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

ORDER PO-2207

Appeal PA-020123-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Heath and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records that would enable the requester to quantify the dollar amount that women with ruptured or defective breast implants have cost Ontario's health care system since the federal government began pulling the devices off the market in 1991. The requester indicated that the records should include:

- e-mail correspondence with Health Canada;
- correspondence with health care professionals such as plastic surgeons and general practitioners;
- correspondence with the breast implant manufacturers;
- briefing notes; etc.

The Ministry found no responsive records in the Registration and Claims Branch of the Ministry. At the suggestion of the requester, the Ministry expanded the search to include the Communications and Information and Legal Services Branches of the Ministry. Seventeen responsive records were located. In a decision letter dated April 4, 2002, the Ministry agreed to disclose three of the records, denied access to 13 others the records in their entirety and one record in part, claiming the application of sections 13(1) (advice or recommendations), 15(a) (relations with other governments) and 19 (solicitor-client privilege) of the *Act*.

The Ministry also assessed a fee for the records in the amount of $491.10. The requester requested a waiver of the fee, which was also denied by decision letter dated June 20, 2002.

The requester, now the appellant, appealed both the decision to deny access and the denial of a fee waiver by the Ministry.

Mediation of the issues was unsuccessful. During the mediation stage of the appeal, the appellant raised the applicability of section 23 of the *Act* (compelling public interest) and this has been added to the issues to be resolved in this appeal.

The Commissioner's office initially sought and received representations from the Ministry. The non-confidential portions of the Ministry's representations were then shared with the appellant, along with a Notice of Inquiry. The appellant did not submit representations in response to the Notice.

RECORDS:

The records at issue consist of draft and final inter-office memoranda; draft and final correspondence; draft and final briefing notes; draft court documents; and an issues note.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry has claimed the application of the solicitor-client privilege exemption in section 19 to all but one of the 14 records remaining at issue in this appeal. Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

The Ministry's representations

The Ministry provided detailed representations on the application of section 19 to each of the records. The majority of those submissions, however, refer to the contents of the records and were not shared with the appellant for that reason. I am, therefore, unable to reproduce them in the body of this decision as to do so would reveal the information contained in the records.

In its public submissions, the Ministry indicates that the Ontario Health Insurance Plan (OHIP), which is administered by the Ministry, "will pay the ongoing costs for removal of faulty breast implants and the treatment of long-term effects, such as cancer, auto-immune disease and birth defects." As a result, it submits that:

> OHIP has a statutory right to recover from wrongdoers all past and future costs (including the cost of hospital and physician services) through subrogation, if a financial award or settlement is made in connection with a legal action for personal injury resulting from the fault of another person.
>
> OHIP's right of subrogation with respect to breast implants has arisen as a result of class action litigation in both the U.S. and Ontario. The General Manager's [on behalf of OHIP] subrogated claim relates to the cost of implant removal and treatment for any long-term systemic or chronic diseases resulting from the implants.
>
> In 1994, the U.S. District Court of Alabama released a court order with a proposed settlement of legal action against U.S. breast implant manufacturers and distributors. The proposed settlement covered all claims, including those of foreign [i.e. Canadian] claimants . . .

As a result, the Ministry indicates that it has an interest in the outcome of the various class action lawsuits currently underway. At the time the records were created, the Ministry was involved in

pursuing its legal remedies on behalf of OHIP with respect to the proposed settlement in the U.S. District Court. It had retained outside counsel and was in the process of instructing them as to the basis for the OHIP claim, as well as obtaining legal advice from this outside legal advisor. Many of the records relate directly to the communications that took place between the law firm and the Ministry with respect to the pursuit of various types of relief from the U. S. District Court. The Ministry submits that these records reflect confidential communications between a solicitor and his/her client made for the purpose of giving or obtaining legal advice.

As noted above, the appellant did not provide representations in response to the Notice of Inquiry.

Findings

Record 1

Record 1 consists of an email from one Ministry lawyer to another in which she comments on a draft letter, attached to the email, prepared by the second lawyer. The draft letter sets out the Ministry's legal status and arguments with respect to the litigation and was intended to assist outside counsel retained by the Ministry to understand and put forward the nature of OHIP's claim.

The email clearly represents a confidential communication between solicitors about a legal issue that was made for the purpose of seeking, giving and formulating legal advice. I find that it qualifies for exemption under the solicitor-client communication component of section 19.

The draft letter is an early version of a communication between a Ministry lawyer and outside counsel retained by the Ministry. The final version of this letter forms part of the documents comprising Record 2. I find that the draft letter forms part of the Ministry's lawyer's working papers relating to the seeking, giving and formulating of legal advice, as contemplated by the decision in *Susan Hosiery* above. As a result, I find that both of the documents which comprise Record 1 are exempt from disclosure under section 19.

Record 2

Record 2 consists of a facsimile cover page sent from one Ministry counsel to another to which are attached the final version of the letter referred to in my discussion of Record 1, a letter sent from a Ministry lawyer to counsel for several other Canadian provinces who were also submitting claims in the U.S. District Court action and a letter from the Ministry's outside counsel to an official with OHIP reporting on his progress in pursuing the claim on OHIP's behalf.

In Order PO-1931, former Adjudicator Irena Pascoe addressed the application of section 19 to correspondence passing between two Crown counsel. She found that:

> Although the Ministry did not make any specific submissions with respect to solicitor-client communication privilege, from my review of the records, I find that Records . . . meet the solicitor-client communication privilege test as set out above. These records consist of internal communications between Crown counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to the various stages of the appellant's husband's prosecution. Based on the nature of these records and the context in which they were created, I am satisfied that this information was treated as confidential as between the Crowns. Accordingly, I find that [the records] qualify for exemption under the solicitor-client communications privilege component of section 19 of the *Act* and are, therefore, exempt from disclosure under section 49(a).

In the present appeal, I find that each of the three pieces of correspondence which comprise Record 2 were made for the purpose of seeking or giving legal advice in the context of the U.S. District Court settlement proceeding. They consist of confidential communications between counsel representing both the Ministry and other claimants who had a common interest in the proceedings. Accordingly, I find that all of the documents included in Record 2 fall within the scope of the solicitor-client communication privilege component of section 19.

Records 3 and 4

Records 3 and 4 are draft briefing notes prepared by Ministry counsel setting out the Ministry's legal position with respect to its claim in the U.S. District Court proceeding. I find that these records represent part of the solicitors' working papers relating to the giving of legal advice to the Ministry on legal issues involving this proceeding. I find that both Records 3 and 4 qualify for exemption under section 19 on this basis.

Records 6 and 7

Record 6 is a draft version of a brief prepared by outside counsel on behalf of the Ministry and other Canadian provinces in support of a motion to intervene in the settlement proceedings before the U.S. District Court. The brief was provided to Ministry counsel in its capacity as the client in these proceedings in order to elicit the Ministry's comments on its contents prior to its being filed with the court. Record 7 is a nearly-identical version of Record 6 provided to the Ministry's counsel by its outside lawyers several days later.

I find that Records 6 and 7 qualify for exemption under section 19 as they represent confidential communications between a solicitor (in this case the outside counsel) and client (the Ministry) made for the purpose of giving legal advice and seeking the client's instructions.

Record 8

Record 8 consists of an email from a Ministry lawyer to an official with the Ministry, a draft letter sent by the same Ministry lawyer to counsel for another Canadian province and two other

emails between Ministry counsel to which are attached a draft letter to the Ministry's outside lawyer. In my view, all of these communications fall within the ambit of the solicitor-client communication privilege on the basis that they form part of the "continuum of communications" passing between counsel and between the Ministry and its lawyers, as contemplated in *Balabel*.

These records represent communications between a solicitor and client and counsel themselves with a view to keeping each other informed of events in the proceedings before the U.S. District Court. I find that all of Record 8 is, accordingly, exempt under section 19.

Record 9

Record 9 consists of an interoffice memorandum from a Ministry lawyer to an official with the Ministry and another legal counsel and a draft memorandum to the Deputy Minister containing legal advice provided to the Ministry by the outside lawyer. In my view, both of these documents contain confidential communications between a solicitor and his or her client which are directly related to the seeking and providing of legal advice. I find that both documents which comprise Record 9 are exempt from disclosure under section 19.

Record 10

This record is an email communication from one Ministry counsel to another reporting on a legal issue relating to the U.S. District Court proceeding. I find that it represents a confidential communication between counsel made for the purpose of providing legal advice. As a result, I find that Record 10 qualifies for exemption under section 19.

Record 11

Record 11 is a one-page briefing note prepared by Ministry counsel for the purpose of bringing its recipients, Ministry staff involved in the OHIP claim, up to date on the status of the proceedings. The Ministry indicates that the record contains both legal advice and factual information and forms part of the confidential working papers of the Ministry's counsel. I find that it qualifies for exemption under the principles expressed in *Susan Hosiery* as it is directly related to seeking, formulating or giving legal advice.

Record 13

Record 13 is an electronic interoffice memorandum from a Ministry lawyer to two others. Attached to this email message is the draft briefing note which is described above as Record 3. I find that the email memorandum is exempt under section 19 as it contains legal advice provided from one Ministry counsel to several others of a confidential nature

Record 15

Record 15 is a letter from a Ministry lawyer to its outside counsel giving instructions as to how the client, the Ministry, wishes the solicitor, the outside counsel, to proceed. I find that this documents is a confidential communication made for the purpose of seeking legal advice and that it is, accordingly, exempt under section 19.

Also included in Record 15 is a letter from counsel with the Province of Manitoba to the outside counsel retained by several provinces, including Ontario, to pursue its claims before the U.S. District Court. I find that this letter qualifies as a confidential communication between a solicitor, the outside counsel, and a client, the Province of Manitoba, relating to the provision of legal services. In addition, I find that any privilege which may exist in this record was not waived by Manitoba when it was shared with legal representatives of the Ontario Ministry as these parties carry a common interest in the outcome of the litigation before the U.S. District Court. As a result, I find that this portion of Record 15 is exempt from disclosure under section 19.

The last part of Record 15 consists of several facsimile cover pages and an affidavit which were provided to the Ministry's outside counsel by the lawyers responsible for carriage of the matter within the Ministry. I find that these communications form part of the "continuum of communications" between solicitor and client and are, accordingly, exempt under section 19.

Record 16

The Ministry indicates that Record 16 "is a memo from a Ministry Counsel that was emailed to policy staff in the Ministry." I find that Record 16 contains confidential legal advice from the Ministry's lawyer to those staff who were its intended recipients related directly to a legal issue involving the Ministry. As a result, I find that it qualifies for exemption under the solicitor-client communication component of section 19.

By way of summary, I find that Records 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 15 and 16 are exempt from disclosure under section 19.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims that portions of Record 12 are exempt from disclosure under the discretionary exemption in section 15(a) of the *Act*, which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

Record 12 consists of two nearly-identical briefing notes. The Ministry has claimed the application of section 15(a) to only a portion of pages 1, 2 and 3 of the briefing notes.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of sections 15(b) and (c) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

The Ministry's representations

Again, the Ministry has provided me with extensive confidential representations on the application of section 15(a) to portions of Record 12. I am unable to reproduce those submissions in the text of this decision, however, as to do so would reveal the substance of the record itself. Essentially, the Ministry takes the position that the records relate to intergovernmental relations and that their disclosure could reasonably be expected to prejudice the conduct of those relations. Neither the Ministry's public or their confidential representations, however, describe how this prejudice might occur or the nature of the harm which disclosure of the passages at issue might cause to the conduct of those relations.

Findings with respect to section 15(a)

The first severance, at pages one and two of Record 12, concern an agreed-upon strategy for the provinces involved to pursue in recovering certain medical costs arising from the negligent manufacturing and distribution of breast implants. The second severance, at page 3 of both copies of Record 12, relates certain actions to be taken following the date of the memorandum by the Ontario Ministry. The actions to be undertaken by the Ministry and its provincial counterparts that are described in these passages have long-since taken place. I note that Record 12 is dated May 28, 1992 and that the Ministry has agreed to disclose the majority of its contents to the appellant, upon payment of the required fee.

In my view, the Ministry has not provided me with the kind of "detailed and convincing" evidence required to establish the application of section 15(a) to the two excerpts from Record 12 under consideration. I specifically find that I have not been provided with sufficient evidence to substantiate a finding that the disclosure of these particular passages from Record 12 could reasonably be expected to result in harm to the conduct of intergovernmental relations by the Government of Ontario. As a result, I find that section 15(a) has no application to the severed information contained in Record 12.

ADVICE OR RECOMMENDATIONS

The Ministry has also taken the position that the excerpts from Record 12 are also exempt from disclosure under the discretionary exemption in section 13(1) of the *Act*, which reads:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

In support of its argument that Record 12 contains information which falls within the ambit of the exemption in section 13(1), the Ministry simply states that "Record 12 contains several specific recommendations to the Ministry of Health." It then goes on to list certain steps to be followed by both the Ministry and its provincial counterparts in furthering the claim under consideration.

I find that the first excerpt from pages one and two of Record 12 does not contain any information which qualifies as "advice or recommendations" within the meaning of section 13(1). The second excerpt, at page 3 of both copies of Record 12, follows a heading entitled "Recommended Ministry Response". In my view, the excerpt does not contain information which could properly be characterized as either advice or recommendations. Rather, it simply states the next steps to be followed by the Ministry in the course of its pursuit of the claim discussed elsewhere in Record 12. In my view, the excerpt does not set out a recommended course of action but instead, simply states the actions to be taken by the Ministry.

I find that section 13(1) has no application to Record 12. As no other exemptions have been claimed to the undisclosed portions of this record, and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant, subject to my findings with respect to the fee estimate issue below.

PUBLIC INTEREST OVERRIDE

The public interest override provided by section 23 does not apply to records which qualify for exemption under sections 12, 14, 16 or 19 of the *Act*. I have found that Records 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 15 and 16 are exempt from disclosure under section 19 and that the passages from Record 12 at issue are not exempt under sections 13(1) and 15(a). Because the public interest override provision in section 23 cannot apply to records which are exempt under section 19, and I have found that sections 13(1) and 15(a) do not apply to Record 12, it is not necessary for me to address the possible application of section 23 to any of the records at issue in this appeal.

FEES

Introduction

Sections 48(1)(c) and 57(1) of the *Act* require an institution to charge fees for requests under the *Act*. Section 57(4) requires an institution to waive fees in certain circumstances. More specific provisions regarding fees and fee waiver are found in sections 6 through 9 of R.R.O. 1990, Regulation 460. The IPC may review the amount of a fee or fee estimate, or the institution's decision not to waive a fee.

Is the fee in accordance with section 57(1) and sections 6 through 9 of Regulation 460?

In its decision letter, the Ministry originally indicated that a fee of $498.60 (later reduced to $491.10) was payable to cover the cost of processing the request. In its representations, this fee was broken down to include $2.40 for photocopying charges (12 pages), $472.50 for the cost of searching for the responsive records (15.75 hours @ $30 per hour) and $3.00 to prepare the records for disclosure (3 pages @ $7.50 per quarter hour), for a total of $477.90.

The Ministry submits that because the request was for specific information relating to financial costs, three individuals in the Ministry's Legal Services Branch conducted a manual search of at least 10 records storage boxes of materials for a total of 15.75 hours. The Ministry does not explain, however, why it was necessary for 3 individuals to conduct the search and why they required 15.75 hours to search just 10 records storage boxes.

I uphold the fees claimed by the Ministry for photocopying and preparation charges, as these amounts fall within the fees set forth in the *Act* and the Regulations thereunder.

I am not, however, satisfied that the fees calculated by the Ministry to reflect the search time required to identify and locate responsive records is reasonable. In my view, it was not reasonable to charge a fee for the cost of "at least" three individuals from the Legal Services Branch to review "at least" 10 boxes of documents reflecting 15.75 hours of search time. The Ministry has not provided me with any representations as to why it was necessary for three individuals to conduct the required searches and why they required what I consider to be an inordinate amount to time to locate the requested records. As a result, I am unable to uphold the fee as calculated by the Ministry. I am prepared, instead, to allow a fee reflecting a search time of five hours for one knowledgeable individual to review the contents of 10 storage boxes as this more accurately reflects, in my view, the actual search time required. I will, accordingly, allow a fee of $150 for search time, for a total fee of $155.40.

FEE WAIVER

Generally

On an appeal of a fee waiver decision, the Commissioner may either confirm or overturn the decision based on a consideration of the criteria set out in section 57(4) of the *Act*. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

Factors for the IPC to consider in reviewing a decision to deny a fee waiver request include:

- the extent to which the actual cost of processing, collecting and copying the records varies from the amount charged by the institution;
- whether the payment will cause financial hardship for the requester;
- whether dissemination of the records will benefit public health or safety;
- whether the requester is given access to the records;
- if the amount charged is under $5, whether the amount of the payment is too small to justify requiring payment.

In addition to the above, section 57(4) of the *Act* also requires consideration of whether it would be "fair and equitable" to waive the fee. Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors are:

- the manner in which the institution attempted to respond to the appellant's request;
- whether the institution worked with the appellant to narrow and/or clarify the request;
- whether the institution provided any documentation to the appellant free of charge;
- whether the appellant worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether or not the appellant has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Order M-408]

Where dissemination of information for the benefit of public health and safety may be a relevant factor:

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.

[Order P-474]

The Ministry's representations

The Ministry states that:

> It has been established in previous orders that the person requesting the fee waiver must justify the request and demonstrate that the criteria for a fee waiver are present in the circumstances [Orders M-429, M-914 and P-1349]. In applying for the fee waiver in this case the appellant did not provide any basis for the request for a waiver except that he was going to receive 'little material'.

The Ministry points out that the appellant has failed to provide any evidence in support of his contention that he ought to be granted a fee waiver. In addition, the appellant has failed to provide any evidence that the payment of the fee indicated would cause him financial hardship and has not demonstrated that there exists a public interest in the disclosure of the requested information, which is mainly financial in nature.

Findings

In Order P-1122, former Adjudicator John Higgins declined to review an institution's decision not to grant a fee waiver in circumstances similar to those present in this appeal. He found that:

> In order to substantiate a fee waiver request, the appellant must first demonstrate that it has met the criteria in one of the subsections of section 57(4). The appellant's waiver request states that payment of the fee would cause financial hardship (section 57(4)(b)), but the appellant has not provided any information to substantiate this claim. Nor have I been provided with any information to bring the waiver application within the criteria enunciated in section 57(4)(a), (c) or (d). In particular, the alleged benefit to individuals the appellant locates, and to the economy generally, do not relate to any of these criteria.

In the present appeal, the appellant is a broadcast journalist and it can be presumed that the request flowed from an interest in reporting on a newsworthy story, as opposed to some private interest on the part of the appellant.

I find, however, that the appellant has not provided me with any evidence whatsoever to substantiate his request for a fee waiver on the basis that the disclosure of the records would yield a public benefit by either disclosing a public health or safety concern or by contributing meaningfully to the development of understanding of an important public health or safety issue. In addition, based on my review of the records which are not subject to exemption, and therefore subject to disclosure should the fee be paid or waived, the subject matter of these documents does not lead to a public health or safety concern.

As a result, I find that the appellant has not met the burden of establishing that a fee waiver is warranted in the circumstances of this appeal. The records which are not subject to an exemption are not such that their dissemination clearly would yield a public benefit with respect to a public health or safety issue. I uphold the Ministry's decision not to grant a fee waiver in this case.

ORDER:

1. I uphold the Ministry's decision to charge a fee of $155.40.

2. I uphold the Ministry's decision not to grant a fee waiver under section 57(4) of the *Act*.

3. I uphold the Ministry's decision to deny access to Records 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 15 and 16 on the basis that they are exempt from disclosure under section 19 of the *Act*.

4. Upon payment of the fee described in Order Provision 1, I order the Ministry to disclose Records 5, 12 and 14 to the appellant by providing him with a copy. Disclosure of Records 5, 12 and 14 are to be made within fourteen (14) days of the date of payment of the fee.

Original signed by: November 19, 2003
Donald Hale
Adjudicator