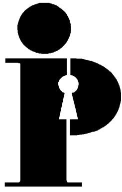

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1953-F

Appeal PA-000202-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

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

> all records (including, but not limited to, documents, files, correspondence, memos, briefing notes, information notes, faxes, reports, email messages and email attachments) within the possession of the [Ministry] including the Minister's office and Ontario Parks relating to consideration of extending, or proposals to extend, cottage leases at Rondeau Provincial Park for the time period of January 1, 1998 to present. This will include for example, but not be limited to, records involving cottage leaseholders, the Rondeau Park Leaseholders' Association, and the Municipality of Chatham-Kent, in addition to records generated by provincial agencies.

The requester (now the appellant) is a charitable organization concerned with environmental issues. In response to the appellant's request, the Ministry issued a fee estimate in the amount of $930.00, which is calculated as follows:

Search time (14.5 hours x $30 per hour)	$435.00
Record preparation (5 hours x $30.00 per hour)	$150.00
Photocopies (1700 pages x .20 per page)	$340.00
Total	$930.00

The Ministry requested a deposit of $465.00 and also advised the appellant that no final decision has been made regarding access.

The appellant responded by asking the Ministry for some details about the types of responsive records that are available and the estimated cost, with a view to narrowing the scope of the request. At the same time, the appellant also sought a fee waiver on the basis that dissemination of the records will benefit public health [section 57(4)(c) of the *Act*] and explained its basis for taking this position.

The Ministry responded by providing the appellant with a description of nine categories of responsive records, and the approximate number of pages in each category. The Ministry also advised the appellant that the total number of pages would be reduced by approximately 30% because of duplicate records. In addition, the Ministry advised that "it is estimated that twenty percent of the pages would be exempt from disclosure". The Ministry also made a decision not to waive the fees.

The appellant appealed the Ministry's fee estimate, in particular, the amount charged for search time. The appellant also appealed the Ministry's decision not to waive the fees. At the same time, the appellant narrowed the scope of the request and advised the Ministry that it was only seeking access to certain categories of records.

In turn, the Ministry issued a revised fee estimate to the appellant based on the narrowed request. The revised fee estimate totalled $730.00 and was calculated as follows:

Search time (13.5 hours x $30.00 per hour)	$405.00
Record preparation (3.5 hours x $30.00)	$105.00
Photocopies (1100 pages x .20 per page)	$220.00
Total	$730.00

The Ministry requested the appellant to remit payment of the deposit ($365.00) and advised that it will resume processing the request upon receipt of the deposit.

The appellant was not satisfied with the revised fee estimate. Further mediation was not possible so the appeal was transferred to the adjudication stage.

In this appeal, the issue of the amount of fees charged places an initial burden of proof on the Ministry. With respect to fee waiver, the appellant must bring itself within the relevant provisions of the *Act* and Regulation 460. To facilitate the orderly and fair processing of the appeal, this office initiated the inquiry by sending a Notice of Inquiry, setting out all issues in the appeal, to the Ministry. The Ministry's representations were then sent to the appellant, who submitted representations in response. The appellant's response was then provided to the Ministry, which in turn submitted reply representations.

DISCUSSION:

FEE ESTIMATE

Introduction

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;
>
> (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.
>
> ...

Under section 57(5) of the *Act*, my responsibility is to ensure that the amount charged by the Ministry is reasonable in the circumstances.

Submissions

The appellant submits that following the narrowing of the request, the small reduction in the Ministry's fee estimate was not commensurate with the reduction in the volume of records that were requested. The appellant also explains that it does not have access to the Ministry's document systems to know whether its submissions in this regard are accurate. Nevertheless, the appellant submits that the Ministry did not discharge its obligations set out in the Notice of Inquiry, by providing only a brief explanation that does not cover all the aspects required, and thus failed to justify its position.

The Ministry submits that subsequent to the issuance of it original fee estimate, wherein 1700 pages of records were identified as responsive to the request, discussions were held with the appellant in order to narrow the request, thereby reducing the fees. As a result of the discussions, the appellant indicated that he did not require records relating to general park information, identified by the Ministry as "miscellaneous". Duplicate records were also deleted from the request. As a result, the Ministry explains that the volume of records decreased by 30% to 1100 pages.

The Ministry goes on to explain that while this reduced the number of records and the costs associated with copying such records, it did not significantly reduce the search time involved. In this regard, the Ministry submits as follows:

> In this instance, … searches were conducted in nine offices of the Ministry. A search in every office was conducted using the search function on the e-mail system by using various key words such as "leases, Rondeau leaseholders, etc." Responsive records were selected, printed and/or copied. Each office then conducted a search of its hard copy files. Searches in the Ministry's office, Deputy's office and Assistant Deputy Minister's office involved 1) going through current 1999 and 2000 files and 2) reviewing the 1998 archives located on another floor of the building. For the other locations, individual office searches were conducted for specific files pertaining to Rondeau Provincial Park leases. If files were located, the records falling within the request were extracted. Those records were then compared with hard copies of the electronic records, and the duplicates removed.
>
> The narrowing of the request did not significantly reduce the search time. The search for the remaining records, memos, emails and attachments, letters, reports etc. involved going through the files and emails at the various locations. Removal of general information and miscellaneous records did not reduce the need to search for records at any location or reduce the number of files, which had to be searched. As a result, it took 13.5 hours to locate records responsive to the requests. With respect to the copying of records and the estimated time for review, given that the request involved 1100 pages, the charges for copying and preparing the records are in accordance with past orders of the Commission. Accordingly, it is the position of the Ministry that the calculation of fees is reasonable and should be upheld.

Findings

Search

Based on the Ministry's submissions and the extent of the searches which were required in order to locate the responsive records, I am satisfied that the 13.5 hours of search time is reasonable in the circumstances of this appeal. Accordingly, I uphold this portion of the Ministry's fee, totaling $405.00.

Preparation

"Preparing the record for disclosure" under subsection 57(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the *Act* (Orders 4, M-376 and P-1536). Similarly, charges for identifying records requiring severing, are also not allowable under the *Act*. These activities are part of an institution's general responsibilities under the *Act*, and are not specifically contemplated by the words "preparing a record for disclosure" under section 57(1)(b) (see for example Order MO-1380).

As indicated above, the Ministry states that "with respect to the copying of records and the *estimated time for review*, given that the request involved 1100 pages, the charge for photocopying and preparing the records are in accordance with past orders of the Commission" [emphasis added]. As the Ministry has not provided any additional information with respect to the preparation of the records, it appears from these representations that the 3.5 hours being charged by the Ministry in this regard involves reviewing the records for disclosure. As I indicated above, this activity cannot be charged for under the *Act*.

As noted earlier, prior to issuing its revised fee estimate, the Ministry did advise the appellant that approximately "twenty percent of the pages would be exempt from disclosure". It appears from this wording that the Ministry intends to withhold these pages in total. Even if the Ministry was contemplating disclosing certain records in part, it has not provided me with any details as to the nature and the amount of the information to be severed.

Therefore, without any additional information from the Ministry with respect to its fee for the preparation of records, I am unable to determine precisely what the Ministry is charging the appellant for in this regard and whether or not this charge is appropriate under the *Act*. Accordingly, I do not uphold this portion of the fee estimate.

Photocopying

The Ministry's fee estimate includes a charge of $220.00 for photocopying 1100 pages calculated at $0.20 per page. As indicated above, $0.20 per page is an allowable charge under the *Act*.

Although, as indicated above, the Ministry advised the appellant during mediation that approximately twenty percent of the pages would be exempt from disclosure, it is not clear whether the Ministry still intends to withhold these pages. Neither the Ministry's revised fee estimate nor its representations include any information in this regard.

Assuming that the Ministry does in fact intend to disclose 1100 pages of records to the appellant, I will uphold this portion of the Ministry's fee estimate. However, if the total number of pages to be disclosed by the Ministry totals less than 1100, I will order the Ministry to adjust its fee estimate accordingly.

In summary, I uphold the Ministry fee of $405.00 for search time, as well as $220.00 for photocopying, for a total of $625.00. I do not uphold the remainder of the Ministry's fee.

FEE WAIVER

Introduction

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.

Under section 57(5), an appellant has the right to ask the Commissioner to review an institution's decision not to waive the fee. The Commissioner may then either confirm or overturn this decision based on a consideration of the criteria set out in section 57(4) of the *Act* (Order P-474).

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] I am also mindful of the Legislature's intention to include a user pay principle in the *Act*, as evidenced by the provisions of section 57.

Appellant's Representations

The appellant is a non-profit, charitable environmental law organization whose mandate is to provide legal representation and advice on matters of environmental significance. The appellant

indicates that it has made regular use of the *Act* and similar legislation to obtain and disseminate information in the public interest. The appellant argues that the dissemination of the requested information will benefit public health, as contemplated by section 57(4)(c) of the *Act*.

In its representations, the appellant asserts that information pertaining to the environmental issues is necessarily related to public health and that the meaning of "public health" within section 57(4)(c) encompasses environmental health. The appellant submits that environmental concerns in relation to the proposed cottage leases mean that the requested information is directly related to public health.

Part of the appellant's submissions seek to establish a broad link between "environmental health" and "public health":

> "Public health" is not defined in the [*Act*]. The Ontario Government, however, defines public health in the following terms:
>
> > Public health is concerned with the health and well-being of the whole community rather than the treatment of illness and disability. Health is viewed as resource for everyday living, and in turn is influenced by the everyday environment that we are part of. Studies have repeatedly shown that the broad determinants of health such as level of income, social status, education, employment opportunities, work place environment, *physical environment*, and family/friend supports have as much or more to do about influencing health than does the presence of health care practitioners and facilities [appellant's emphasis].
>
> This definition demonstrates the important distinction between the narrower notion of "medical health" (i.e. the treatment of illness and disability) with the broader notion of "public health" (i.e. the well-being of the whole community). Public health is thus a broad category of matters that includes medical health and many other matters including those pertaining to the role of the "physical environment" as a health determinant.
>
> According to the World Health Organization, "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" (*Constitution of the World Health Organization*, preamble)
>
> A healthy environment including opportunities for recreation in natural settings both psychological and physical well being. The environmental aspect of public health is widely recognized by all levels of government and the scientific community.
>
> Indeed, the [Ministry's] own policy documents acknowledge the environment component to public health. In its Statement of Environment Values (SEV) …

> the [Ministry] asserts that the accomplishment of its identified goals will contribute to "healthy and safe people". In its highest-level strategic planning document, *Beyond 2000* … the [Ministry] commits to "ensuring that natural resources continue to provide people with … a healthy living environment" and recognizes that "[a] healthy environment is a key requirement to ensuring the economic and social well-being of the people of Ontario". The SEV also recognizes that "[a]ll life is connected, from the fungi in the soil to the birds in the sky". Once this basic biological reality is accepted, it is clear that public health is inseparable from ecosystem health.
>
> …
>
> The SEV was required to be produced by the [Ministry] by virtue of s. 7 of the *Environmental Bill of Rights* (EBR). The EBR establishes a "right to a healthful environment" in Ontario (Preamble and s.2(1)(c)) and required various Ministries, including the Ministry of Natural Resources, to produce an SEV that "explains how the purposes of this Act are to be applied" and how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of the decision making of the ministry" (ss. 7(a) and 7(b) of the EBR).

In submissions that are, in my view, more germane to the fee waiver issue in this appeal, the appellant also suggests that private leasing of provincial parklands is a public health issue:

> The continued leasing of provincial parklands to private individuals has direct adverse effects on physical, mental, and social well being, by limiting access to the park and by degrading the quality of the healthful experience of park users. The continued presence of private cottages prevents restoration of large portions of Rondeau Park to a natural habitat, and contributes to the proliferation of non-native species, which are displacing native flora in the park. This is especially important in Rondeau because it is the only large provincial park in southwestern Ontario. This part of the province (Kent, Essex Counties) has been subjected to intense urban, residential and agricultural development and opportunities for healthful enjoyment of natural areas are quite limited. …The impact of the cottages on this much-diminished natural heritage has generated expressions of concern from national organizations such as the Canadian Botanical Association … Indeed, the importance of protecting a natural area of significant size led to the creation of Rondeau as one of Ontario's first parks, and the goal of fully transferring the parklands over to healthful public enjoyment of them led to a specific regulation that requires such by the year 2017 … The prospect that this legal commitment may be altered so that these parklands will not be turned over to public enjoyment by 2017 is what led to this [freedom of information] request.
>
> In the Appellant's view, the cottage situation in Rondeau Park is symptomatic of wider problems of encroachment on Provincial Parks which conjointly pose an

> extremely serious threat to the integrity of the system, and thus to public health in Ontario. Information on cottage leases in the Park is pertinent to public health. As argued below, the dissemination of this information will promote public awareness of the health importance of the provincial park system and may lead to increased environmental quality in Rondeau Park, with resulting positive public health impacts. …
>
> *[I]n addition to presenting a threat to physical, mental and social well being through their impact on the environmental integrity of Rondeau Park, the cottages also present a threat to physical well being through their potential impact on water quality. In this sandy shoreline physical environment and soil conditions on which the cottages are built, there is a risk of adverse public health impacts from the wastewater and sewage generated by the cottages. Continued occupation of the site by cottages may give rise to water contamination problems.* … [emphasis added]

The appellant also submits that the dissemination of the information will benefit public health:

> … the plain meaning of s. 57(4)(c) is clear: in making his or her decision on granting a waiver, a head is to consider "whether *dissemination* of the record will benefit public health or safety," [original emphasis] not whether the record itself directly addresses a public health or safety issue. Thus, even if many of the records requested have to do with, for example, political issues surrounding the decision to renew the Rondeau leases, *dissemination* of these records may well have very significant effects on public health through raising awareness of the importance of access to natural habitats, and the political pressures preventing the return of leased parklands to their natural state [original emphasis].

Ministry's representations

In response to the appellant's representations, the Ministry submits the following:

> … The keystone to [the appellant's] representations appears to be what they term a "definition" of public health which has been adopted by the Ontario Government.
>
> This description is found on the Ministry of Health and Long-Term Care website which deals with the Public Health Program, a copy of which is attached. A careful reading of this page reveals a number of things which removes this keystone to the appellant's argument; thus, in the Ministry's view, causing it to collapse.
>
> First of all, the passage quoted is not provided as a definition of "public health" but as a description of the approach of the public health program. It contains no language stating that it is a definition. Indeed, the paragraph falls under the

paragraph "About the Program". The paragraph contains broad statements setting out that the approach takes into account "the health and well being of the entire community rather than the treatment of illness and disability". Such an approach is appropriate for a program dealing with public health, i.e. that it is community based and focused. However, the following paragraphs, which are missing from the representations of the appellant, set out the focus for that approach and are critical to understanding the approach and the page. They read as follows:

> *Public health focuses on three areas: preventing conditions that put health at risk (health protection)*, early detection of health problems (screening), and changing peoples and societies attitudes and practices regarding lifestyle choices (health promotion). [emphasis added]
>
> *Health protection works particularly in the areas of food and water safety environmental risks* such as toxic waste handling and air pollution, second-hand smoke, public sanitation, spread of rabies, vaccinations against major communicable diseases, and mandatory tuberculosis screening of immigrants to Canada. [emphases added]
>
> The screening programs are aimed at specific groups where the early detection of an illness of problem can lead to significant improvements in health. Examples of this are the Healthy Babies, Healthy Children program, preschool speech and language, school-age dental exams, and breast and cervical screening for cancer.
>
> The health promotion programs include the provision and education around tobacco use, nutrition, physical activity, injury prevention, birth control and reproductive health, prevention of sexually transmitted diseases including HIV/AIDS, and breastfeeding.
>
> Public health delivers its programs and services on a population health approach. This means that programs are targeted at either the public as a whole e.g. physical activity, dangers of second-hand smoke, or targeted sub-groups of the population such a expectant mothers (pre-natal health), high school students (drinking and driving), or women between the ages of 50-70 (breast cancer screening). Public health practitioners also aim to influence politicians and policy writers at all levels, to consider the health implications of proposed policies.

The second paragraph on the page is critical. It makes it clear that the public health program focus on three areas: (1) health promotion, i.e. preventing

> conditions that put health at risk (2) screening, i.e., early detection of health problems and (3) health promotion. The next three paragraphs provide examples or elucidation of the three areas. All are tied to the physical well being of members of the community.
>
> The next paragraph, which deals with Health Protection, is the most relevant for the purpose of this discussion. It ties health protection, public health with the environment, by citing that health protection works with "environmental risks such as toxic waste handling and air protection, second hand smoke, public sanitation, spread of rabies etc. Clearly the Public Health unit looks at environmental issues as they effect or could effect the physical well being of members of the community or public. This is consistent with your office definition of "public health" as set out in the [*Act*].

I note, however, that the appellant's representations, and particularly the passage I have highlighted in relation to possible problems with water quality and sewage, do in fact point to the very types of environmental risks that the Ministry defines as genuinely relating to public health.

The Ministry goes on to make an argument based on a provision of the freedom of information legislation passed by the legislature of British Columbia:

> To accept an expanded definition of the "public health" which includes any matter relating to environmental integrity or ecosystem health would stretch the definition well beyond that contemplated by the statute. If the intention had been that of the legislature, it would have adopted the specific language identifying "environment" as a grounds for a waiver as found in ss 57(5)(b) of the *Freedom of Information and Protection of Privacy Act* of British Columbia which reads:
>
>> (5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>>
>> (b) the record relates to a matter of public interest, including the <u>environment</u> or <u>public health and safety</u> … [Ministry's emphasis]
>
> The fact that the legislature did not do so clearly shows that environment and public interest are not grounds for waiver. The fact that the legislature in British Columbia adopted such language shows that such grounds are separate and cannot be read into the phrase "public health". Accordingly, it is the position of the Ministry that the commission was correct in its previous orders that public health must relate to matters involving the physical well being of a community and its members.

The Ministry goes on to submit that the records at issue relate to the leases of cottages in provincial parks and a debate about land uses in parks. The Ministry argues that while this is a

debate which may be of public interest, it is not a public health issue. In this regard, in its initial response to the Notice of Inquiry the Ministry stated the following:

> It is the position of the Ministry that the requester has failed to provide any evidence or demonstrate that the grounds for a fee waiver set out in subsection 57(4) applies in this case. In the June letter [which contains the appellant's initial submissions to the Ministry with respect to the fee waiver issue], the issues raised by the requester relate not to health and safety but to the management of the park such as is the leased park land being managed for the "enjoyment of all park users", restoration of natural habitat and the proliferation of non native species and soil and water conditions in the park. While these are matters of public interest, they do not relate to public health and safety as contemplated by subsection 57(4). …

Finally, the Ministry disputes the appellant's argument that dissemination of information will benefit public health. The Ministry submits that the records relate to a decision about land use or the use of provincial parks and not to a debate relating to public health issues. The Ministry argues that dissemination of the records may further debate upon permitted land uses in the park but not public health and safety issues.

The Ministry also relies on Orders M-404, P-608 and P-698 in support of its position that section 57(4)(c) is not applicable in the circumstances of this appeal.

Analysis of Previous Orders and Case Law

In Order P-474, former Assistant Commissioner Irwin Glasberg reviewed the principles that 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.

The Williams Commission discussion quoted by the former Assistant Commissioner is aimed at fee waiver in the broad public interest, whereas the section actually passed by the legislature restricts this type of waiver to circumstances in which dissemination of the information "would benefit public health or safety". However, the former Assistant Commissioner's criteria clearly place the Williams Commission's discussion of "public interest" in the context of a benefit to public health or safety, and in my view, therefore, they are appropriate for analyzing the application of section 57(4)(c). I adopt his comments for the purposes of the present appeal.

A number of previous orders of this office have concluded that certain matters relating to the environment also raise serious public health and/or safety issues. In Order PO-1909, for instance, Adjudicator Donald Hale found that matters relating to the safety of Ontario's air and water, by their very nature, raise a public safety concern. In considering the factors outlined in Order P-474, he stated:

> 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. …

Similarly in Order M-408, former Adjudicator John Higgins determined that the subject of the records relating to a proposed landfill site is a matter of public interest and relates to a public health or safety issue. In that appeal, the appellant argued the following:

> It is common knowledge that ... waste landfills are public health and safety issues. Landfills generate hazardous leachate which, if the site is not properly situated and designed, will eventually escape from the landfill and contaminate drinking water and surface water. This, in fact, is exactly what happened in the case of the Cobourg landfill, which is immediately adjacent to the Landfill proposed by the [County]. The Environmental Assessment Board, in the case of the Cobourg

> landfill, deemed it to be sufficiently unsuitable to require that the site be closed immediately.
>
> Landfills also generate a variety of other harmful or potentially harmful environmental effects. For instance, landfills generate organic airborne compounds, many of which are known carcinogens (e.g. vinyl chloride). Landfills are also significant generators of dust and suspended particulate which can cause significant health effects on those in the vicinity of the site.

Based on the appellant's representations former Adjudicator Higgins concluded that the criteria established in Order P-474 had been met, and that disclosure of the record would benefit public health and safety within the meaning of section 45(4)(c) of the *Municipal Freedom of Information and Protection of Privacy Act*, which is equivalent to section 57(4)(c) of the *Act*.

In Order PO-1688, Senior Adjudicator David Goodis dealt with an appeal involving certain records relating to an application for a certificate of approval under section 9 of the *Environmental Protection Act* to discharge air emissions into the natural environment at a specified location. In concluding that there is a compelling public interest in the disclosure of the records under section 23 of the *Act*, he stated:

> The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal to change its operations, if implemented, will impact the environment.
>
> My finding is consistent with one of the fundamental, public interest purposes of the *EBR* which, as the [Environmental Commissioner of Ontario] has stated, is the protection of the environment, in part by providing mechanisms to ensure that government ministries act in the public interest when making decisions about the environment. I agree with the ECO's submission that disclosure of relevant information is crucial if these mechanisms are to work effectively and that, therefore, disclosure of a record regarding the environmental impacts of proposed air emissions, such as the record in this case, would be in the public interest.
>
> Further, this finding is consistent with Orders P-270 and P-1190 (upheld on judicial review 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.)), in which compelling public interests were found in the disclosure of nuclear safety records. Although the circumstances in these cases were not the same as those found here, what is common to all of these cases is

> that the records at issue concerned *environmental matters with the potential to affect the health and safety of the public*. [emphasis added]

As part of Order PO-1688, Senior Adjudicator Goodis also considered the overall purpose of the *EBR*, explaining that the *EBR* was enacted for the following reasons, as described in its preamble:

> The people of Ontario recognize the inherent value of the natural environment.
>
> The people of Ontario have a right to a *healthful environment*.
>
> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.
>
> While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner. [emphasis added]

The right to a safe environment was also emphasized in the Supreme Court of Canada decision in *R. v. Canadian Pacific Ltd.* (1995), 125 D.L.R. (4th) 385 at 417-418 (S.C.C.), where the court said:

> . . . Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the Exxon Valdez oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming, and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment* [Working Paper 44 (Ottawa: The Commission, 1985], which concluded at p. 8 that:
>
>> ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
>>
>> . . . environmental protection [has] emerged as a fundamental value in Canadian society . . .

Findings

There is no dispute in this case that the subject matter of the requested records is a matter of public interest. The focus of section 57(4)(c), however, 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. [Order MO-1336]

As outlined above, the Ministry argues that since the legislature did not adopt the specific language identifying "environment" as a grounds for a waiver, as found in section 57(5)(b) of the *Freedom of Information and Protection of Privacy Act* of British Columbia, this shows that environment is not a ground for waiver. The Ministry goes on to state that the fact that the legislature in British Columbia adopted such language shows that grounds such as environment and public interest are separate and cannot be read into the phrase "public health".

The Ministry is, in effect, arguing that the phrase "public health" in the British Columbia legislation and in the *Act* must have a consistent meaning, and that the specific inclusion of "environment" in the former enactment means it is excluded in the latter. Such an argument invites consideration of the doctrine of statutory interpretation known as "coherence". In *Driedger on the Construction of Statutes*, 3rd ed., by Ruth L Sullivan (1994: Butterworths, Toronto and Vancouver), the author explains this principle as follows (at p. 176):

> It is presumed that the body of legislation *enacted by a legislature* does not contain contradictions of inconsistencies, that each provision is capable of operating without coming into conflict with any other … [emphasis added]

Similarly, in The Interpretation of Legislation in Canada (2nd ed.) by Pierre André Côté (1991: Les Éditions Yvon Blais Inc., Cowansville, Que.), the author explains the principle as follows, at p. 288:

> Different enactments *of the same legislature* are supposedly as consistent as the provisions of a single enactment. All legislation *of one Parliament* is deemed to make up a coherent system. … The presumption of coherence in enactments *of the same legislature* is even stronger when they relate to the same subject matter … [emphases added]

As noted by both the Sullivan and Côté texts, the principle of coherence applies to enactments of the same legislature, and therefore cannot apply here.

Based on the above-mentioned orders, it is clear that matters concerning the environment and those concerning public health and safety are not necessarily mutually exclusive and that there is clearly a significant overlap between them. As illustrated above, very often matters concerning the environment, by their very nature, raise important public health or safety concerns. Having said that however, I am not persuaded that every issue concerning the environment would automatically be considered a public health or safety issue, as contemplated by section 57(4)(c).

In my view, each case must be considered individually and a determination made as to whether the identified factors raise public health or safety issues within the meaning of section 57(4)(c).

As outlined above, the Ministry argues that the issues raised by the requester "relate not to health and safety but to the management of the park such as is the leased park land being managed for the 'enjoyment of all park users', restoration of natural habitat and the proliferation of non native species and *soil and water conditions in the park*" [emphasis added]. The Ministry goes on to state that "[w]hile these are matters of public interest, they do not relate to public health and safety as contemplated by subsection 57(4)".

I do not accept the Ministry's position. Consistent with these findings in previous orders, and with the Ministry's own submissions that health protection relates to "water safety environmental risks", I have concluded that soil and water conditions are clearly matters that concern public health and safety. I recognise that the circumstances surrounding this appeal are different from those identified in the above-mentioned orders. In my view, however, what is common to all of these cases is that the records at issue concern environmental matters with the potential to affect the health and safety of the public. I am therefore satisfied that the environmental concerns associated with the issue of extending the leases in question are sufficiently connected to public health to bring them within the scope of section 57(4)(c).

This view is supported by the Ministry's characterization of some of the issues surrounding this matter, in a letter (provided by the appellant with his representations) from Ontario Parks to a particular environmental protection organization, responding on the issue of the possible extension of the leases in question. The letter states:

> Ontario Parks is undertaking discussions with Rondeau's cottage leaseholders about a possible lease extension proposal. These discussions were initiated at the request of the Rondeau Park Leaseholders' Association and in response to a council resolution from the Municipality of Chatham-Kent. Any draft proposal would need to be acceptable to the province and would have to address a number of items including compliance with *environmental, health and safety standards* [emphasis added].

In my view this response confirms that in addition to and in connection with environmental matters, health and safety issues are also clearly part of the considerations of whether or not to extend the leases in question.

While I am not in a position to assess the merits of the health concerns as outlined by the appellant, and ultimately these concerns may or may not be determined to be valid or significant, I am satisfied that disclosure of the records would benefit public health by assisting the public in participating in any consultation on the subject of extending the leases and would meaningfully contribute to the development of understanding of the public health and safety issues surrounding this matter. I also believe it is likely that the appellant would disseminate the contents of the records.

As indicated above, the Ministry relies on Orders M-404, P-608 and P-698 in support of its position that section 57(4)(c) is not applicable in the circumstances of this appeal.

The circumstances in Order M-404 differ significantly from those in the present appeal in that this case did not deal with environmental issues and their potential effect on public health and safety. Therefore, in my view, the reasoning in this order is not helpful in determining this appeal.

In Orders P-608 and P-698, which also dealt with different circumstances, the Adjudicators determined that the appellants had not provided sufficient evidence to establish that dissemination of the records would benefit public health and safety. In these circumstances, these two decisions do not advance the Ministry's argument.

I would also point out that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations [*Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.)]. [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health) v. Goodis* [2000] O.J. No. 4944 Div. Ct.]

Therefore, I conclude section 57(4)(c) of the *Act* applies in the circumstances, subject to any finding I may make below under the "fair and equitable" test.

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

The *Act* requires that I also make a determination as to whether it is "fair and equitable" to waive the fee. Previous orders have set out a number of factors to be considered in determining whether a denial of a fee waiver is "fair and equitable" [P-474, P-890, P-1183, P-1259 and P-1557]. These factors are:

(1) the manner in which the institution attempted to respond to the appellant's request;

(2) whether the institution worked with the appellant to narrow and/or clarify the request;

(3) whether the institution provided any documentation to the appellant free of charge;

(4) whether the appellant worked constructively with the institution to narrow the scope of the request;

(5) whether the request involves a large number of records;

(6) whether or not the appellant has advanced a compromise solution which would reduce costs; and

(7) whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the Ministry.

The appellant argues that "the waiver of the fee would not shift an unreasonable burden on the institution in that (a) the issue raised is one of importance to public health and (b) if a charitable public interest group wishes to inform itself of government deliberations which may potentially alter the government's present legal obligation to phase out the cottage leases by 2017, it should not be frustrated in involving itself in such an important public debate by being refused access to publicly owned records about a publicly owned provincial park".

Based on the material before me, it is clear that the Ministry worked cooperatively with the appellant and attempted to provide him with as much information as possible about the requested records in order to assist in the narrowing of the request. Equally important is the fact that the appellant also worked constructively with the Ministry in this regard. In my view, it is noteworthy that the appellant's request is narrow in scope and is focused on one specific issue, that being the possible extension of the leases in a particular provincial park. Although I recognize that the narrowing of the request did not significantly reduce the search time in this case and that 1100 pages of responsive records is still a fairly large number, I am satisfied that the appellant has made reasonable attempts to limit the scope of the request in order to try and reduce the costs.

In considering the representations of the parties and the nature of the information at issue in this appeal, I find that it would be fair and equitable to waive the search fees in the circumstances of this appeal. However, in light of the fairly large number of responsive records, I find that 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*.

Accordingly, I order the Ministry to waive the search charges in this appeal. I uphold the Ministry's decision not to waive any photocopying costs.

ORDER:

1. I uphold the Ministry fee of $405.00 for search time, as well as $220.00 for photocopying, for a total of $625.00. I do not uphold the remainder of the Ministry's fee.

2. I order the Ministry to waive the fee of $405.00 for search time.

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

4. If the actual number of pages to be copied varies from the estimate, the Ministry will be obliged to adjust its fee accordingly. For greater certainty, I allow the Ministry to charge the appellant $0.20 for each record page to be disclosed to the appellant.

Original signed by: September 28, 2001
Irena Pascoe
Adjudicator