

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4501

Appeal PA22-00482

Ministry of Tourism, Culture and Sport

March 28, 2024

Summary: An individual submitted a request to the Ministry of Tourism, Culture and Sport (the ministry) under the *Act* for access to records relating to himself and his company. The ministry issued a fee estimate and agreed to waive part of the fee when the appellant applied for a fee waiver. The appellant appealed the ministry's fee, seeking a full fee waiver on the basis of financial hardship and that dissemination of the records would benefit public health or safety. In this order, the adjudicator upholds the ministry's decision not to provide a further fee waiver. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 57(4); Regulation 460, section 8.

Orders Considered: Orders MO-1336 and PO-4458.

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

OVERVIEW:

[1] This order determines whether it would be fair and equitable for the Ministry of Tourism, Culture and Sport (the ministry) to grant a full waiver of the fee charged for records relating to the requester and his company.

[2] The ministry received an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the requester and his

company.

[3] Following the ministry's request for clarification, the request was clarified to:

...copies of documents of any nature (including but not limited to emails, files, memos, bulletins, press releases, handwritten notes) relating to myself and my company [named company], [requester's representative], and [two named individuals].

Including Communication with/within the Ministry regarding [named company], [requester's representative], or [two named individuals] (for example but not limited to): [four named individuals]

Including Communication with the Ontario Media Development Corporation (Ontario Creates) regarding [named company], [requester's representative], [named individual] or [two named individuals] (for example but not limited to): [six named individuals]

Timeframe: January 1, 2014, to August 16, 2022

[4] The ministry issued a fee estimate in the amount of \$645.10 for a paper copy or \$555.10 for an electronic copy of the records.

[5] The requester submitted a fee waiver request to the ministry. In response, the ministry waived the original fee estimate by 60%, thereby reducing the fee to \$258.04 for a paper copy or \$222.04 for an electronic copy.

[6] The requester, now the appellant, appealed the ministry's decision not to grant a full fee waiver to the Information and Privacy Commissioner of Ontario (IPC). A mediator was assigned to attempt to reach a mediated resolution between the parties.

[7] The ministry subsequently issued a time extension decision, indicating that it was extending the time limit to process the request by an additional 780 business days (1,119 calendar days) due to the high volume of responsive records, and in order to conduct necessary consultations outside the ministry.

[8] During mediation, the appellant confirmed that he is not seeking access to duplicative records and agreed to remove a number of other types of records from the scope of the request.

[9] Despite the narrowed request, the ministry advised that it had located additional records and provided an updated fee estimate that was more than the original. However, the ministry confirmed that it would not charge additional fees beyond the reduced fee waiver amounts of \$258.04 for a paper copy or \$222.04 for an electronic copy. The ministry also issued a revised time extension decision, reducing the time limit to 203 business days (299 calendar days).

[10] The appellant takes the position that the ministry should fully waive the fee and takes issue with ministry's time extension.

[11] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process, where the adjudicator may conduct an inquiry under the *Act*.

[12] The adjudicator originally assigned to the appeal sought and received representations from the ministry and the appellant. During the inquiry, the ministry issued a revised decision letter granting partial access to the requested records. The ministry subsequently confirmed receipt of 50% of the fee from the appellant and provided him with an electronic copy of the records.

[13] As an access decision has been issued, the issue of time extension is now moot and has been removed from the scope of the appeal. The sole issue in this appeal is the issue of fee waiver.

[14] The appeal was subsequently transferred to me to complete the inquiry and issue a decision.

[15] In this order, I uphold the ministry's decision not to grant a further fee waiver and I dismiss the appeal.

DISCUSSION:

[16] The sole issue to be determined in this appeal is the issue of fee waiver – specifically, whether the ministry should waive its fee further or in full.

[17] The fee provisions in the *Act* establish a "user-pay" principle. The fees referred to in section 57(1) and outlined in sections 6 and 6.1 of Regulation 460 are mandatory unless the requester can show that they should be waived.¹

[18] 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 the 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,

¹ Order PO-2726.

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed by the regulations.

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

(1) Whether the person requesting access to the record is given access to it.

(2) If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

Other relevant factors

[19] A fee must be waived, in whole or in part, if it would be “fair and equitable” to do so in the circumstances.² An institution must consider any relevant factors when deciding whether it would be fair and equitable to waive the fee. Relevant factors may include:

- the manner in which the institution responded to the request
- whether the institution worked constructively with the requester to narrow the scope of 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 has provided any records to the requester free of charge, and

² See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

- whether the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution.³

Representations

The ministry's representations

[20] The ministry submits that the original fee estimate was based on feedback from its Communication Branch and Tourism and Culture Division, and consisted of an estimated 14 hours of search time and 4.17 hours of preparation time at \$30/hour. Combined with a \$100 fee for photocopying an estimated 500 pages (at \$0.20/page) or a \$10 fee for a USB key, this resulted in a fee estimate of \$645.10 for a paper copy or \$555.10 for an electronic copy.

[21] The ministry indicates that after issuing the original fee estimate, it identified other branches and offices of the ministry that needed to search for responsive records. Once these other branches and offices searched for and located records, the search time increased from the estimated 14 to 32 hours. Additionally, due to the volume of records that were located, and which needed to be reviewed, the preparation time increased from the estimated 4.17 to 68.49 hours.

[22] The ministry submits that the updated fee estimate only included 18 hours of search time (rather than 32 hours), as well as 68.49 hours of preparation time at \$30/hour. Combined with a \$1,643.80 fee for photocopying an estimated 8,219 pages (at \$0.20 per page) or a \$10 fee for a USB key, this resulted in an updated fee estimate of \$4238.50 for a paper copy or \$2604.70 for an electronic copy.

[23] The ministry submits that it reduced the original fee estimate by 60% in response to the appellant's request for a fee waiver, to \$258.04 for a paper copy or \$222.04 for an electronic copy. The ministry submits that the actual cost of the request is much greater than what the appellant has been asked to pay, noting that the bulk of the cost for the request is in search and preparation time, owing to the broad scope of the request and the large volume of records that were located.

[24] The ministry acknowledges that the appellant is experiencing financial hardship and submits that it took this factor into account when making its decision to waive part of the fee. The ministry submits that it has borne the majority of the financial burden for the request and that given the scope and complexity of the request, it is appropriate for the appellant to pay a portion of the overall cost under the user-pay principle established in the *Act*.

[25] The ministry acknowledges that upon receiving the request, it was able to clarify the request with the appellant and to revise the wording with the appellant's agreement. However, the ministry submits that the appellant was unwilling to narrow or modify the

³ Orders M-166, M-408 and PO-1953-F.

scope of the request until the mediation stage. The ministry notes that it was only at this point that the appellant identified records that he was not interested in, which reduced the number of pages at issue from 25,270 to 8,219.

[26] The ministry submits that the request relates to the appellant's company, and that dissemination of the records will have no benefit to public health or safety because the contents of the records do not relate to any public health or safety issue.

The appellant's representations

[27] The appellant confirms that his request relates directly to litigation that his company has commenced against an agency of the ministry for lack of duty of care to taxpayers in relation to retroactively enacted changes to a specific media tax credit.

[28] The appellant explains that the reason for his request is his need to understand the reasons for the retroactively enacted changes to the tax credit. The appellant explains that these changes to the tax credit left them inaccessible to his company and that this ultimately resulted in his company shutting down, leaving him with enormous debt.

[29] The appellant submits that he recognizes that his requests have placed a substantial burden on the ministry and acknowledges with thanks the ministry's professionalism and attention to his requests (also noting that they were still not complete more than 17 months after they were made).

[30] The appellant submits that that the *Act* contemplates and allows for a full fee waiver where there is true financial need. The appellant provided financial information to support his submission that he is impecunious and relying on a CPP disability benefit. He also indicated that he has been forced to rely on the assistance of friends, as well as food banks, and any amount in these circumstances is extremely financially difficult.

[31] The appellant suggests that requesting a few hundred dollars from an impecunious individual such as himself seems punitive. The appellant also notes that in a similar request to the Ministry of Finance, he received a 95% fee waiver.

[32] The appellant submits that public health and safety is relevant in this appeal. The appellant suggests that if his legal case is successful, it could create a legal prohibition to prevent the government from implementing retroactive changes to tax law and that this would benefit other producers who were similarly affected.

[33] The appellant submits that unpredictable changes to tax law can cause anxiety and stress amongst Ontarians, and as such this matter has implications for the public health of all Ontarians. The appellant also suggests that a key measure of public health is mental health, for which financial well-being is a key determinant.

[34] The appellant submits that he is obliged to use research to reveal the decision-making process that led to many companies being made casualties of the retroactive

changes to the tax credit. The appellant submits that he does not know which parties are involved or in what ways, which makes it difficult for him to narrow his request. He further submits that the suggestion that he should work with the opposition in his legal case is absurd under the circumstances.

[35] The appellant submits that he has made concessions that demonstrate that he has been attentive to the cost and time of the work effort from the ministry's perspective. The appellant notes that with the assistance of the IPC mediator, he spoke with the ministry and accepted their recommendations, which reduced the time period of the request as well as the number of records.

Analysis and findings

[36] A fee must be waived, in whole or in part, if it would be "fair and equitable" to do so in the circumstances.⁴ Section 57(4) makes it clear that all of the factors must be considered.

[37] The appellant relies on the following factors that must be considered in deciding whether it would be fair and equitable to waive the fee:

- the payment will cause a financial hardship for the person requesting the record [Section 57(4)(b)]
- dissemination of the record will benefit public health or safety [Section 57(4)(c)]
- the requester worked constructively with the institution to narrow the scope of the request [other factors]

[38] The ministry discussed these factors and relied on the following factors:

- the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment [Section 57(4)(a)]
- the institution worked constructively with the requester to narrow the scope of the request [other factors]
- the request involves a large number of records [other factors]
- the waiver of the fee would shift an unreasonable burden of the cost from the requester to the institution [other factors].

[39] I will consider these factors below.

⁴ See *Mann v. Ontario (Ministry of Environment)*, 2017 ONSC 1056.

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

[40] In its representations, the ministry submits that the actual time that was required for processing the request was 32 hours of search time and 68.49 hours of preparation time. It explained that the original fee estimate was based on 14 hours of search time and 4.17 hours of preparation time, whereas the updated fee estimate was based on 18 hours of search time and 68.49 hours of preparation time. Therefore, even before considering the fee waiver, the actual cost to the ministry is higher than the amounts set out in both the original and updated fee estimates.

[41] The ministry stated that after receiving the appellant's request for a fee waiver, it granted a 60% waiver from the original fee estimate of \$645.10 for a paper copy or \$555.10 for an electronic copy and reduced the fee to \$258.04 for a paper copy or \$222.04 for an electronic copy. I note that comparing the reduced fee to the amounts set out in the updated fee estimate (\$4,238.50 for a paper copy and \$2,604.70 for an electronic copy) results in a percentage waiver of significantly more than 60%. I agree that the ministry has reduced the fees charged by a significant amount, regardless of whether I compare the reduced fee to the original or updated fee estimates.

[42] It is clear that the actual cost to the ministry to process the appellant's request is much greater than the fee that the appellant has been asked to pay. I find that this factor weighs against a further fee waiver and is relevant in this appeal.

Financial hardship of the appellant: section 57(4)(b)

[43] For section 57(4)(b) to apply, the appellant must provide evidence regarding their financial situation, including information about income, expenses, assets and liabilities.⁵

[44] Based on my review of the parties' representations, I find that payment of the fee estimate will cause the appellant financial hardship. I note that the ministry considered the appellant's financial hardship when it made its fee waiver decision. In his representations, the appellant attached a bank demand letter and a line of credit statement that support his submission that he is impecunious and living on credit.⁶

[45] In my view, despite the ministry's fee waiver, the appellant has provided sufficient evidence to show that payment of the fees will cause financial hardship. This factor weighs in favour of a further fee waiver and is relevant in this appeal.

Public health and safety: section 57(4)(c)

[46] 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

⁵ Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393.

⁶ The attachments to the appellant's representations were shared with the ministry with consent.

information about a public health and safety issue.⁷

[47] The following factors may be relevant in determining whether the distribution of a record will benefit public health or safety:

- 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 distribution of the record once disclosed would yield a public benefit:
 - a. by disclosing a public health or safety concern, or
 - b. by contributing meaningfully to the development of understanding of an important public health or safety issue; and
- the probability that the requester will share the contents of the record with others.

[48] I have considered the representations on the application of section 57(4)(c) to the present case. In the circumstances, I am not convinced by the appellant's submissions that dissemination of the information relating to his request would benefit public health or safety. For the following reasons, I find that this factor is not relevant in this appeal.

[49] The appellant suggests that if his legal case is successful, it could create a legal prohibition to prevent the government from implementing retroactive changes to tax law. He also suggests that it would benefit other producers who were similarly affected.

[50] The appellant also submits that the changes to the tax credit have had a significant impact on his financial well-being, which is a key determinant of mental health. The appellant suggests that the records relating to the request will help the public better understand government policy, which has positive implications for public health such as by alleviating stress and anxiety.

[51] In Order PO-4458, the adjudicator considered whether a legal prohibition to prevent retroactive changes to tax law would constitute a benefit to "public health or safety". I agree with the adjudicator that while there may be a public interest in a legal prohibition to prevent retroactive changes to tax law, especially for similarly situated parties, the existence of a public interest by itself does not satisfy the "public health or safety" section of the fee waiver provisions in section 57(4)(c), in its ordinary sense.

[52] In Order MO-1336, the adjudicator considered the relationship between "public health or safety" in section 45(4) (the municipal *Act* equivalent to section 57(4)) and

⁷ Orders MO-1336, MO-2071, PO-2592 and PO-2726.

public interest as that concept is understood elsewhere in the *Act* and in other contexts:

The focus of section 45(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.

[53] I agree with the reasoning of the adjudicators in these two orders and adopt it for the purposes of this appeal.

[54] In my view, there is not enough evidence before me to demonstrate a sufficient connection between retroactive changes to tax law and public health or safety. To be clear, even if dissemination of the records relating to the request could be said to be in the public interest, I am not convinced that it would benefit public health or safety.

[55] Furthermore, as noted above, the appellant’s request encompasses records relating to himself and his company. I am sympathetic to the appellant’s assertions that his mental health has been significantly affected by the underlying circumstances of the appeal. However, I find the appellant’s comments to be specific to his individual case and am not persuaded that the subject matter of the records is a matter of public rather than private interest or that it relates directly to a public health or safety issue.

[56] Having concluded that the appellant has not established that the information in the records relates *directly* to a matter of public health or safety as contemplated under section 57(4)(c), I find that this is not a relevant factor supporting a further waiver of the fee in this appeal.

Section 57(4)(d) and section 8 of Regulation 460

[57] Section 8 of Regulation 460 prescribes 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.

[58] Based on the ministry’s revised decision and subsequent correspondence, it appears that the appellant is in receipt of the records. As a result, I find that paragraph 1 of section 8 applies in this appeal and weighs against a fee waiver. As the fee is not \$5 or less, paragraph 2 does not apply.

Other factors

[59] As previously noted, I am required to consider the factors listed in the *Act* and the

regulation, as well as any other relevant factors.⁸

[60] The ministry submits that it offered to work with the appellant to narrow the request (the clarified version of which spanned an eight-year time frame) to reduce cost, but that the appellant was unwilling to narrow or modify his request until the mediation stage. The appellant provided various explanations for why it was difficult for him to narrow the request.

[61] The parties appear to agree that the scope of the request was successfully narrowed at the IPC's mediation stage, and that this substantially reduced the number of pages remaining at issue from 25,270 to 8,219. Previous orders of this office have established that whether the institution worked constructively with the requester to narrow and/or clarify the request and whether the requester worked constructively with the institution to narrow the scope of the request are both relevant factors in deciding whether it would be fair and equitable to waive a fee.

[62] In my view, while it may have been beneficial for the appellant to work with the ministry to narrow his request at an earlier stage, the parties were ultimately able to work constructively with each other to narrow the request. I find that these two factors balance each other out and do not weigh in favour of or against a further fee waiver.

[63] Although the parties were able to narrow the request at the mediation stage, there remain at issue 860 records consisting of 8,219 pages. I agree with the ministry that this is a large volume of records and find that this is a relevant factor that weighs against a further fee waiver.

[64] Finally, I also consider as a relevant factor whether a further fee waiver would shift an unreasonable burden of the cost from the appellant to the ministry. The ministry has already waived a significant portion of the fee and has worked with its staff to reduce the amount of search and preparation time. Given the actual cost of processing the request and considering the user-pay principle that is established in the *Act*, I find that it would be unreasonable to order a further fee waiver because it would shift an unreasonable burden of the cost from the appellant to the ministry.

Conclusion

[65] I find that the following factors weigh against a further fee waiver:

- the actual cost of the request to the ministry, which it partially waived;
- the requests involve a large number of records (860 records, totalling 8,219 pages);

⁸ Orders M-166, M-408 and PO-1953-F.

- further waiver of the fees would shift an unreasonable burden of the cost from the appellant to the ministry.

[66] I find that the following factor weighs in favor of a further fee waiver:

- payment of the fee will cause the appellant financial hardship.

[67] Considering all of the relevant factors, and in light of the user-pay principle articulated above, I find that on balance, it would not be fair and equitable to grant a further fee waiver.

ORDER:

The appeal is dismissed.

Original signed by: _____

Anda Wang
Adjudicator

_____ March 28, 2024