Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1909

Appeal PA_000357_1

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> records identifying all municipal and industrial water and air dischargers that were in non-compliance with Control Order, Certificate of Approval or regulatory limit as a result of air or water discharges, from January 1, 1999 to December 31, 1999

for each of five separate regions. The requester specified that she was seeking access to data which is not duplicated in the electronic databases to which access had already been granted. The requester also sought a fee waiver for any fees which the Ministry may wish to charge, relying on the decision in Order P-1557 in which Adjudicator Holly Big Canoe ordered the Ministry to waive the fees chargeable for the required search and preparation time with respect to similar records for the year 1996.

The Ministry responded by denying access to the requested information on the basis that most of it had been posted on the Ministry's website and was, accordingly, publicly available and subject to sections 22(a) and (b) of the *Act*. The Ministry provided information as to how the information might be accessed through the Ministry's website.

The Ministry also advised that because the request included information which was not publicly available, it would require a significant amount of time to locate and identify. It therefore provided a fee estimate of $8,240 for the cost of search and preparation time, as well as photocopying charges. The Ministry provided the requester with a two-page chart delineating the information available through its website and the information which is accessible only upon the completion of a search of the Ministry's paper records.

In addition, the Ministry advised the requester that it would take 180 days to locate and identify the requested information that is maintained in paper form. The Ministry also denied the requester's request for a fee waiver on the basis that the information contained in the Ministry's website provides the public with sufficient details about those companies which are not in compliance with their air and water discharge obligations.

The requester, now the appellant, appealed the Ministry's decision to charge a fee, the decision not to grant a fee waiver and the decision of the Ministry to seek a time extension for its response to the request. During the mediation stage of the appeal, the appellant confirmed that she was not appealing the Ministry's decision to deny access to the publicly available information under sections 22(a) and (b).

I initially decided to seek submissions from the Ministry with respect to the issues raised by the appeal. In its representations, the Ministry revised its fee estimate as a result of its receipt of a letter dated January 23, 2001 in which the appellant substantially narrowed the scope of the

requested information. The information now sought by the appellant consists of the electronic data for some of the 61 companies that was missing from the May 8, 2000 disclosure of data.

In its representations, the Ministry set out in detail the nature and extent of the searches which it undertook for records responsive to the narrowed request. It has provided details of the costs associated with each of the searches, as well as its projected photocopying expenses. The total fee estimate was revised to the sum of $4,555. The Ministry also provided me with its position with respect to the fee waiver issue and has revised its time extension to 80 days, rather than the 180 days originally identified.

The representations of the Ministry were then shared, in their entirety, with the appellant, along with a Notice of Inquiry. The appellant made extensive representations detailing the history of the Ministry's handling of her request, the fee waiver issue and the time extension question. These submissions were also shared with the Ministry. Finally, the Ministry also submitted reply representations to me in which it further clarified the calculation of its fee estimate, revising the amount of the fee to $4,190 and reducing the time extension request from 180 to 80 days.

DISCUSSION:

APPROPRIATENESS OF THE FEE ESTIMATE

The charging of fees is authorized by section 57(1) of the *Act*, which states:

> 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,
>
> (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;
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> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 460 also deals with fees. It states, in part, as follows:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
> ...

> 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.
>
> ...

In its reply submissions, the Ministry provided me with a detailed breakdown in support of its calculation of a fee of $4,190. It indicates that these fees represent the cost of searching for various paper reports respecting non-compliance by various municipalities and industrial facilities along with the time required to compile a list of names and addresses of those facilities. A fee of $500 for photocopying charges of the estimated 2,500 pages of responsive records has also been included in the total amount of the fee estimate. Specifically, the Ministry states that its fee estimate is based on the following calculations:

- searches for monthly self-monitoring reports detailing municipal non-compliance (UMIS reports for 82 municipal water systems) - 62 hours X $30 for a total of $1,860;
- searches for occurrence reports for air non-compliance or hard copy reports showing non-compliance by 17 industrial facilities (ORIS reports) - 17 hours X $30 for a total of $510;
- searches for hard copies of self-monitoring reports submitted by 32 industrial facilities demonstrating discharge non-compliance - 36 hours X $30 for a total of $1,080;
- preparation of a list of names and addresses of all non-compliant facilities - 8 hours X $30 for a total of $240;
- photocopying charges for approximately 2500 pages of records - 2,500 X $.20 for a total of $500.

The Ministry states that it has consulted with its staff who are familiar with the records sought by the appellant and that they will require one hour to search for, retrieve and print the requested information for each non-compliant municipality or industrial facility. An additional eight hours are required to compile the list of the names and addresses of each of the non-compliant facilities. Because the non-compliant facilities are scattered throughout the province, these searches must be undertaken in all five of the Ministry's regions and most of its 22 district offices by Ministry staff who are familiar with records of this nature, in this case an Environmental Officer. For each facility, the Ministry indicates that its compliance file for 1999 ranges from one to twelve feet of file shelf space.

The appellant has not specifically addressed the issue of the appropriateness of the fee estimate provided to her in the submissions which I received. It would appear that she is concerned that some of the information which was provided to her electronically through the Ministry's website

since the date of the initial request may be duplicated in the records which are the subject of the searches described above. The appellant infers that the searches may be unnecessary in some cases because the information sought has already been disclosed to her electronically.

Based on my review of the submissions of the Ministry, I am satisfied that the fee estimate provided to the appellant is in accordance with the requirements of section 57(1) and section 6 of Regulation 460. I find that one hour of search time for responsive records in each of the files which the Ministry maintains on non-compliant facilities is reasonable, given the size and complexity of the record-holdings. I also uphold the fee estimate with respect to the preparation of the list of names and addresses of non-compliant facilities requested by the appellant and the photocopying charges referred to above. To summarize, I uphold the Ministry's fee estimate of $4,190.

FEE WAIVER

Fee waiver is provided for by section 57(4) of the *Act*, which states:

> 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;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed in the regulations.

Section 8 of Regulation 460 provides as follows:

> 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.

Many previous orders have held that the onus is on the appellant to demonstrate that a fee waiver would be justified. [for example, Orders 31, M-166, M-429, M-598, M-914, MO-1285, P-474 and P-1484]

The majority of the appellant's submissions revolve around the public interest which exists in the disclosure of the information contained in the responsive records. The appellant represents a non-profit, charitable environmental law organization whose mandate is to provide legal representation and advice on matters of environmental significance. This organization has often made use of the access rights prescribed by the *Act* and equivalent legislation in other Canadian jurisdictions. The appellant specifically refers to the decision in Order P-1557 in which it successfully argued in favour of a waiver of a fee estimate provided to it by the Ministry with respect to similar records involving non-compliance during the year 1996. The appellant argues that the dissemination of the information which it is seeking in this appeal will benefit public health or safety, as contemplated by section 57(4)(c) of the *Act*.

In Order P-474, former Assistant Commissioner Irwin Glasberg reviewed the principles which govern requests for a fee waiver where the public interest has been raised. He stated that:

> In interpreting the scope of section 57(4)(c) of the *Act*, upon whose wording this appeal will turn, the comments contained in the report prepared by The Williams Commission entitled *Public Government for Private People* are instructive. It should be noted that this report formed the foundation of Ontario's *Freedom of Information and Protection of Privacy Act*. With respect to fee waivers, the Report comments at page 270 that:
>
> > ... we have concluded that the statute should explicitly provide for waiver or reduction of fees when provision of the information can be considered as primarily benefiting the general public. Criteria for the exercise of this discretion should include the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the disclosure may further, the usefulness of the material to be released, and the likelihood that a tangible public good will be realized.
>
> Section 57(4)(c) of the *Act* was also considered by former Commissioner Sidney B. Linden in Order 2. There, he stated that:
>
> > In this case, the relevant criterion for waiver of fees contained in subsection 57(3)(c) [now 57(4)(c)] is whether or not dissemination of the record will "benefit public health or safety." While there is no definition of that term, in my view, it does not mean that fees will be waived where a record simply contains some information relating to health or safety matters ... The institution submits that the appellant must show some "causal connection" between the dissemination of the record and any substantive benefit to "public health or safety." In most cases this would be difficult for an appellant to do, even where, as in this case, the appellant has viewed the record.

> The United States Department of Justice has issued guidelines to federal agencies in the United States on how to process fee waiver requests. These guidelines suggest that a waiver is appropriate among other considerations, "if the information released **meaningfully contributes to public development or understanding of the subject**.
>
> If the information is only of marginal value in informing the public, then the public benefit is diminished accordingly." (*Common Cause v. IRS*, 1 GDSP 79188 (D.D.C. 1979); *Shaw v. CIA* 3 GDSP. 183, 009 (D.D.C. 1982). (Emphasis added).

I adopt the comments of Commissioner Linden for the purposes of this appeal.

Drawing both from the Williams Commission report and Order 2, I believe that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the *Act*:

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 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;

4. The probability that the requester will disseminate the contents of the record.

I adopt the comments of the former Assistant Commissioner for the purposes of the present appeals.

In considering the factors listed above to the information which is the subject of these appeals, I find that the subject matter of the responsive records is a matter of public, rather than private interest. In addition, I find that issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety concern. Without having reviewed the voluminous records responsive to the request, it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. The records may, or may not, contain information about a public health or safety risk. This is precisely the reason for the appellant's request.

I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. In Order P-1190, which was upheld by the Ontario Superior Court of Justice (Divisional Court) in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Assistant Commissioner Tom Mitchinson adopted the findings of former Commissioner Tom Wright in Order P-270 with respect to the public interest which exists in information relating to the safety of Ontario's nuclear industry. He determined that:

> Commissioner Tom Wright discussed the issue of nuclear safety and section 23 in Order P-270. This appeal involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the *Act*. In considering whether there was a compelling public interest in disclosure of nuclear safety related information, he stated:
>
> > In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
> >
> > I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
>
> In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

Similarly, I adopt the findings of the former Commissioner and the Assistant Commissioner and agree that matters relating to the safety of Ontario's air and water, like those concerned with the nuclear industry, by their very nature, raise a public safety concern. In addition, I find that the disclosure of the information contained in the records would be reasonably likely to result in the dissemination of information by the organization represented by the appellant relating to possible environmental degradation. This in turn would lead to a greater public understanding of this important public issue.

I conclude that the dissemination of the information contained in the records which are responsive to the appellant's request will benefit public health or safety within the meaning of section 57(4)(c) of the *Act*, as was the case in Order P-1557. The Ministry recognizes this fact through its own publication of similar information on its website in recent years.

Is It "Fair and Equitable" to Waive the Fee?

Section 57(4) of the *Act* requires that I also make a determination as to whether it is "fair and equitable" to waive the fee. In Order P-1557, former Adjudicator Holly Big Canoe set out a number of factors to be considered when determining whether a denial of a fee waiver is "fair and equitable". These considerations have also been referred to in several previous orders [P-474, P-890, P-1183 and P-1259]. The factors which are relevant in the circumstances of this appeal are listed and considered below.

1. The manner in which the Ministry attempted to respond to the appellant's request

The appellant takes the position that the Ministry has delayed and obstructed her attempts to secure the information sought in this request since it was initially made. She states:

> It is our belief that [the] Ministry was fully aware of our information needs but chose to ignore them. [The organization represented by the appellant] did everything possible to minimize the efforts of the Ministry; we agreed to the Ministry's timeline, we submitted the request promptly in the new year [2000 for information about non-compliance in 1999] to put them on notice that we required this information and we attempt[ed] to work productively with the coordinator. Our efforts proved fruitless.
>
> Compiling non-compliance information lies at the very heart of the Ministry's responsibility. The Ministry's submission regarding this inquiry describes the time and effort required to seek out and copy the records we require, but surely the Ministry would be required to do such in order to provide their summary posted on the Ministry's web site.

In my view, the Ministry took an inordinate amount of time to respond to the request. Despite efforts on several occasions by the appellant to narrow the scope of the request, the Ministry failed to promptly identify and locate the responsive records and did so only after continuous pressure being applied by the appellant and the Mediator assigned to the appeal by this office. I find that this is a significant consideration weighing in favour of the granting of a fee waiver in the circumstances.

2. Whether the Ministry and the appellant worked together to narrow and/or clarify the request

The appellant describes in detail the efforts made to narrow the scope of the request and to clarify the information sought which was not reflected in the information posed on the Ministry's

web site. The appellant indicates that the scope of the request was narrowed to include only data relating to non-compliance as opposed to extensive investigation and monitoring data.

The Ministry takes the position that the appellant's request was not significantly narrowed as the request for hard copies of non-compliance data represent the most labour intensive part of the appellant's original request and involves all of the Ministry's regional and district offices.

I find that while the Ministry cooperated with the appellant in narrowing the scope of the request and identifying the information actually sought, as a result of the delay in providing the appellant with any meaningful response, these efforts only served to hinder the appellant's exercise of her right of access. I find that this is also a factor weighing in favour of the granting of a fee waiver.

3. Whether the Ministry provided any documentation to the appellant free of charge

The Ministry indicates that electronic records responsive to the request were provided free of charge in May 2000 along with other data relating to some of the non-compliant facilities earlier this year. The Ministry also relies on the fact that it provided the appellant with information relating to non-compliance in 2000 in electronic form at no charge.

The fact that the Ministry provided some of the responsive 1999 information which is recorded electronically free of charge to the appellant is a significant consideration weighing against the granting of a fee waiver.

5. Whether the request involves a large number of records

In this appeal, there are a significant number of records at issue, as many as 2,500 pages of documents have been estimated as responsive to the request. This is a significant factor weighing against the granting of a fee waiver.

Whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the Ministry

The Ministry submits that it:

> compiles the information requested by the appellant into summary form for presentation on its web site. Production of the raw data requested by the appellant, which confirms and provides a higher level of detail to information already publicly available, represents an unreasonable level of effort on the Ministry's part. This level of effort should be reflected by the payment of fees for searching for, and preparing, records responsive to the appellant's request.

The appellant submits that in order for it to properly act as an overseer of the Ministry's role in protecting Ontario's environment, it requires the data contained in the responsive records, as opposed to that which is posted on the Ministry's web site. The appellant has provided a number of instances in which the Ministry's web site contained incomplete or misleading information about non-compliance by various facilities. She argues that without the provision of the detailed

information contained in the records sought, her organization would be unable to monitor the Ministry's efforts to ensure the safety of Ontario's environment.

In addition, the appellant submits that the information contained in the Ministry's web site completely omits data relating to a number of Ontario's most seriously non-compliant facilities and that without access to the information sought, this fact would go unreported to the public. As a result, she submits that the public is not able to discern the true extent of non-compliance based solely on the information contained in the Ministry's web site.

The organization represented by the appellant performs an important public service, in my view. By undertaking to act as a watchdog of the Ministry's environmental oversight functions, the appellant's organization informs the public about the state of environmental monitoring process in this province. Recent events in Walkerton and North Battleford have heightened the public's interest and concern over the safety of drinking water and air quality issues.

In my view, and in light of the demonstrated expertise of the appellant's organization in addressing issues relating to environmental health, the cost of providing disclosure of this publicly-important information ought to be borne by the Ministry in this case. I am satisfied that the appellant has demonstrated that, with respect to the records relating to non-compliant facilities in 1999, the Ministry was unable or unwilling to provide important information on its web site in a timely, complete and comprehensible fashion. In my view, it is fair and equitable that the Ministry bear the responsibility for paying the cost of ensuring that this information is disseminated by the appellant's organization, as it has proven itself unable to do. Again, this is a highly significant factor weighing in favour of a fee waiver in the circumstances of this appeal.

Based on my review of the factors noted above, I find that on balance, the considerations favouring the granting of a fee waiver outweigh those against. In my view, the granting of a fee waiver in the present circumstances is both fair and equitable, given the circumstances surrounding the difficulties the appellant has encountered in obtaining access to this information, which is of great interest to the public in general in each community in Ontario. In light of the large number of records which have been identified as responsive to the request, however, I find that in the circumstances it would be fair and equitable for the appellant to bear the cost of reproducing the records, particularly in light of the user pay principles contained in the *Act*. The Ministry has estimated this cost of photocopying the responsive records to be $500 and I uphold the Ministry's decision not to waive that portion of the fee.

TIME EXTENSION

As noted above, the Ministry has modified its estimate for the time required to identify, retrieve and compile all of the responsive records from 180 to 80 days. It indicates that this effort will take some 123 person-hours to accomplish as well as additional time to co-ordinate, prepare and photocopy the responsive records. To accomplish this work in less time would, the Ministry argues, unreasonably impact on the day to day business of its regional and district offices.

The appellant submits that the time extension sought by the Ministry is simply yet another "stalling tactic" designed to frustrate the appellant's request. The appellant is of the view that

the requested information has already been retrieved for inclusion in the Ministry's web site and "any additional time to compile the information should not be required".

In my view, the 30-day period prescribed by section 26 of the *Act* provides the Ministry with adequate time to compile the information responsive to the appellant's request. As pointed out by the appellant, this information has already been retrieved to some extent for inclusion in the Ministry's web site. I find that because the information sought is widely distributed throughout the Ministry's regional and district offices, the searches required of each need not be particularly time-consuming or onerous and would not unreasonably impact on the day to day business of the Ministry's operations. For this reason, I deny the Ministry's request for a time extension under section 27 of the *Act* and will require that access to the requested information be granted within the 30-day period set out in section 26.

ORDER:

1. I order the Ministry to waive the search and preparation charges associated with the appellant's request, though I uphold the amount of the fee estimate provided by the Ministry.

2. I uphold the Ministry's decision not to waive the photocopying charges.

I deny the Ministry's request for a time extension and order that it provide the appellant with access to the requested information within the 30-day time period prescribed by section 26 of the *Act* using the date of this order as the date of the request.

Original signed by: May 30, 2001
Donald Hale
Adjudicator