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

ORDER PO-2530

Appeal PA-050117-1

Ministry of Natural Resources

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The requester submitted a request, dated March 27, 2003, to the Ministry of Natural Resources (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …the number of times [the requester] has contacted District Offices requesting information on the Wild Turkey Program [the Program] since December 2002. It is very important that District Offices are directly contacted to obtain this information.

The Ministry denied access to the responsive records pursuant to section 10(1)(b) of the *Act* (request for access is frivolous or vexatious). The requester (now the appellant) appealed the Ministry's decision and I conducted an inquiry into this issue. On November 26, 2004, I issued Order PO-2348, finding that the appellant's request was not frivolous and vexatious and ordered the Ministry to issue a decision letter in accordance with Part II of the *Act*.

In response to my order, the Ministry issued a decision containing two fee estimates, involving alternative searches for records responsive to the appellant's request, one in the amount of $2,520.00 and a second in the amount of $5,370.00.

Following communication between the parties, the appellant subsequently narrowed the scope of her request as follows:

> In order to reduce the costs further, the 25 named staff members of the ministry can initially verbally confirm whether [named individual] contacted them. After which a more in depth search can occur.

The Ministry subsequently issued a new decision, in response to the narrowed request, containing a fee estimate of $240.00. In the decision, the Ministry provided the following information:

> You have narrowed your request to 25 named staff members of the ministry. Staff members were canvassed to ascertain whether they recall having contact with you, with respect to the wild turkey introduction program, and eight members recall having had contact with you on the matter. If the search is narrowed to these eight staff members, the estimated fee for the request is therefore 8 persons at one hour search time per person, for a total of $240.00

The appellant appealed the Ministry's new decision.

During the course of the mediation stage, the appellant submitted a request for a fee waiver to the Ministry. The Ministry denied the fee waiver request. Accordingly, fee waiver is also at issue in this appeal.

Through mediation, the Ministry's position with respect to the amount of the fee estimate remained unchanged. Accordingly, the fee estimate of $240.00 remains at issue.

During mediation, the appellant also sought clarification from the Ministry that it had interpreted the narrowed request to cover only the time frame of December 2002 to March 2003. The Ministry responded that it did not specify a time frame of December 2002 to March 2003 when it canvassed Program staff. The appellant takes issue with this as she feels that the fee estimate could be further reduced by limiting the time frame for the period from December 2002 to March 2003 when canvassing staff about their recollection of having contact with the appellant. As a result, scope of request has also been added as an issue in the appeal.

I commenced my inquiry by first seeking representations from the Ministry on the scope of request, fee estimate and fee waiver issues. The Ministry submitted representations and I shared the non-confidential portions with the appellant, seeking representations from her on the above three issues. The appellant submitted representations in response.

DISCUSSION:

SCOPE OF REQUEST

Introduction

As indicated above, the appellant takes the position that the scope of her narrowed request was restricted to the period between December 2002 and March 27, 2003.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Representations

In response to this issue the Ministry states:

> On May 2, 2005, the appellant wrote and appears to have narrowed her request to the number of times she called these 8 people between December 22, 2002 and March 27, 2003. She wished the Ministry to canvass these people to see if they recall being contacted between those dates. Based on the initial telephone canvass and the fact that it would be unreasonable to expect an individual to recall the dates on which they were contacted, it was decided not to further recontact [*sic*] the individuals. The appellant appeared to be unnecessarily stretching out the time frame for the processing of the request by making unreasonable demands upon Ministry staff. The appellant was contacted by mail and asked to pay a deposit based on the fee estimate for the search of 8 individual's files or appeal the fee estimate. The appellant appealed the fee estimate set by the Ministry.

In response, the appellant states that she did not narrow her request on May 2, 2005 to the December 2002 through March 27, 2003 time frame. She asserts that this time frame was part of her "original request". The appellant states that the wording of her original request, including the time frame, is also contained in the Ministry's initial decision letter, dated December 9, 2004.

Analysis and findings

On my review of the parties' representations and other relevant evidence, including correspondence between the parties, I am satisfied that the appellant had narrowed her request to the number of times she spoke with 25 identified Ministry employees between the period of December 2002 and March 27, 2003.

In reaching this finding I rely, in particular, on the wording of the appellant's original request letter dated March 27, 2003 and the Ministry's initial decision letter, dated December 9, 2004. On my reading of the appellant's original request, it is clear that she was seeking information from December 2002 up to the date of her letter (March 27, 2003). In my view, the Ministry confirmed this understanding in its December 9th letter in which it frames the appellant's request as follows:

> Number of times [the appellant] has contacted District Offices requesting information on the Wild Turkey Program since December 2002 to March 27, 2003.

The fact that the appellant subsequently narrowed her request to 25 identified Ministry employees did not, in my view, impact on the time period for which the appellant seeks this information.

Accordingly, I find that the scope of the request is as the appellant has described it, namely, to include only the number of times she spoke with 25 identified Ministry employees about the Program between the period of December 2002 and March 27, 2003 and I will address the remaining issues under appeal in this context.

FEE ESTIMATE

General principles

This office has the power to review an institution's fee estimate and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

Section 57(1) of the *Act* requires an institution to charge fees for requests under the *Act*. That section reads:

> 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 57(3) provides that the head shall give the requester a "reasonable" estimate of the fee to be charged. That section states:

> The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over $25.

More specific provisions regarding fees are found in section 6 of Regulation 460 under the *Act*, which reads:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, $10 for each disk.
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.
5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received. O. Reg. 21/96, s. 2.

Representations

The Ministry states that there is "no single file which records or documents contact which [the appellant] has made with Ministry staff." As a result, the Ministry submits that it was required to conduct a search for responsive records. The Ministry states that its fee estimate was prepared by the Ministry's "Communications Specialist of the Peterborough District Office" (Communications Specialist), who is also its access to information contact with that office, and is based on a search of a "representative sampling" of records. The Ministry submits that the Communications Specialist is "knowledgeable about the Program and consulted with Program staff [in preparing] his estimate." The Ministry states that the estimate the Communications Specialist prepared was "extrapolated over various Ministry District offices which the appellant had contacted …"

The Ministry states that to identify responsive records, each staff member would have to search "phone logs, notebooks, emails and the relevant file stacks." The Ministry submits that the estimated search time for each staff person would be as follows:

Search of phone logs - 10 minutes
Search of note books kept by staff - 10 to 30 minutes
Search of emails - 10 to 40 minutes depending upon the location and system response times
Search of file stacks - 10 to 30 minutes

The Ministry states that its Freedom of Information Unit (FOI Unit) "examined the estimate and took a conservative approach, in fairness to the requester" and reduced the estimate to one hour per person in accordance with the following breakdown:

Search of phone logs - 10 minutes
Search of note books - 10 minutes
Search of emails - 20 minutes
Search of file stacks - 20 minutes

The Ministry submits therefore that the total search time equates to eight hours (eight Ministry staff at one hour per person). The Ministry concludes that based on this approach, the fee estimate is fair and reasonable.

The appellant takes issue with the Ministry's fee estimate, principally because it failed to consider the specific time frame (December 2002 to March 27, 2003) that is of interest to her. The appellant states:

> By ignoring the time frame, the Ministry expanded the original request and possibly the costs. This also extended the processing time. When [a named Ministry employee] canvassed staff to ask if they remember speaking with me regarding the [Program], why didn't they also ask them ***when*** did they speak with me?
>
> I suggested that the [Ministry's FOI Unit] canvass the 25 named individuals to see if they remembered speaking with me as a way to narrow costs. This is not complicated either in concept or effort in my opinion.

Analysis and findings

The issue before me is whether the Ministry's $240.00 fee estimate is reasonable and is calculated in accordance with the *Act*.

The Ministry's search fee calculation is in keeping with paragraph 3 of section 6 of Regulation 460 under the *Act* (i.e. one hour of search time, at the rate of $30.00 per hour, for each of eight Ministry staff). However, having carefully reviewed and considered the representations of the appellant and the Ministry along with the wording of the original request and the Ministry's response to it, I find that the basis for the calculation of the fee estimate by the Ministry is not reasonable, for the simple reason that it failed to consider the four-month time frame, between December 2002 and March 27, 2003, that is of interest to the appellant. I accept the appellant's view that in canvassing its 25 staff, the Ministry should have attempted to determine when these individuals spoke with the appellant. Had the Ministry done so it might have found that some of the eight employees that have said they spoke with the appellant did not do so during the four-month time frame.

Unfortunately, the evidence does not assist me in determining to what extent, if any, the search fee would be reduced had the Ministry asked staff whether they had spoken with the appellant between December 2002 and March 27, 2003. Therefore, I am not in a position to determine whether a search fee reduction would be appropriate in the circumstances. This issue will only become clear when the Ministry conducts its search.

However, in an effort to address this issue in a fair and equitable way at this stage, I will make an order directing the Ministry to charge search time for only those records that fall within the December 2002 to March 27, 2003 time frame. Accordingly, to the extent that any of the eight individuals that the Ministry has identified as having communicated with the appellant did not do so within this time frame, the Ministry will not be entitled to charge for search time.

FEE WAIVER

General principles

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. That section 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 by the regulations.

Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee:

> 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.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in

part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

Section 57(4) requires that I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in section 57(4) and then, if that basis has been established, determine whether it would be fair and equitable for the fee to be waived. The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Part 1: Basis for Fee Waiver

The appellant has raised both financial hardship [section 57(4)(b)] and public health or safety [section 57(4)(c)] in support of her application for a fee waiver.

Financial hardship

Under section 57(4)(b), the onus of establishing financial hardship must be met by the appellant.

Generally, a requester should provide details regarding his or her financial situation, including information about income, expenses, assets and liabilities [Orders M-914, P-591, P-700, P-1142, P-1365, P-1393].

In support of her position under section 57(4)(b), the appellant simply states that she is looking for a fee waiver because she is "a low income person, a student and a volunteer activist." The appellant states further that as an activist she regularly seeks information under the *Act* and the "costs associated with these requests are beyond [her] financial resources."

The Ministry submits that the appellant has provided "insufficient evidence of her current financial circumstances to justify the granting of a fee waiver."

Having reviewed the parties' submissions on this issue, I find that the appellant has not provided sufficient financial disclosure to meet the criteria for the application of section 57(4)(b). As noted, the onus is on the appellant to establish financial hardship. Although self-described as a "low income person", the appellant has not provided me with any evidence regarding her income, expenses, assets and liabilities. I find that there is no clear and convincing evidence to support a finding that the payment to the Ministry of the $240.00 fee estimate would pose a financial hardship on the appellant.

Accordingly, I find that the criteria set out in section 57(4)(b) have not been met.

Public health or safety

In previous orders of this office, the following factors have been found to be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

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

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

This office has found that dissemination of the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- quality of care and service at group homes [Order PO-1962]
- quality of care and service at long-term care facilities (nursing homes) [Orders PO-2278 and PO-2333]

The appellant states that she has been charged by the Ontario Provincial Police for "harassment for continually calling the Ministry and ignoring [a] gag order [regarding further enquiries on the Program]." She states that she hopes the information she is seeking will assist her and her lawyer in understanding her relationship with the Ministry. The appellant believes that gaining access to this information would be "valuable not just to [her], but to anyone who has similar experiences trying to access information." The appellant states further that [s]uccessfully challenging the Ministry's discretion as to who has access to information and who doesn't, would have far reaching influence and hopefully shift the status quo to one [that is] more equitable."

The appellant also submits that the information she is seeking is "often used for campaigning, actively trying to influence public opinion and policy. The appellant asserts that without this sort of enquiry "many people would be unaware that such government programs exist." The

appellant believes that whether she is challenging a wildlife issue or her right to access to government information, each action has a "broad public value."

The Ministry states that records that are the subject of the request "do not relate" to public health or safety. The Ministry submits that the subject matter of the records is not a matter of public interest, but rather one of "personal interest" to the appellant.

Having carefully considered the representations of the appellant and the Ministry, I am not persuaded that section 57(4)(c) applies in this case. While awareness of the Program may be of public interest, the appellant has not provided evidence that knowing the number of times she contacted Ministry District Offices during the four-month period in question would be of public interest, relate directly to a public health issue or yield a public benefit.

I concur with the Ministry that the information being sought is of personal interest to the appellant in furtherance of her issues with the Ministry. I am, therefore, not convinced that this information would be of any value or interest to other requesters, even to the extent of shedding light on the Ministry's processing of similar access to information requests.

Accordingly, I find that the criteria in section 57(4)(c) have not been met.

In conclusion, I find that the appellant has not established a basis for a fee waiver in the circumstances of this case.

ORDER:

1. I deny the appellant's request for a fee waiver.

2. I direct the Ministry to prepare a revised fee estimate, charging search time for only those records that fall within the time frame specified in the appellant's request, specifically December 2002 to March 27, 2003. To the extent that any of the eight individuals that the Ministry has identified as having communicated with the appellant did not do so within this time frame, the Ministry will not be entitled to charge for search time.

3. If the Ministry decides not to ask for a deposit, in regard to provision 2 above, I order it to issue a final decision letter and statement of fees, no later than **January 11, 2007,** without recourse to a time extension and to provide copies of the records being disclosed to the appellant forthwith after payment of any outstanding fees.

4. In the event that the Ministry requires payment of a deposit, I order it to advise the requester of this requirement forthwith, and to provide a final access decision and statement of outstanding fees no later than 30 days after receipt of the deposit. I further order the Ministry to provide copies of the records being disclosed to the appellant forthwith after payment of any further outstanding fees.

5. I order the Ministry to provide me with copies of the decision letters referred to in paragraphs 2, 3 and 4, as applicable.

6. I remain seized pending the resolution of the issues set out in provisions 2, 3 and 4 of this order.

Original Signed by: December 8, 2006
Bernard Morrow
Adjudicator