adjudication to dispute the decision to deny the fee waiver request.

[7] Since mediation could not resolve the appeal, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[8] As the adjudicator of this appeal, I conducted a written inquiry under the *Act* by sending a Notice of Inquiry on the issue of fee waiver. The ministry and the appellant provided written representations in response, which I shared amongst the parties on consent, and as necessary.[3] The parties' representations included lengthy arguments,

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[1] The ministry issued an interim decision and a fee estimate of $232.50. The ministry advised that a 50% deposit of $116.25 was required before it would proceed with the processing of the request. The ministry's interim decision was that, in the ministry's preliminary view, partial access may be granted, as some information may be protected under the discretionary exemptions at sections 12(1) (Cabinet records), 13(1) (advice or recommendations), and 19 (solicitor-client privilege) of the *Act*. The requester paid the deposit so that the ministry would continue to process the request.

[2] That is, by changing the start date of the timeframe from June 2, 2022 to August 2, 2022.

[3] The only representations that I did not put to the ministry were the appellant's sur-reply representations. After reviewing the latter, I determined that I did not need to hear further from the parties.

which I have considered and summarize in this order.

[9] For the reasons that follow, I uphold the ministry's determination that it would not be fair and equitable to grant a fee waiver, and I dismiss the appeal.

DISCUSSION:

[10] The only issue in this appeal is whether it would be fair and equitable to waive the $232.50 fee. As I explain below, the appellant has not sufficiently established that it would be.

[11] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 57(1) of the *Act* and outlined in section 6 of Regulation 460 are *mandatory* unless the *requester* can show that they should be waived.[4] The *Act* requires an institution to *waive* fees, in whole or in part, if it is fair and equitable to do so.[5]

[12] Section 57(4) of the *Act* and section 8 of Regulation 460 set out matters the institution *must* consider in deciding whether to waive a fee.

[13] Section 57(4) of the *Act* says:

> 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);
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> (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.

[14] Section 8 of Regulation 460 says:

> 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:

[4] Order PO-2726.
[5] See *Mann v. Ontario* (*Ministry of Environment*), 2017 ONSC 1056.

> 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.

[15] In *Mann v Ontario (Ministry of the Environment)*,[6] the Divisional Court confirmed that each of the factors in section 57(4) must be considered. 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.]

[16] The ministry relies on this test, and notes that the Court also said in the same case that, "[t]he requirement that a waiver must be fair and equitable gives the head [of an institution] a broad range of discretion in reaching his/her opinion."[7]

[17] Below, I will discuss a summary of the evidence before me about each of the factors listed in section 57(4). This will be followed by a summary of the parties' arguments about other relevant factors in the circumstances.

Actual cost in comparison to the fee: section 57(4)(a)

[18] Where the actual cost to the institution in processing the request is higher than the fee charged to the requester, this may be a factor weighing against waiving the fee.[8] That is the case here.

[19] Section 57(1) of the *Act* sets out the items for which an institution is *required* to charge a fee, such as the costs of every hour of manual search required to locate a record and the costs of preparing the record for disclosure.[9] More specific fee information is found in section 6 of Regulation 460, regarding, for example, the fees that shall be charged for each 15 minutes spent by a person to manually search for a record, or to

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[6] *Ibid*.
[7] *Ibid.*
[8] Order PO-3755. See also Order PO-2514.
[9] Section 57(1) of the *Act* says:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
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> (a) the costs of every hour of manual search required to locate a record;
> (b) the costs of preparing the record for disclosure;
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
> (d) shipping costs; and
> (e) any other costs incurred in responding to a request for access to a record.

prepare a record for disclosure.[10]

[20] Here, the ministry states that processing the request "includes searching a broad range of records, including communications materials, draft Environmental Registry of Ontario postings, advice, summaries, submissions and draft legal instruments." The ministry says the records responsive to the request will include:

- all draft versions of changes to the Greenbelt Plan,
- draft amendments to the Greenbelt Area boundary,
- draft redesignation of land under the Oak Ridges Moraine Plan, and
- draft changes to laws and policies affecting the Duffins Rouge Agricultural Preserve.

[21] The ministry explains that the actual cost of processing, collecting, and preparing the records is higher than the relatively low fee estimate of $232.50 charged to the appellant. It explains that the request is broad in scope and is anticipated to involve a large number of records. The ministry states that its staff have spent at least 10.5 hours searching for responsive records, which it describes as "a significant amount of time and does not include time taken to prepare the records for disclosure." The ministry submits that, therefore, this factor [at section 57(4)(a)] weighs against granting a fee waiver.

[22] The appellant's response does not cite section 57(4)(a) specifically. However, she objects to the characterization of her request being "broad," arguing that "it is tightly focused on changes to a single group of related policies that were made simultaneously." She also notes that no estimate of the volume of records was provided, and argues that it is unreasonable for the ministry to state that it will take longer to search for responsive records than was previously anticipated in the fee estimate.

[23] In reply, the ministry addressed these concerns. It explained why it considers the request to be broad: while the Greenbelt policies are "related, and were made simultaneously, they were a significant undertaking" by the ministry, involving a great amount of work from [its] staff and affected a large number of lands," and a large number of responsive records. More specifically, as of its October 2023 reply representations, the ministry estimates that 300 responsive records exist (about 1000 pages). In addition, the

[10] Section 6 of Regulation 460 says, in part:

> 6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
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> 1. For photocopies and computer printouts, 20 cents per page.
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

ministry explains that it followed the IPC's guide to fee estimates,[11] which allows it to base a fee estimate on a sample of responsive records. Therefore, the ministry submits that it is reasonable to have found that the search has taken longer and involved a broader swath of records than was initially anticipated.

[24] In sur-reply, the appellant says that she does not wish to debate definitions. However, she then asserts that the term "broad" is "typically used to describe requests that cover a large range of subjects, or are nonspecific or unfocused," and taking that to be the "common" definition of the term, she questions how a request for "one type of document (draft versions) related to one package of policy changes on a single subject" is broad. Regarding the additional details about search time and the number of records, the appellant appreciates them, but appears to downplay them. She questions whether the ministry "is acting in good faith" because she says the ministry "made no attempt to communicate" with her on the estimated search time until she filed an appeal. She argues that 1000 pages is about a third of the volume involved in an order that the ministry had previously cited (Order PO-2464), so she says her request "is not so large as that." And even if I consider that to be a large volume, she asserts that "the public benefit" would outweigh the ministry's concern, and that recent developments in the Greenbelt matter (such as two ministerial resignations) weigh heavily towards dissemination.

[25] Based on my review of the parties' representations, I am satisfied that the factor at section 57(4)(a) weighs against granting a fee waiver.

[26] As mentioned, section 57(1) of the *Act* requires institutions to charge requesters certain fees. However, in this case, the ministry's fee estimate is less than its actual cost. I accept the ministry's assessment of the request as broad, and as based on its knowledge of its own record holdings and its staff's efforts in the Greenbelt matter. I do not accept that because a request is related to one general matter that it is not broad; in this situation, the ministry has explained why that would not be the case. The ministry's actual costs will include the costs of its further search time, and any preparation time necessary to process the roughly 1000 pages of responsive records identified (as of October 2023).[12]

[27] I do not find the appellant's representations persuasive on any of these points. It is not reasonable to point to the existence of many more pages involved in another appeal to argue that 1000 pages is not a large number of pages for the ministry to consider in relation to its obligations under the *Act* to respond to this request. In addition, I do not accept the appellant's argument that the ministry was not acting in good faith, and find it to be unwarranted and therefore unhelpful to resolving this appeal. I have reviewed the ministry's correspondence with the appellant before she filed her appeal and see no evidence of acting in bad faith.

[28] In the circumstances, I find that the factor at section 57(4)(a) clearly and

[11] The IPC's guide entitled "Responding to Access Requests," which notes that a fee estimate may be based on a review of a representative sample if the fee is $100 or more.
[12] See Note 1 with respect to possible exemptions that may apply to the information at issue.

significantly weighs against granting a fee waiver.

Financial hardship: section 57(4)(b)

[29] The appellant did not claim a financial hardship. In the absence of a claim by the appellant for financial hardship pursuant to section 57(4)(b), I find that the lack of such claim weighs against granting a fee waiver and in favour of defaulting to the user-pay principle.

Whether dissemination of the record will benefit public health or safety: section 57(4)(c)

[30] The focus of section 57(4)(c) is "public health or safety." It is not enough to show that there is a "public interest" in the records – the public interest must relate to gaining information about a public health and safety issue.[13]

[31] Previous IPC decisions have found that the following factors may be relevant in determining whether distribution of a record will benefit public health or safety:

(1) whether the subject matter of the record is a matter of public rather than private interest,

(2) whether the subject matter of the record relates directly to a public health or safety issue,

(3) whether distribution of the record once disclosed would yield a public benefit:

- by disclosing a public health or safety concern, or
- by contributing meaningfully to the development of understanding of an important public health or safety issue, and

(4) the probability that the requester will share the contents of the record with others.[14]

[32] Based on my review of the parties' representations, I am satisfied that the first and fourth considerations listed above are relevant, and weigh towards finding that section 57(4)(c) applies. The parties agree, and I find, that the subject matter of the records is a matter of public, not private interest. I also accept the appellant's representations that she frequently uses freedom of information requests to obtain documents that she believes to be of public interest, writing stories about them, and publishing them through the non-profit news organization, without a paywall. In the

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

circumstances, I am satisfied that there is a high probability that the appellant will share the contents of the records with others. These considerations weigh in favour of finding that the factor at section 57(4)(c) applies, but they are not determinative of the matter.

[33] Regarding the second consideration, the ministry submits that the appellant did not sufficiently establish that the records she seeks are directly related to a public health or safety issue, and as such, the third consideration is not relevant. Later in the inquiry (after the government announced changes to its Greenbelt plans), the ministry argued that any negative impacts on the environment that the appellant was expressing concern about have been avoided, thus removing the relevance of the second and third considerations.

[34] The appellant disagrees. In her initial representations, she states that she is "somewhat alarmed that the [m]inistry requires a detailed explanation to establish a connection between these issues, given that the Greenbelt is a significant land use policy with inherent, direct and obvious links to public health or safety issues." She then goes on to cite the ministry's website, and other sources, discussing environmental issues such as flooding and extreme weather. Notably, she specifically addresses environmental issues related to one of the areas named in her request. In response to the ministry's contention that the reversal of the government on the Greenbelt issue makes the matter moot, she notes that the legislative bill to do so has not passed. She also argues that even if it does, that would not change what happened or the need for insight into it.

[35] Below, I will further summarize the parties' representations in my analysis on the second and third considerations in determining whether section 57(4)(c) applies.

Whether the subject matter of the record relates directly to a public health or safety issue

[36] The appellant's reason for seeking a fee waiver is that because her request is related to the Greenbelt and its environmental protections, she should not have to pay a fee to have her access to information request processed by the ministry. This can be seen, for example, by her use of language like "inherent, direct and obvious links" in her representations, or the closing paragraph of her fee waiver request to the ministry, saying:

> In addition, Ontarians have the right under the Environmental Bill of Rights to be consulted on decisions that can affect the environment, and be informed about what they are. I do not believe it's logical, then, for a fee to be charged for Ontarians to have access to information that should have been provided anyway to help them understand the thinking behind those decisions.

[37] The appellant's fee waiver request (set out below) emphasized her assertion that the request relates directly to a public health or safety issue:

> The issues covered in the requested draft versions of changes to the Greenbelt and other related land use plans are all matters of public interest that are directly tied in with matters of public health and safety. Ontario's Protected lands in the Greenbelt sequester carbon, playing a crucial role in helping to mitigate the worst impacts of climate change, which include a long list of extreme weather events that affect Ontarians. Greenbelt lands also absorb water runoff, naturally helping to prevent floods in a way that human-made stormwater management ponds cannot replicate. When these lands are developed, that natural capability is lost, and flood risk is increased along entire watersheds. That has implications for public health and safety.
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> The decision to remove land from the Greenbelt, then, is a significant one, as it could have repercussions down the line in the form of more frequent and extreme flooding. To date, however, the Ontario government has declined to show its work and provide a detailed explanation of how it settled on the parcels of land it chose to be removed from the Greenbelt.
>
> Drafts of the changes would illuminate the decision-making process, which would in turn show how and if potential impacts to public health and safety were considered.
>
> Media reports about this issue have resulted in significant public interest, including from Indigenous communities who were not consulted or informed in advance, and from the province's integrity commissioner and auditor general, who are separately probing the situation.
>
> In addition, Ontarians have the right under the Environmental Bill of Rights to be consulted on decisions that can affect the environment, and be informed about what they are. I do not believe it's logical, then, for a fee to be charged for Ontarians to have access to information that should have been provided anyway to help them understand the thinking behind those decisions. [Emphasis added.]

[38] Both parties have made general reference to other access requests for records relating to the Greenbelt. However, this appeal relates only to the ministry's decision not to waive the fee in relation to the particular request made by the appellant.

[39] The ministry's initial representations state that the appellant provided no supporting evidence regarding the assertions made about the Greenbelt (for example, that the actual lands involved in the government's decision would lead to more frequent flooding). The ministry submits that this fee waiver request "does not provide the level of detail required to establish a connection between the records and an established public health or safety issue."

[40] In addition, the ministry submits that the appellant's argument (that issues covered in her request "are all matters of public interest that directly tied in with matters of public health and safety") does not accord with previous IPC jurisprudence about fee waivers. Citing Order PO-1953-F, the ministry says that the IPC held that not every issue concerning the environment will automatically be considered a public health or safety issue, as contemplated by section 57(4)(c). Rather, issues concerning the environment must be considered individually on a case-by-case basis. In addition, the ministry also relies on past IPC orders, including Orders MO-1336, PO-2592, and PO-2726, which it says emphasize that a direct relation must exist between the subject matter of the record and the recognized public health or safety issue.

[41] I find that the ministry's assessment of the appellant's initial position about whether the records relate directly to public health or safety to be reasonable, as it was not particularly detailed and it lacked supporting evidence with respect to the government's plans to change certain parts of the Greenbelt. However, during the inquiry the appellant provided more fulsome information, including specifically about one of the areas named in her request (as described above).

[42] Considering the arguments made by the appellant in the inquiry, I find that the subject matter of the records is directly related to a public health or safety issue and this consideration should have moderate weight in favour of finding that section 57(4)(c) applies.

Whether distribution of the record once disclosed would yield a public benefit by disclosing a public health or safety concern or contributing meaningfully to the development of understanding of an important public health or safety issue

[43] This third consideration in determining whether the subject matter of the record relates directly to a public health or safety issue under section 57(4)(c) is related to the second, which I have just discussed. As a result, I am prepared to give it moderate weight as well, for similar reasons.

[44] However, I do not accept the ministry's position that the government's announcement that it was reversing its course and its introduction of a legislative bill to that effect mean that this third consideration is not relevant. I find the reasoning in Order PO-4244 and in Order PO-4286 with respect to transparency into changed decisions relevant and persuasive here, as aptly summarized in Order PO-4286:

> That case [Order PO-4244] concerned a request for records related to police powers under a provincial emergency stay-at-home order in response to the third wave of COVID-19. The emergency order initially granted police the power to stop and question individuals about their reasons for leaving their homes, but that aspect of the stay-at-home order was retracted after a public outcry. The adjudicator in that case found that disclosure of the

> records before her would contribute meaningfully to the development of understanding of an important public health issue, "namely the Ontario government's cost-benefit analyses of the potential use of emergency police powers to curtail individual rights during a public health or other crisis events."[15] She noted the value of the responsive records in discussions about government powers to re-introduce such measures in the event of future crises, and she found this weighed in favour of a fee waiver.
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> Similarly, in this case, the use of facial recognition technology by law enforcement continues to be the subject of ongoing debate, notably in the challenge it presents in balancing the competing societal interests of individual privacy and public safety.[16]

[45] Applying this reasoning, since I accept that the appellant provided some basis for a link between a public health or safety issue, even though the government has since announced a reversal of plans, I am prepared to accept that distribution of the records once disclosed may yield a benefit in terms of public health and safety. Similarly, I accept that distribution of the records once disclosed would add meaningfully to the public's understanding of this issue, including how and/or why it came about, even if those plans have changed.

Conclusion: section 57(4)(c)

[46] Taking the four considerations discussed above into account, I find that they weigh moderately in favour of accepting that the factor listed at section 57(4)(c) applies. I give this factor moderate weight because two of the considerations were clearly established, but two were not as well established.

Any other matter prescribed by the regulations: section 57(4)(d)

[47] In determining whether a fee waiver is just and equitable in the circumstances, the ministry must also consider section 8 of Regulation 460 (whether access is granted or if the fee is less than $5). The ministry submits, and I find, that these considerations are not relevant to this appeal because the ministry has not finished processing the request and the fee is more than $5. Therefore, section 8 of Regulation 460 has neutral weight in deciding this fee waiver dispute.

[48] Based on the evidence before me, I have found that:

- the factors at sections 57(4)(a) and 57(4)(b) weigh against granting a fee waiver,
- the factor at section 57(4)(c) moderately weighs in favour of a fee waiver, and

[15] PO-4244, paragraph 44.
[16] Order PO-4286, paragraphs 60 and 61.

- the factor at section 57(4)(d) is neutral.

Other relevant factors

[49] Before concluding, I must also consider whether the head of the institution discharged his or her duty to determine whether it was fair and equitable in this particular case to waive the fee. Previous IPC orders have set out relevant factors that may be considered, including:

- 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 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 offered a compromise that would reduce costs,
- whether the institution provided any records to the requester free of charge, and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.[17]

[50] The ministry responded to the appellant's fee estimate dated January 27, 2023 just over the required 30-day mark, on March 3, 2023. In the circumstances, this is not a significant delay in considering whether a fee waiver would be just and equitable. I do not find relevant the appellant's position that the ministry has not finished processing the request. That is a separate matter than this fee waiver request, involving separate considerations and obligations under the *Act*; the ministry's interim decision noted that some of the information at issue might be withheld under three exemptions.

[51] Furthermore, as mentioned, although the appellant's representations question the good faith with which the ministry was responding to her request, I find no support for such a position. Likewise, on balance, I find no basis for accepting that the ministry was somehow uncooperative or did not work constructively at IPC mediation. I also acknowledge that the appellant attempted to narrow the request by narrowing the date range. In my view, the relative degree of cooperation by both parties was comparable and does not tilt the balance in favour or against a fee waiver.

[52] In addition, while the appellant disputes whether 1000 pages are many, I find that they are, and this too weighs against granting a fee waiver.

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

[53] In conclusion, while I have given moderate favourable weight to the factor listed at section 57(4)(c) of the *Act*, I have found that the remaining relevant factors all weigh against granting a fee waiver in relation to the ministry's fee estimate of $232.50. As a result, I uphold the ministry's decision, and dismiss the appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by:	January 12, 2024
Marian Sami Adjudicator	