



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2173

Appeal MA-060087-2 and MA-060088-2

Regional Municipality of York



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NATURE OF THE APPEAL:

The Regional Municipality of York (the Municipality) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for records relating to two named Health Centres, which operate as long-term care facilities. The appellant sought the following:

1. Inspection Reports – January 2000 to January 2006 inclusive
Annual; Nursing; Dietary; Environmental; Special visits; Complaints;
Incidents; Occurrences; follow-up; Special investigations.
2. Licenses – January 2000 – January 2006
3. Names of Board of Directors – If Applicable

The Municipality granted access in full to records responsive to these requests and indicated that fees of \$210.00 in the first request, and a further \$120.00 in the second request, were being charged. Detailed Indices of Records were provided to the requester with the decision letters.

After reviewing the Index of Records, the requester reduced the number of reports she was seeking access to and requested a waiver of the fees. In the first request, the Municipality issued a revised fee in the amount \$105.00 for three and a half hours of search time at \$30.00 per hour. In the second request, the Municipality issued a revised fee in the amount of \$60.00 for two hours of search time at \$30.00 per hour.

In both requests, the Municipality decided to waive the photocopying costs for certain records, namely, the past Facility Review Reports as current copies of these reports were available at no charge. The Municipality also advised the requester that it was not prepared to grant further fee reductions in either request.

The requester (now the appellant) appealed the Municipality's decisions in both requests to deny a fee waiver. During mediation, the appellant advised that she wished the search fees to be waived on the basis that the disclosure of the records would benefit public health or safety as contemplated by section 45(4)(c) of the *Act*. At mediation, the Municipality reiterated that it was not prepared to waive the search fee.

As it was not possible to resolve the appeals by mediation, the files were transferred to me to conduct an inquiry. I sent a Notice of Inquiry in each appeal, setting out the facts and issues, to the Municipality seeking its representations, initially. I received the Municipality's representations, which I sent to the appellant, along with a Notice of Inquiry for each appeal seeking her representations. I received the appellant's representations, which I sent to the Municipality seeking reply representations. The Municipality provided representations in reply. As the issues and the representations were common to both appeals, I have issued one order for both appeals.

DISCUSSION:

FEE WAIVER

The sole issue in this appeal is whether the revised search fees of \$105.00 and \$60.00 should be waived. Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

45. (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.

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 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 relies on the provision in section 45(4)(c) concerning public health or safety to justify the waiver of the fees in these two appeals.

The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(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]

Representations of the Parties

The appellant submits that:

I voluntarily advocate with families of institutionalized seniors and through successful publication of my letters to editors...

The information contained in these records contain significant concerns about public health issues which institutionalized seniors and disabled persons and their families should be aware of... [I]ncidences of serious harm and neglect of vulnerable and dependent residents in long-term facilities continue...

My experience with families and seniors makes it clear that there very much is a need for continuous dissemination of the various types of [long-term care facilities] inspection reports, beyond 'current' annual reports, in order for the public to understand the chronic and systemic problems occurring in far too many provincial [long-term care] homes.

The disclosure of the information contained in these reports will contribute in a most meaningful way to the development and understanding of this very

important public health and safety issue. Seniors and their families should have every opportunity to be kept informed about the problems and high risk situations that exist in [long-term care facilities].

In support, the appellant submitted numerous news articles and editorials where she had written about problems with long-term care facilities. I sent these to the Municipality, along with the appellant's submissions. I asked the Municipality to provide representations in reply to the following questions:

1. Whether the dissemination of the records 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; and
2. The probability that the appellant will disseminate the contents of the records. [Order P-474]

The Municipality replied as follows:

Disclosing a public health or safety concern

No public health or safety concern will be disclosed by the dissemination of the records by the applicant because,

- a) The records ... do not disclose health or safety concerns;
- b) Current records are already disclosed in accordance with applicable regulations. Current records are publicly posted or made available on request or application, and so public health or safety concerns would already be readily identified and communicated were they to occur in Regional facilities.

Contributing meaningfully to the understanding of an important public health or safety issue

The applicant's method of dissemination, as indicated in her representations in this matter, are confined to 'letters to the editor'. She is an advocate for a cause to which she is committed, and for which she holds strong views. She is entitled to those views and is to be applauded for her conviction....

Probability of Dissemination

[T]he information has already been disseminated by the Region in accordance with provincial regulations. Nothing in the appellant's submission would indicate that further dissemination will occur except' in an anecdotal manner...

It is therefore submitted that appellant has not demonstrated that the requested information will be disseminated in a manner which additionally or meaningfully contributes to the understanding of this health or safety issue.

Analysis/Findings

In Order P-474 former Assistant Commissioner Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c) of the provincial *Freedom of Information and Protection of Privacy Act*, which is the equivalent of section 45(4)(c) of the *Act*:

- Whether the subject matter of the records is a matter of public rather than private interest;
- Whether the subject matter of the records relates directly to a public health or safety issue;
- Whether the dissemination of the records 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; and
- The probability that the requester will disseminate the contents of the records.

Prior orders have recognized that the quality of care and service at institutions funded by the government are matters of public concern and have found that dissemination of records containing information of this sort will often benefit public health or safety under section 45(4)(c). In particular, the records in these orders were related to:

- the quality of care and service at group homes [Order PO-1962];
- complaints about long-term care facilities [Order PO-2278];
- unusual occurrence reports for "alleged/actual abuse/assault" at long-term care facilities [Order PO-2333].

Based on the representations of the parties, and on the reasoning contained in Orders PO-1962, PO-2278 and PO-2333, I find that the subject matter of the records is a matter of public interest, and that their dissemination would benefit public health or safety.

The records at issue consist of various Special Visit, Facility Review, Food Premises Inspection and Food Bacteriology Reports concerning the named long-term care facilities. The appellant

has submitted that these reports, which provide specific details of the actual problems in the named long-term care facilities, are not available on the Municipality's website. This assertion has not been disputed by the Municipality.

I am also satisfied that the appellant will disseminate the contents of the records. She has provided various news articles and letters to the editor that she has written on the subject matter of the records and has provided evidence to confirm that these types of records are not readily available publicly from other sources. In addition, the appellant has provided three letters of reference in support of her assertion that she will disseminate the contents of the records. These letters can be summarized as follows:

1. A letter from a lawyer who practices in the area of medical malpractice. This lawyer refers clients to the appellant, who through her advocacy work in the area of long-term and elder care, is able to provide these clients with information concerning the resources available to them.
2. A letter from another advocate who also raises public concerns about the type and quality of care provided in long-term care facilities, homes for the aged and other facilities. This advocate submits that the appellant's work in this area adds enormously to public understanding of the sometimes dangerous conditions faced by residents of these institutions.
3. A letter from a professor at the Faculty of Social Work at the University of Toronto who describes the appellant as a highly effective communicator who disseminates information as much as any single individual can do both orally, in a number of public forums, and in writing, by way of letters to the editors of newspapers and newspaper op-ed pieces. This professor describes the appellant as one of the best watchdogs of long-term care facilities in the Greater Toronto area.

I agree with the findings of Adjudicator Frank DeVries in Order PO-2333, where he stated that:

It is clear that the quality of care at institutions funded by the government [is a matter] 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.

Accordingly, I find that the dissemination of the records by the appellant will provide a benefit to public health or safety. I also find that the appellant will disseminate the contents of the records and that her method of dissemination would contribute meaningfully to the understanding of an important public health or safety issue. I do not agree with the Municipality's view that, in order to qualify for a fee waiver under section 45(4)(c), the appellant should "disseminate ... detailed,

statistical or informed analysis of the situation” in long-term care facilities. The Municipality submits that:

... the appellant [does not] engage in any other form of mass or broadcast communication, such as a discussion forum or ‘blog’, where other views might be presented or a fuller analysis of the information is presented.

Further, the appellant’s approach to the dissemination of information does not represent an academic approach where sources are cited and theories are tested and defended.

Barring the application of journalistic or academic standards, or at least facilitating a balanced perspective on an issue, the information provided in the appellant’s letters to the editor is anecdotal and could give rise to a misunderstanding of the state of care offered in Regional facilities and in [long-term care facilities] generally.

I adopt the findings of Adjudicator DeVries in Order PO-2333, where he stated:

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...

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.

I will now decide whether it would be fair and equitable to require the Municipality to waive the fees in these two appeals.

Part 2: fair and equitable

For a fee waiver to be granted under section 45(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]

Representations of the Parties

The appellant submits that:

As the safety and well-being of institutionalized residents obviously cannot be ensured as reports of severe neglect of residents continue, it is imperative that the public have easy and free access to these reports. I reduced my request for reports from 328 pages to 204 pages.

The Municipality submits that:

To be seen to contribute meaningfully to the understanding of an issue and become entitled to a full waiver of fees, it is submitted that a requester should at a minimum be required to present a broad perspective on the matter under consideration, as a journalist might do...

The fee reductions already made should be regarded as fair and sufficient in the circumstances, and supportive of the appellant’s personal role as an advocate for better [long-term care] in Ontario. In the Region’s view, the appellant’s activities

are not materially different than other issue advocates who make requests pursuant to [the *Act*] and pay prescribed fees.

Findings

In making a finding as to whether a waiver of the fees is fair and equitable, I have considered the representations of the parties and the factors listed above.

With respect to the manner in which the Municipality responded to the appellant's requests, I note that the Municipality responded to both the appellant's initial requests and her requests for fee waivers in a timely manner. I further find that both the Municipality and the appellant worked together constructively to narrow and clarify the scope of the requests. The Municipality also reduced its search fees for the records by one half. The Municipality provided the appellant with some records without charging for photocopying costs.

Although the above factors weigh in favour of the Municipality, I find that a waiver of the fees in the present appeals would not shift an unreasonable burden of the costs from the appellant to the Municipality. The appellant is an independent advocate; her interest in the records is not private. The advocacy work she does is completely voluntary. The cost of the search fees does pose a financial barrier to the information being sought because she does not receive any compensation for her advocacy. The strong letters of support that the appellant has provided with her representations have convinced me that the appellant, as an independent advocate for the rights of the elderly and the disabled, will widely disseminate the records in order to seek to improve the public's understanding of this health or safety issue in the Municipality. Accordingly, I find that it would place an unreasonable burden on the appellant to bear the cost of the \$165.00 search fees and I will order the Municipality to waive these fees.

ORDER:

I order the Municipality to waive the search fees in these two appeals.

Original signed by: _____
Diane Smith
Adjudicator

March 15, 2007