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

FINAL ORDER PO-2515-F

Appeal PA-050216-1

Ministry of Children and Youth Services

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NATURE OF THE APPEAL:

The Ministry of Children and Youth Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> 1) The licensing Module database for all licensed childcare programs, part of the Ministry's System Management Information System.
>
> 2) The Special Occurrence Reporting System database.
>
> I also request copies of all complaints against Ontario day care facilities between January, 2000, and present.

The requester also asked the Ministry to waive any applicable fees.

The Ministry issued an interim access decision and fee estimate in response to the last part of the request about complaints against Ontario day care facilities. The total estimated fee amounted to $66,150.00 for searching, photocopying and severing the records. The fee was calculated on the basis of what the Ministry's interim decision described as a "random sample" of 60 files taken from the three largest regional offices.

The Ministry also indicated that, based on its review of the "random sample" of 60 files, severances would have to be made pursuant to section 21 (personal information) of the *Act*, but that no final access decision had been made because the records had not been reviewed in detail. Regarding the appellant's request for a fee waiver, the Ministry's decision letter provided:

> I note that you are asking the ministry to consider waiving the fees for this request. This section of the Act requires that you write to me outlining your reasons why the requested information would benefit public health or safety, under section 57. Until, I receive your submission, the ministry cannot consider granting a fee waiver.

The Ministry also advised the requester that a deposit of 50% of the estimated fee was required in order to continue processing the request since the fee estimate was over $100.00.

The requester (now the appellant) appealed the Ministry's decision and claimed that the fee estimate was excessive. In his notice of appeal, the appellant raised the possible application of the "public interest override" at section 23 of the *Act*, and requested a response to parts 1 and 2 of his request.

After the appeal was received in this office, it was assigned to a mediator in order to attempt to settle some or all of the issues. The mediator asked the Ministry to respond, in writing, to the first two parts of the appellant's request. The Ministry did not do so. The appellant confirmed that he was appealing the fee and that he seeks a fee waiver.

Mediation did not settle the appeal. It proceeded to the adjudication stage and was assigned to me to conduct an inquiry under the *Act*.

Because the Ministry had not responded to parts 1 and 2 of the request, I decided to follow the procedures for "deemed refusal", which arises under 29(4) in circumstances where an institution does not respond to a request within the statutory time frame (usually 30 days). I wrote to the Ministry and indicated that a decision on parts 1 and 2 of the request must be issued on or before February 10, 2006. As I did not receive the decision letter by that date, I issued Interim Order PO-2457-I, compelling the Ministry to issue a decision letter with respect to the first two parts of this appeal.

The Ministry did issue a decision letter, agreeing to release the records requested in part 1 of the request, and provided an estimate of the fee required. The Ministry also advised that it could not grant access to the Serious Occurrence Reporting System Database mentioned in part 2 of the request because "[t]he database development project is in implementation…." In response to the Ministry's decision on parts 1 and 2 of the request, the appellant filed an appeal of the fee estimate relating to part 1 of the request. A separate appeal was opened in that regard, and it has been fully dealt with. I will not refer to it further in this order, which is concerned only with the final part of the request, in which access is sought to "all complaints against Ontario day care facilities" between January 2000 and the date of the request.

I commenced my inquiry regarding the final part of the request by issuing a Notice of Inquiry to the Ministry, initially, seeking representations on the issues of fee estimate and fee waiver. In the Notice of Inquiry, I noted that at this stage, the public interest override at section 23 of the *Act* is not an issue because no final access decision has been issued and, therefore, no exemptions under the *Act* to which section 23 might apply have actually been claimed. I also indicated that the appellant would be at liberty to raise the public interest override as an issue when, or if, the Ministry issues a decision formally claiming exemptions to which section 23 of the *Act* may apply.

The Ministry provided representations in response to the Notice of Inquiry. I then sent a Notice of Inquiry and a copy of the representations of the Ministry, in their entirety, to the appellant. The appellant filed representations in response setting out, among other things, the basis for his request for a fee waiver. I forwarded those representations in their entirety to the Ministry and asked the Ministry to submit reply representations on the issues of fee estimate and fee waiver only. The Ministry responded with reply representations.

DISCUSSION:

FEE ESTIMATE

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.

The requirements for an interim access decision letter and fee estimate, such as the one issued by the Ministry in this case, were set out by former Commissioner Sidney B. Linden in Order 81.

The purpose of the interim access decision is to avoid the expenditure of time and resources that may be necessary to answer the request with a final decision in circumstances where the records may be voluminous and the cost of preparing them for disclosure may be substantial. The interim access decision should also give the requester sufficient information to make an informed decision as to whether or not to pay the fee and pursue the access.

Former Commissioner Linden described the process in Order 81 as follows:

> What should the head do in these situations? In my view, the Act allows the head to provide the requester with a fees estimate pursuant to subsection 57(2) of the Act. This estimate should be accompanied by an "interim" notice pursuant to section 26. This "interim" notice should give the requester an indication of whether he or she is likely to be given access to the requested records, together with a reasonable estimate of any proposed fees. In my view, a requester must be provided with sufficient information to make an informed decision regarding payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure that the fees estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the Act.
>
> How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) *the head can base the estimate on a representative (as opposed to a random) sample of the records.* Admittedly, the institution will have to bear the costs incurred in obtaining the necessary familiarity with the records, however, this is consistent with other provisions of the Act. For example, subsection 57(1)(a) stipulates that the first two hours of manual search time required to locate a record must be absorbed by the institution and cannot be passed on to the requester.
>
> The head's notice to the requester should not only include a breakdown of the estimated fees, but also a clear statement as to how the estimate was calculated (i.e. on the basis of either consultations or a representative sample.) While I would encourage institutions to provide requesters with as much information as possible regarding exemptions which are being contemplated, the head must make a clear statement in the notice that a final decision respecting access has not been made. Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed. However, in my view, if no indication is made at the time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees. [Emphasis added.]

The Ministry based its fee estimate of $66,150 on an earlier estimate it had prepared in relation to a previous, and somewhat different, request by the appellant that was subsequently abandoned. In its decision letter, the Ministry described the manner in which it arrived at the fee estimate in the following way:

> As you will recall, on February 14, 2004, you requested access to copies of all complaints against Ontario daycare facilities between January 2000 and the present. During our conversations about that request, you agreed to narrow your request for records to the 3 regional offices of the [Greater Toronto Area]. I wrote to you on March 23, 2004 explaining the fee estimate for costs related to searching approximately 1,200 files over a 4 year period for 3 of the 9 regional offices of the ministry.
>
> To determine the fee estimate to respond to your [previous] request it was found that, of those complaints that are made against a licensed child care centre, each regional office may field about two complaints a week, or 100 complaints per year. That is to say, for the three regional offices, approximately 1,200 complaints would be reviewed by the ministry over the four year period of your request.
>
> Based on a random sample of 60 files it was estimated that it would require approximately half an hour to locate, sever and copy each file. …

The Ministry then set out the following calculations from its estimate in the prior request, and its basis for extrapolating them to the new request for a five-year period in relation to all nine regional offices:

15 hours of search time	@ $30.00 per hour	$450.00
360 pages of records	@ $00.20 per page	$ 72.00
Severing	@ 2 min/page x $30.00 per hour	$360.00
Total Estimated Cost for 60 files		$882.00

> Total estimated cost to review 1,200 files would be 20 x $882 = $17,640.00 [this was the total estimate in relation to the previous request].
>
> Your current request is for a 5 year period and for all 9 regional offices. As a result the fee estimate will be substantially higher for this request than the previous one.
>
> The total fee estimate for this request is $66,150.00.
> 4,500 files (100 complaints per year x 9 regions x 5 years)

It appears that the basis for this calculation was as follows: $882 (amount for 60 files) divided by 60 = $14.70 per file x 4,500 files = $66,150.

In its representations, the Ministry further explains the process followed to arrive at the original estimate in the previous request, and how this was used to arrive at the estimate for the current request:

> The ministry's FOI Coordinator worked with the assistance of the Compliance Managers in the three largest regional offices of the ministry, the Toronto Regional Office, the Central East Regional Office and the Central West Regional Office, to determine the fee estimate. These managers are responsible for the licensing and compliance staff that are charged with the responsibility for inspecting and licensing all child care centres operating in accordance with the *Day Nurseries Act*. The random sample of 60 files, 20 from each office, was pulled from the four years requested and included, in one office, files returned from off-site storage. Additionally, the compliance managers indicated that on review of the Complaints Log, on average, each office received 2 complaints per week.
>
> It was also found that the records are filed and maintained according to each regional office's business practice. One office maintained the complaint file with the complaint log while another filed the complaint in the child care agency's licensing file. And the third office had a mixture of both practices as the business practice changed during the time period of the request.
>
> The staff who performed the work to retrieve the random sample were the program advisers, designated under section 16 of the *Day Nurseries Act*, who are responsible for inspecting day nurseries and private-home day care agencies to enforce licensing requirements.
>
> …
>
> **Preparation for Disclosure:**
>
> [C]omplaints and the ministry's records related to the investigation of the complaint may contain identifying information about the children and their families in attendance at a particular child care agency.
>
> Only costs associated with the severing of records at the standard of two minutes per page was applied to the fee estimate.
>
> **Photocopies:**
>
> The number of pages for each complaint varied according to the nature of the complaint. Usually, documents related to a single complaint ranged from 3-5 pages, however, others were 11 -15 and, in a few cases, over 50 pages. The complaint record included the incoming complaint document and records related to the ministry's finding upon investigation and its resolution.

Basis of Fee and Search for the 2005 Request

> The ministry relied upon earlier work on the 2004 fee estimate to determine the fee estimate at issue in this appeal. The key differences between the two requests are that in 2005 the appellant asked for complaints in the ministry's **nine** regional offices, as compared to the earlier **three** regional offices. As well the time period of the request was expanded in 2005 to be for **five** years from the earlier request of **four**.
>
> …
>
> It is the ministry's position that the fee estimate, based on a random sample of 60 files, is a fair and representative picture of the work that would need to be undertaken to respond to the request. The estimate was based on the information provided by staff in the compliance units, who are the experts in this program area and have the experience and knowledge to be able to clearly and accurately identify the complaint records.

The appellant submits that the fee estimate is unreasonable and not supported by the submissions of the Ministry. The appellant submits:

> The fee estimate is not based on "representative" samples. The fee estimate is based on 60 files, 20 from each of what the Ministry says is the "three largest regional offices of the ministry". Why were these three offices used as the basis of the estimate? I believe that in using the three "largest offices" as the basis of the estimate resulted in a distorted and unreasonably high fee estimate. Presumably, being the "largest regional offices of the ministry", these offices would have the most complaints and the most records to review and redact, if necessary. Is the average of "2 complaints per week" cited in the Ministry's representations representative of the number of complaints received in the other 6 offices where the complaints are held? ... Toronto is the largest and most diverse city in the country. I believe that the records in the Toronto Regional office simply cannot be representative of the records in other offices – both in terms of the number of complaints and the nature of the complaints.
>
> The fee estimate should have been based on "representative samples" not "random samples"…Are the 60 samples pulled from the largest regional offices of the Ministry representative of the complaints from the 9 offices where the records are stored? If not, I do not believe that the random sample is an appropriate basis for the estimate.
>
> …
>
> The time required to locate complaints. The Ministry indicates in its submissions that "the records are filed and maintained according to each regional office's business practice." and that practices may differ by office. Presumably, however,

> each office would be familiar with its record storage practice and would or should be able to retrieve the records in issue with ease.

With respect to the amount claimed by the Ministry for the time spent severing personal information from the records, the appellant submits:

> [T]o the extent that the editing simply relates to the removal of identifying information, i.e. names, addresses, phone numbers, I question the amount of time claimed by the Ministry.

In that regard, the appellant also indicates that he does not object to the severance of the personal information in the records.

The issue before me is whether the Ministry's fee estimate is reasonable and is calculated in accordance with the *Act*. Having carefully reviewed and considered the representations of the appellant and the Ministry along with the correspondence that was exchanged between the parties regarding the fee estimate, I find that the basis for the calculation of the fee by the Ministry is not reasonable, for the reasons that follow.

I agree with the appellant that the Ministry should have used a "representative" sample, as contemplated in Order 81, rather than a "random" sample. Nevertheless, based on the Ministry's description of the manner in which the sample was assembled, I am satisfied that the records selected from the three largest regional offices would, in fact, constitute a "representative" sample with respect to those three offices. Having said that, however, I agree with the appellant that it is not reasonable to assume that the other six offices, which represent less populated areas of the province, would necessarily have a similar number of complaints. If the average number of complaints received in the three regional offices is two per week, the average number received in the other regional offices may well be significantly less. In my view, the Ministry erred when it simply multiplied the average number of complaints from these areas by the number of regions that have custody of records that fall within the scope of this request. Before applying results from a past search, it is necessary to consider whether, under the circumstances, that approach is likely to produce an accurate result.

In this regard, the Ministry refers to Orders MO-1699 and P-914 in support of its submission that it acted reasonably in relying upon the random sample of records used in the previous request of the appellant. In Order MO-1699, the institution significantly expanded the basis for it fee, and the overall amount claimed, in a subsequent fee decision. Both decisions related to the same request, and this was not a case where calculations in relation to a previous request were used to prepare an estimate for a subsequent, different request. I also note that the additional fee in that case was wholly disallowed. In Order P-914, the issue was whether the institution could rely on previous responses to three previous requests, and whether its search had been reasonable. Fees were not an issue in that case, and the previous requests were the same as the one under consideration, unlike the situation here, where the new request is not the same as the previous one. In my view, these decisions do not assist the Ministry.

As noted, the essential problem with the Ministry's fee estimate in this case is the faulty assumption that each of the six regions not reflected in the sample relied on by the Ministry from the previous request would generate a similar number of complaints as the three regions that were included, which centre around the Greater Toronto area. This assumption is inconsistent with the lower population in the other six regions. In my view, this means that the estimate of 4,500 complaint files is likely inaccurate, and it would be reasonable to expect that the number could be significantly lower.

In some situations, this might lead me to order a new fee estimate based on a new representative sample. In this case, however, given the outcome of the fee waiver analysis below, I do not believe it would be appropriate to delay matters by requiring a new estimate, since the only component for which the Ministry will be entitled to charge fees is photocopying, which is a comparatively small component of the fee. That being the case, I have decided to revise the photocopying estimate to a lower figure based on geographic and population information, on the understanding that once the number of pages to copy has been established, the final fee can be adjusted and will be completely accurate.

I note that the Ministry did not respond to the appellant's comments regarding the relative populations of the three regions included in its earlier estimate and the further six regions that must be included in the current estimate. However, the Ministry's own Web site identifies the areas included within each of the nine regions. Based on Statistics Canada's information about the populations of those areas, it appears that the six regions not reflected in the sample would likely have a population totalling about half of the total population of the three regions that are included.

As noted above, the Ministry estimates that each of the three regions in the original request would receive 100 complaints per year. For those three regions over a five year period, therefore, the estimated number of complaints would be 1,500. Assuming that the other six regions have a population totalling about half of the total population of the three regions represented in the estimate on the previous request, those six regions could be expected to receive approximately 750 complaints during this period. The total number of complaints is therefore 2,250, which is exactly one-half of the number estimated by the Ministry. Applying this analysis to the entire fee would result in a revised estimate of $33,075 for search time, severing (preparation time) and photocopies.

However, because of the fee waiver decision set out below, it is only necessary to estimate the photocopying component of the fee. Based on the Ministry's sample, which cites 360 pages for 60 files, the average number of pages per file is 6. The estimated fee for photocopying would therefore be calculated as 6 pages x 2,250 complaints x $0.20 per page = $2,700. I uphold an estimated photocopying charge in this amount. Once the request is completed, this charge would have to be adjusted based on the actual number of pages to be photocopied, as contemplated in the discussion above.

I now turn to consider whether a fee waiver is warranted in the circumstances of this appeal.

FEE WAIVER

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

> 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 by the regulations.

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

> 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.

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

Providing Information about the basis for a Fee Waiver during an Appeal

As noted, the Ministry was given an opportunity to respond to the appellant's representations on all issues, including fee waiver. The appellant's representations on this issue are outlined below. Rather that responding to the merits of these submissions, the Ministry essentially argues that it is "unreasonable" to require that the Ministry now consider the appellant's arguments. The Ministry states:

> The appellant did not provide the ministry with any substantive information on which to base a decision on granting a fee waiver in response to the ministry request that he do so in the fee estimate letter of July 18, 2005.
>
> It is unreasonable to require that the ministry now consider the arguments made by the appellant in support of his request for a fee wavier.
>
> In Orders M-509, P-1142, it was found that when the appellant did not provide representations regarding the justification for a fee waiver, it was found that the granting of a waiver would shift an unreasonable burden of the cost of access from the appellant to the institution.

The appellant, who is a journalist, submitted that the Ministry did have information on which to base a decision regarding a fee waiver because it was aware of the nature of the records requested by the appellant, and it must have known of the "inherent public interest" in the information contained in the records. Further, he submits that the Ministry knew that he was a reporter for a major newspaper and that the information may be reported upon in an upcoming edition of the newspaper.

To deal with the appellant's submission first, past orders of this office are clear in stating that requesters should make such a request and explain the basis for it (Orders M-914, P-474, P-1393, PO-1953, cited above). Accordingly, it is not sufficient for the appellant to assume that the Ministry will draw inferences from his position as a journalist or the nature of the information. Nevertheless, I note that the fee waiver provisions of the *Act* are mandatory, and in my view, institutions should give serious consideration to proactively granting a full or partial waiver in cases where disclosure would yield an obvious benefit to public health or safety (see the criteria below), and it is likely that the information would be disseminated by the requester. Institutions already do this in many instances where the fee is under $5, or where access is fully denied to the requested records. Circumstances of this nature may be seen as an exception to the general rule that requesters must explain and justify all fee waiver requests.

In this case, although it would have been preferable for the appellant to explain the basis for his fee waiver request earlier (having been asked to do so both at the request stage and during mediation of this appeal), I do not agree with the Ministry's submissions on this point. As noted above, the appellant asked for a fee waiver in his initial request letter. Although previous orders

indicate, as discussed above, that a fee waiver request must generally be explained and justified by the requester, it is not, in my view, absolutely necessary that this be completed at the request stage or in the early part of the appeal process. In Order P-1393, Adjudicator Laurel Cropley considered a fee waiver request that was included in the letter of appeal. She sought representations on the issue and dismissed the fee waiver claim because the appellant did not provide representations or evidence on that point. If the appellant had done so, the result might have been different.

In this case, unlike Orders M-509 and P-1142 (cited by the Ministry), the appellant *did* provide representations on the point during the appeal and the Ministry was given a full opportunity to respond. These orders therefore do not support the Ministry's position. Moreover, the Ministry has not demonstrated that it suffered any prejudice on the basis of this manner of proceeding, nor does it otherwise explain why it would be "unreasonable" to require it to respond to the appellant's representations at this stage.

In my view, absent any compelling basis for reaching such a conclusion in the circumstances of a particular case, it would in fact be unreasonable to disentitle appellants from receiving fee waivers across the board because they did not provide detailed information about the basis for the waiver at the request stage. As noted, the Ministry has not been prejudiced by the procedure followed in this case, and I therefore reject this basis for refusing the appellant's fee waiver claim. Accordingly, I will go on to consider the appellant's substantive arguments on fee waiver, to which the Ministry did not respond.

Financial Hardship

The appellant submits that he is entitled to a fee waiver on the basis of financial hardship under section 57(4)(b) of the *Act*. Under this section, the onus of establishing financial hardship must be met by the appellant. The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402].

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].

I have reviewed the submissions of the appellant on this issue and I find that the appellant has not adduced sufficient evidence to meet the criteria for the application of section 57(4)(b). As noted, the onus is on the appellant to establish financial hardship. The appellant has not adduced any evidence about his financial situation. Nor has the appellant adduced any evidence from his employer on this issue or about the employer's practices with respect to information requests of this type or magnitude. For these reasons, I find that there is no clear and convincing evidence to support a finding that the payment to the Ministry of the amount requested in its decision letter would pose a financial hardship on the appellant and/or his employer. Accordingly, I find that the criteria set out in section 57(4)(b) have not been met.

Public Health or Safety

The appellant also relies upon section 57(4)(c) to support his application for a fee waiver. 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]

Following are the representations of the appellant regarding his request for a fee waiver:

- The records in issue [consist] of copies of complaints against Ontario day care facilities. I believe that the nature of these complaints and how the Ministry is dealing with them is of inherent interest to members of the public. We are dealing with complaints relating to the treatment of the most vulnerable members of our society. To the extent that these complaints are not being effectively managed, the public has an interest in knowing this so that it can demand that its elected representatives take immediate corrective action.

- In this regard, a startling fact contained in the Ministry's submissions is that based on the data from the three largest regional offices, each office received 2 complaints per week. While it is difficult to put this number in context, I believe

that the public ought to know why there are 2 complaints per week and what the Ministry has done to try to reduce the number of complaints.

- Similarly, the large fee estimate of $66,150 indicates that there are a significant number of complaints about Ontario day care facilities. Again, the public is entitled to know about the nature of these complaints and how they are handled. Only in this way can public pressure be brought to bear on elected officials to take corrective action.

- The [requester's newspaper] is [a very large Canadian] English language newspaper. It has demonstrated a commitment to reporting on the issues of public interest including the work of public institutions and the health and safety of children. Without having seen the data, I cannot state what story, if any I would write if the complaints are provided to me. However, from the little information that I have already, I believe that the information sought in my request is information that the public has an interest in receiving and that I would be interested in reporting on.

- From a practical standpoint, no media outlet would be able to pay $66,150.00 for the information requested. Nor should it. This is information which the public has a significant interest in receiving as it relates directly to the health and/or safety of young children. Any dissemination of this information can only result in greater protection of children and greater accountability of public institutions who are made subject to public scrutiny. If complaints relating to how children in day care facilities are being treated are not being dealt with effectively, the public has a pressing and urgent interest in knowing this so that immediate corrective action can be taken.

- The information that I seek is, arguably, information that the Ministry ought to itself want disclosed to the public. To the extent that complaints have been made against particular institutions, parents would want to know this. To the extent that certain practices are commonly the subject of complaints, i.e. staff/child ratios, this too should be made public because it will allow parents to make informed decisions when selecting a day care facility for their child. They will know to ask, for example, when the "staff/child ratio" is, what program activities are available etc. To the extent that Ontario day care facilities are the subject of significant complaints, parents would want this information in deciding whether to send their children to such facilities or use other childcare options.

- The federal Liberal government announced, prior to the last election, a national day care initiative. While the new Conservative government does not support such a program, information contained in the complaints will be of interest to Ontarians in a public debate on what the best vehicle is for dealing with the issue of childcare.

I have reviewed the representations of the parties. For the reasons that follow, I am satisfied that the appellant has adduced sufficient evidence to establish that section 57(4)(c) applies in this appeal, subject to the question of whether it is fair and equitable to waive all or part of the fee, which I will also address. In this assessment, I will consider the revised total fee of $33,075, including a photocopying component of $2,700.

The Ministry provided the following background information about the operation of day care facilities, which is helpful in addressing this issue:

> The *Day Nurseries Act* sets out very specific rules, regulations and standard relating to the physical environment, staff child rations, program activities, staff training, health and safety, and nutrition. Operators of day nurseries and private-home day care agencies must meet these standards in order to get and maintain a license.

Regulations under the *Day Nurseries Act* set out the criteria that must be met before a license will be granted. The majority of those criteria relate to the health and safety of the children under the care of the day care centre. A paper entitled "*Recognizing Quality in Child Care*" prepared by the Ministry and, published on its web site, provides some guidance on the issue.

> Your child's care is important to you. It is also important to the Ministry of Children and Youth Services and the people who operate child care centres. We all want to make sure that child care centres are happy, healthy, and safe places where children will learn and grow.
>
> One of the ways the ministry ensures that children in Ontario are cared for in a manner that is safe and healthy is by licensing and monitoring all premises where more than five children of different parents are cared for. Whether they are called child care centres, nursery schools, day care centres, or day nurseries, they are subject to the regulations contained in the Day Nurseries Act.
>
> Most of the regulations in the Act are designed to ensure the health and safety of children. For example, there are regulations that set minimum standards regarding the physical environment of centres, fire and safety procedures, hygiene and cleanliness practices, nutritious meal planning, and policies dealing with child illness.
>
> In addition, some regulations relate to helping children develop and learn. These are based on research into child development and are expressed in regulations such as those pertaining to staff-child ratios; staff qualifications and training; and planning for outdoor and indoor play. Another example of a regulation that relates to positive child development is the one which forbids staff in child care centres to treat children in a way that is demeaning or that undermines a child's self-confidence.

Previous orders of this office have clearly held that the quality of care and service at institutions that deal with vulnerable individuals are matters of public concern. In Order PO-2333, Adjudicator Frank DeVries considered this issue as it applied to unusual occurrence reports for Long-Term Care facilities operated by the Ministry of Health and Long-Term Care. Adjudicator DeVries stated:

> 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.

Former Assistant Commissioner Tom Mitchinson made a similar finding with respect to records relating to the quality of care and service at group homes and day programs funded by the Ministry of Community and Social Services in Order PO-1962. In that order, he 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.
>
> …

> In summary, I find that the subject matter of the SORs 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.

I agree wtih the reasoning in these orders, as well as that of Adjudicator Laurel Cropley in Order P-754. In that order, a requester asked for copies of records from the Ministry of Health relating to complaints received by the Psychiatric Patient Advocate Office from current or former patients of the Queen Street Mental Health Centre alleging physical or sexual abuse by staff. In deciding that a fee waiver was warranted in that case, Adjudicator Cropley made the following findings:

> In my view, institutionalized psychiatric patients are, like many other individuals such as the elderly or developmentally handicapped who have been placed in institutionalized environments, among the most vulnerable individuals in our society. I am also of the view that the care and safety of these vulnerable individuals is a public responsibility and of public concern.

I believe that Adjudicator Cropley's comments are equally applicable to the records relating to the children of this province who are attending day care centres licensed by the Ministry. Children are vulnerable individuals and the requested information relates to complaints against licensed bodies that have charge of them while the children are on their premises. Although not all day care facilities are funded by the government, they operate under provincially-issued licences. I am satisfied that the vulnerability of their resident populations raises the same public health and safety interests, with respect to complaints against licensed day care facilities, as the records requested in Orders PO-2278, PO-2333, PO-1962 and P-754.

In order to protect children, it is essential that parents be well-informed about the child care options available to them. The Ministry has an obligation to ensure that the day care centres are meeting the minimum standards imposed by legislation. There has been a significant amount of public debate about funding of child care options in the recent past and I believe that the information requested in this appeal will contribute in a meaningful way to that debate by informing the public about the quality of the day care services that seek licensing from the Ministry.

Accordingly, I find that the subject matter of the requested records clearly relates to a public health or safety issue. The records relate directly to complaints about the services provided by licensed day care centres and the actions that may have been taken by the Ministry with respect to those complaints. I also find that this is a matter of public rather than private interest.

I am equally satisfied that dissemination of the information will contribute meaningfully to the understanding of an important public health or safety issue, namely the quality of day care services and the manner in which complaints about licensed operators are handled.

I am also satisfied that there is a significant probability that the appellant will disseminate the contents of the records.

To conclude, the appellant has met the threshold to establish that dissemination of the records will benefit public health or safety, and subject to the question of whether it is fair and equitable to waive the fee, I find that section 57(4)(c) applies.

Part 2: Fair and Equitable

For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. Previous orders have set out a number of factors to be considered in determining whether a denial of fee waiver is "fair and equitable". These factors are:

- 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 Ministry has not responded to the request of the appellant in an open and constructive manner. Although I am dealing with a waiver request in relation to the final part of the request, I believe the Ministry's response (or lack thereof) to parts 1 and 2 of the request is relevant here. For an extended period of time, the Ministry failed to respond to these parts of the request despite the clear inclusion of these items in the original request, the filing of the appeal including that issue, and the mediator's attempt to obtain a decision from the Ministry. The appeal had already reached the adjudication stage by the time the Ministry issued its decision on parts 1 and 2. As already discussed, the Ministry's decision granted access to all of the records responsive to part 1, and explained why it could not give access to the records in relation to part 2. The appellant filed an appeal in relation to the fees for part 1, which was eventually settled, but in any event, the appellant's eventual access to the part 1 records was needlessly delayed, with no explanation, by the Ministry's persistent failure to address these aspects of the request.

Although there is some evidence that the Ministry worked with the appellant in an attempt to narrow and/or clarify the request shortly after the request was made, its failure to provide submissions directly addressing the appellant's fee waiver arguments, when given an opportunity

to do so by me at the adjudication stage of this appeal, has also been less than open and constructive.

As well, I agree with the appellant that the information he seeks "… is, arguably, information that the Ministry ought to itself want disclosed to the public". Indeed, it is somewhat perplexing from a records management standpoint that it would be so time-consuming or awkward to locate the information sought by the appellant. In fact, with the exception of the personal information in the records, this kind of information would seem to be an ideal candidate for active dissemination and routine disclosure, at least in some form.

The only argument advanced by the Ministry in this regard is to the effect that it would not be reasonable to shift the burden of the cost of access to the Ministry in circumstances where the appellant did not set out the reasons for the fee waiver at the early stage of the process. For the reasons already outlined above, I do not accept the Ministry's position on this issue.

On the other side of the equation, the appellant did not narrow the request, but in the circumstances of this case, it is perfectly reasonable for the appellant to continue to seek access to all of the requested records to obtain a full picture. As well, I have estimated that there will be 2,250 complaints that are responsive, which is a significant number of records. 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 (see Order M-914).

In these circumstances, and bearing all these factors in mind, I have concluded that it would be fair and equitable to order the Ministry to waive its fees in relation to search and preparation (*i.e.*, severing) time, while permitting it to charge for photocopying the records. In my view, allowing the Ministry to charge for photocopies is justified in view of the large volume of records likely to be disclosed, and in keeping with the user-pay principle. A similar approach was taken in Orders PO-1962 and PO-2333.

Having found that it would not be appropriate to waive the fee as it relates to photocopying charges, it is necessary for me to determine how to frame the order provisions in order that this matter may reach a conclusion at the earliest possible time. In this regard, I must also bear in mind that the Ministry has not yet issued a final access decision, although it indicates that severances will be made to protect personal privacy under the mandatory exemption at section 21(1) of the *Act*, and the appellant agrees that this is appropriate. Any different decision by the Ministry (e.g. to claim additional exemptions) may potentially complicate matters, and would give rise to further rights of appeal by the appellant.

In the result, I will order that the Ministry waive the fees for search and preparation time, and I will uphold a fee estimate for photocopying in the amount of $2,700. I would anticipate that the Ministry will require a 50% deposit, and once that has been paid and the request fully processed, the Ministry will be required to adjust the fee in its final access decision, based on the actual number of photocopies that are required.

Unless the Ministry decides to claim additional exemptions in its final access decision (which the appellant could also decide to appeal), these order provisions should permit the request to be concluded in an orderly manner.

ORDER:

1. I order the Ministry to waive its fees for search and preparation time.

2. I uphold the Ministry's decision not to waive the photocopying charges and I find that a fee estimate of $2,700 in this regard is reasonable.

3. If the Ministry decides not to ask for a deposit, I order it to issue a final decision letter and statement of photocopying charges, no later than **November 27, 2006,** 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 photocopying charges 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. In the event that the amount of photocopying charges is different than the estimate of $2,700 upheld in provision 2, I order the Ministry to adjust its fee accordingly in the statement of photocopying charges referred to in provisions 3 and 4, as applicable.

6. The appellant may appeal any exemption claim or adjusted fee in the final access decision.

7. I order the Ministry to provide me with a copy of the decision letters referred to in paragraph 3 or 4, as applicable.

Original signed by: October 26, 2006
John Higgins
Senior Adjudicator