



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2333**

**Appeal PA-030265-1**

**Ministry of Health and Long-Term Care**



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## **NATURE OF THE APPEAL:**

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the Act). In that decision, the Ministry denied a request to waive the fees associated with a request. The only issue to be decided in this appeal is whether the fee should be waived.

## **BACKGROUND**

A request was submitted to the Ministry under the Act for access to the following information:

...copies of Unusual Occurrence Reports filed by certain long term care facilities (nursing homes and homes for the aged) in Ontario. The reports (the white copies) are filed to the regional office of your ministry.

A blank copy of a report is attached. Below you will find a list of the ministry regions and the facility providers for which I would like reports.

I would like the reports, in each case, for the years 2000, 2001 and 2002.

...

Please remove the following personal information so that the documents can be released without a privacy concern: Name of resident, date of birth of resident.

I am requesting a fee waiver in this case.

The Ministry issued an interim decision containing a fee estimate of \$13,835.00. The Ministry denied the request for a fee waiver. Concerning the issue of the waiver of the fee, the Ministry stated:

The request for a fee waiver under section 57(4) of the Act is denied. Long-term care facilities are mandated by legislation to report any unusual occurrences to the Ministry and in the same report provide a plan to correct the situation or prevent reoccurrence. The reported incidents are part of the daily operation of a facility and the dissemination of the incident and/or the solution would not benefit public health or safety.

Following receipt of this decision, the requester agreed to narrow the scope of the request as follows:

I am asking for Unusual Occurrence Reports for “alleged/actual abuse/assault” over a five-year period starting April 28, 1998.

I have attached a spreadsheet with the names of the nursing homes, owner and location, along with the roll-up of abuse cases (where available) that you provided to me. In the case of the Toronto Region, you were not able to provide me with

the numbers. I am requesting the abuse reports for the time period specified for the facilities specified.

...

I am requesting a fee waiver in this case.

The requester also included information concerning the fee waiver request. That part of the request stated:

This [fee waiver] request is based on section 57(4)(c) of the *Act*....

Nursing homes provide care for the elderly. These people are arguably the most vulnerable part of our community. Reports relating to their care should be made public. In the recent case of PO-1962, involving [a newspaper] and the Ministry of Community and Social Services, the [IPC] found that serious occurrence reports (similar to unusual occurrence reports) are a matter of public, not private, interest.

The decision read: "In summary, I find that the subject matter of the serious occurrence reports and the annual summaries is a matter of public rather than private interest; this subject matter relates directly to a public health or safety issue; dissemination of the records would yield a public benefit by disclosing a public health and safety concern and contributing meaningfully to the development of understanding of this important health or safety issue; and it is highly probable that the appellant will disseminate the contents of the records. Accordingly, the appellant is entitled to a fee waiver, provided it is "fair and equitable" to do so in the circumstances."

In response to the revised request, the Ministry issued another interim decision containing a fee estimate of \$6,772.20. The Ministry again denied the request for a fee waiver, and that part of the decision read as follows:

The request for a fee waiver is denied. Section 57 of the *Act* notes that a fee waiver may be applied when:

*(a) The cost of processing varies from the estimated amount.*

The costs presented will be actual amounts not estimated amounts.

*(b) The payment will cause financial hardship for the requestor.*

The requester's employer reported [a significant income].

*(c) Dissemination of the record will benefit public health or safety.*

Long-term care facilities are mandated by legislation to report any unusual occurrences to the Ministry and in the same report provide a plan to correct the situation or prevent reoccurrence. The reported incidents are part of the daily operation of a facility and the dissemination of the incident and/or the solution would not benefit public health or safety.

In response to the revised decision, the requester made a further revision of the request as follows:

I am asking for Unusual Occurrence Reports for “alleged/actual abuse/assault” for the years 2000, 2001 and 2002. This narrows my earlier request, which had asked for the reports over a five-year period.

...

I am requesting a fee waiver in this case.

The Ministry issued a further interim decision containing a revised fee estimate of \$5,827.00. The Ministry indicated that the responsive records are subject to severances pursuant to section 21 (invasion of privacy) of the *Act*.

The requester (now the appellant) appealed the Ministry’s decision not to waive the fee.

During the course of mediation, the appellant’s representative advised the mediator that although she submitted a deposit of \$2,913.50 to the Ministry, which represents 50% of the fee estimate contained in the most recent interim decision, she had also advised the Ministry that she would continue to appeal the Ministry’s denial of the fee waiver.

After receiving the deposit from the appellant, the Ministry issued a final fee statement wherein the total fee was assessed at \$5,004.20 with a balance owing of \$2,090.70. The appellant submitted the balance owing to the Ministry, received the requested records, but clarified that she was still pursuing the fee waiver of \$5,004.20, and took the position that the fee should be waived pursuant to section 57(4)(c) of the *Act*.

The Ministry confirmed that it was maintaining its position with respect to the fee waiver request, as noted in the first two interim decision letters, and therefore denied the fee waiver request.

As a result, the issue of the fee waiver, which is the sole issue in this appeal, remains in dispute.

I sent a Notice of Inquiry to the appellant, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the appellant’s representations, to the Ministry. The Ministry also provided representations.

## **DISCUSSION:**

### **FEE WAIVER**

#### **General principles**

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

- (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.

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

1. Whether the person requesting access to the record is given access to it.
2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

In reviewing a decision by an institution denying a fee waiver, this office may decide that all or part of a fee should be waived [Order MO-1243].

### **Whether dissemination will benefit public health or safety**

In this appeal, the appellant relies on section 57(4)(c) (benefit to public health or safety). In prior orders of this office, the following factors have been found relevant in determining whether dissemination of a record will benefit public health or safety:

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F, PO-1962]

In addition, this office has found that dissemination of records will benefit public health or safety under section 57(4)(c) where they relate to the quality of care and service at group homes [Order PO-1962], and the quality of care and service at long-term care facilities (nursing homes) [Order PO-2278].

### **Representations**

In this appeal, the appellant begins by reviewing her history and the history of her employer (which she identifies as a newspaper with a large circulation and readership in Ontario), the success she has had in investigating governments and government programs, and the positive results that these actions have initiated. She then states:

[Our employer] is committed to using the *Act* to obtain and disseminate information that will further the good of the public. It is for this reason that a series of [requests under the *Act*] were made ... for long term care records maintained by the government.

The appellant then states:

[The requester] was billed for the records at issue in this request. [The requester] paid the bill, obtained the records (and others through the *Act*), and disseminated them to the public through a series of newspaper articles that probed the unfortunate state of care in nursing homes. Following publication, the Minister of Health announced that he plans a “revolution” in the nursing home sector. He made this announcement as a direct result of [the requester’s] stories.

The appellant also refers to the decision by Assistant Commissioner Mitchinson in Order PO-1962, in which the Assistant Commissioner held that the quality of care and service at group homes is a public interest. The Assistant Commissioner stated:

I find that the quality of care and service at group homes and day programs [funded] by the Ministry is a public rather than a private interest. Not only are these agencies funded by tax dollars, but they also provide services to a wide range of people across the province, and both parties' representations acknowledge that a significant number of people with developmental disabilities use the services provided by these organizations.

The appellant acknowledges that it is not enough that disclosure of a record be in the public interest, but also that there must be some connection between the "dissemination" of the record and a benefit to public health or safety. The appellant then states:

The attached series of nursing home stories by [the appellant] make that case. Using the records at issue, and others, we have proved that residents of nursing homes are subject to neglect, abuse, injuries and other forms of maltreatment. Leaders in the nursing home field ... agreed with our conclusions. The Minister of Health ... agreed and promised a "revolution".

The appellant provided documentation supporting her position on these matters.

Furthermore, the appellant disputes the Ministry's position, as set out in its earlier decisions, that the Ministry is properly monitoring itself, and that the dissemination of the records would not benefit health and safety. The appellant takes the position that her investigation showed flaws in the tracking, investigation and making of determinations regarding the nursing homes that need intense investigation. The appellant also provides supporting information for its position. Furthermore, the appellant states that the results of her examination of the records confirmed the discrepancies in the information provided by the Ministry. The appellant states:

These [records] and other information obtained through [the *Act*] led to the conclusion that the Ministry is not properly scrutinizing its own information. ... we were able to bring scrutiny to this system, and the Minister of the institution has announced that the Ministry will now take action.

The appellant's representations were shared with the Ministry.

In its representations, the Ministry agrees that the subject matter of the records is a matter of public interest. It states, however, that this does not end the matter, but that I must also determine (based on the principles set out in Orders 2 and PO-1962), that

- the subject matter of the records relates directly to a public health or safety issue;
- the dissemination of the records would yield a public benefit; and

- the probability that the requester will disseminate the contents of the record

With regard to whether the subject matter of the records relates directly to a public health or safety issue, the Ministry takes the position that, although the records relate to health issues concerning a given segment of the population, this does not necessarily render it a “public health” issue. The Ministry identifies a concern that a broad interpretation of this criterion would result in its application to almost all records held by the Ministry.

Concerning whether the dissemination of the records would yield a public benefit, the Ministry refers to the fact that an earlier Audit report had brought a number of the problems referred to by the appellant to light, and that the Ministry had been actively involved in a review of all Long-Term Care procedures and reporting requirements.

The Ministry also takes the position that the public did not benefit from the dissemination of the records provided to the appellant in this case. The Ministry states:

The Serious Occurrence Reports [SORs] that involve client incidents and the statistical data provided in the FMIS reports were not reflected in the articles produced by the appellant. The articles do not attribute the source as these records, thus the Ministry ... disagrees with the appellant that the dissemination factor is relevant. These articles were of an anecdotal nature focusing on the experience of individuals and many interviews with Nursing Home staff.

With respect to the probability that the requester will disseminate the contents of the record, the Ministry takes the position that this factor unduly benefits media requesters, and should therefore not be given significant consideration in this case.

### **Findings regarding public benefit**

Based on the representations of the parties, and on Orders PO-1962 and PO-2278, I am satisfied that the subject matter of the records is a matter of public interest, and that the dissemination of them would benefit public health or safety. In addition, in this appeal, I am satisfied that their dissemination has benefited public health and safety.

It is clear that the quality of care at institutions funded by the government are matters of public concern. The records at issue in this appeal, namely, the unusual occurrence reports for Long-Term Care facilities for the identified years, reflect the quality of care at facilities funded by the government. These facilities assist particularly vulnerable members of society, and I am satisfied that the records relate to a public rather than a private interest.

I am supported in this finding by Adjudicator Sherry Liang’s decision in PO-2278, where she found that dissemination of records relating to care and service at nursing home facilities were a matter of public interest. She stated:



I am satisfied that it has been shown that dissemination of the records will benefit public health or safety. Prior orders have recognized that the quality of care and service at institutions funded by the government are matters of public concern (see Orders P-754 and PO-1962), and the Ministry does not disagree with this. The records at issue, in the words of the appellant, “paint a picture” of the quality of care and service at nursing home facilities funded by the Ministry. Undoubtedly, private interests are also reflected in the records, to the extent that they document concerns raised about the care of specific residents at specific nursing homes. However, the appellant is not seeking access to the information of a specific resident and is content to receive the records without any personal information. I am satisfied that taken as a whole, without personal information, the records are more a matter of public rather than private interest.

I do not accept the Ministry’s position that because an earlier Audit Report had brought a number of the problems referred to by the appellant to light, and because the Ministry had been actively involved in a review of all Long-Term Care procedures and reporting requirements, that the subject matter of the records does not relate directly to a public health or safety issue, and that the public did not benefit from the dissemination of these specific records. Assistant Commissioner Mitchinson addressed a similar argument in Order PO-1962, in which he stated:

While the Ministry has presented evidence that there are a number of safeguards and organizations in place to monitor and scrutinize the care provided at these transfer payment agencies, it does not necessarily follow that media attention on this issue would not contribute to the public’s understanding of the health and safety issues surrounding these agencies.

In my view the public has benefited from the dissemination of the records, notwithstanding the other processes that are in place to monitor the procedures and reporting requirements at these facilities.

The Ministry states that newspaper articles produced by the appellant do not attribute the source as the records at issue in this appeal, and that the articles were of an anecdotal nature focusing on the experience of individuals and many interviews with Nursing Home staff. However, I am satisfied based on the appellant’s submissions, including the newspaper articles she attached to her submission, that the records at issue, although not the sole source, were one source for the published articles. Indeed, these records are specifically mentioned as source records.

I also do not accept the Ministry’s position that the factor of whether or not the requester will disseminate the contents of the record should not be given significant consideration in this case as it unduly benefits media requesters. The public interest in the dissemination of the records is the issue that I am addressing, and the ability of the appellant to do so is clearly a factor in any analysis of this issue. Furthermore, in this appeal I find that the fact that the requester did publish a series of newspaper articles based partly on the contents of the records is a significant

consideration. The subsequent public responses and reactions to these published articles are further evidence of the weight to be given to this factor.

Accordingly, I am satisfied that dissemination of the record will benefit (and indeed, has benefited) public health or safety. I must now decide whether it would be fair and equitable to require the Ministry to waive the fee.

### **Whether it would be fair and equitable to waive the fee**

For a fee waiver to be granted under section 57(4), it must be “fair and equitable” in the circumstances. Relevant factors in deciding whether or not a fee waiver is “fair and equitable” may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has 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.

[Orders M-166, M-408, PO-1953-F]

The representations also suggest that sections 57(4)(a), (b) and (d) may be relevant in this appeal.

In the circumstances of this appeal, I find that a number of the above factors favour a fee waiver, and some factors do not.

For the purposes of sections 57(4)(a), (b) and (d), I find that costs paid by the appellant were the actual amounts and not estimated amounts, and that the appellant was given access to the records. Furthermore, the parties agree that the payment will not cause a financial hardship for the appellant.

Concerning the manner in which the institution responded to the request, and whether it worked constructively with the requester to narrow and/or clarify the request, I find that the Ministry did properly respond to the initial request and the subsequent narrowed requests.

Although the Ministry takes the position that it did provide records to the appellant free of charge, it appears that these records are largely public documents or summary reports, and not

the records specifically requested. Indeed, the Ministry consistently stated throughout the series of requests for records and for fee waivers (set out above) that it would not waive the fees.

The request does involve a large number of records.

I find that the requester has worked constructively with the institution to narrow the scope of the request, mainly by submitting narrowed and modified requests to the Ministry to focus on the records which, in its view, were most relevant. The requester also identified that it was not pursuing access to personal information contained in the records. Furthermore, the requester identified in its representations that it was prepared to pay the photocopy costs for the records.

In assessing whether waiver of part or all of the fee would shift an unreasonable burden of the cost from the appellant to the Ministry, I considered the Ministry's concern about the broad scope of its mandate, and the possibility that almost all Ministry records might arguably relate to the health of the people of Ontario. I also had reference to Adjudicator Liang's decision in PO-2278, where she decided not to order a waiver of the full fees in her appeal. That appeal dealt with records similar to the ones at issue in this appeal, and she stated:

It is not intended that the fee waiver provisions undermine the user-pay principles of the *Act*. The circumstances of this appeal are not extraordinary. They involve, in essence, a request by a member of the media for records kept by the Ministry in the ordinary course of its monitoring responsibilities over one sector of its mandate. I accept that a waiver of fees in this case would make it difficult for the Ministry to deny a waiver of fees in many other cases.

In considering all of these circumstances, I might have been inclined to order a partial waiver of the fees. However, given that the Ministry has already agreed to a substantial reduction in its fees, I am satisfied that no further waiver is appropriate.

Like the situation faced by adjudicator Liang, this appeal also involves a request by a member of the media for records kept by the Ministry in the ordinary course of its monitoring responsibilities over one sector of its mandate. However, unlike the situation in Order PO-2278, in my view the circumstances in this appeal are extraordinary, largely based on the nature of the newspaper articles produced as a result of access to the records, and the various reactions they provoked.

## **Conclusion**

Having reference to all of the factors referred to by the parties in this appeal, and in particular to the established public interest in the subject matter of the records, the actions of the requester throughout the course of this request, and the extraordinary nature of the newspaper articles produced by the appellant (relying, in part on the records at issue) and the various reactions they

provoked, I find that it would be fair and equitable to waive all search and preparation fees in this appeal.

As far as photocopy charges are concerned, in light of the position taken by the appellant, and the large number of records, I find that it would not be fair and equitable in the circumstances to require the Ministry to absorb the costs of these charges, particularly in light of the user pay principles contained in the *Act*.

I therefore find that the requirements for a fee waiver in section 57(4) of the *Act* have been established for all search and preparation charges in this appeal, but not for photocopy charges. Accordingly, I will order the Ministry to waive the search and preparation charges, and to refund these fees to the appellant.

**ORDER:**

1. I uphold the Ministry's decision not to waive the photocopying charges of \$204.20 in this appeal.
2. I order the Ministry to waive the search and preparation charges, and to refund these fees to the appellant.
3. To ensure compliance with Provision 2, I reserve the right to require the Ministry to provide me with evidence of compliance, upon request.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

October 20, 2004 \_\_\_\_\_