



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2566

Appeal PA-060126-1

Ministry of Health and Long-Term Care



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NATURE OF THE APPEAL:

The appellant, a member of the Ontario Legislative Assembly (MPP), submitted a request to the Ministry of Health and Long Term Care (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act). The request read:

I am requesting the following information from the Ministry of Health and Long-Term Care:

Information, beginning in the fiscal year 2000-2001 to as recent as possible, regarding how many out-of-country claims were approved by Ontario Health Insurance Plan (OHIP) for cancer treatment. For these approved claims, I would like to know:

- The names of the facilities (if possible);
- How much money was involved; and
- What type of treatments were involved (I would like to know the type of cancer, if possible, and more importantly, the chemotherapy which was paid for – e.g. the drug type such as Erbitux, Velcade, etc)

The Ministry wrote to the appellant advising that it would be extending the time to issue a decision due to the large volume of records that needed to be searched in order to complete the request.

The Ministry subsequently wrote to the appellant advising that it would be granting access to all the records and that there would be an associated fee of \$760 relating to search time and photocopies (\$750 for 25 hours of search time and \$10 for photocopies). In its letter, the Ministry stated that its Provider Services Branch had conducted a thorough search of its files and 1,924 out-of-country applications were responsive to the request. The Ministry advised that these applications were then separated into two sets of records: the first consisting of applications submitted under the Cancer Care Ontario Re-referral Program and the second consisting of all other applications for cancer care.

Upon receipt of the Ministry's letter, the appellant wrote to the Ministry revising her request. She stated that she was not interested in the first set of records (i.e. those applications submitted under the Cancer Care Ontario Re-referral Program), but that she would like to obtain the second set (i.e. all other applications for cancer care). The appellant asked that the fee of \$760 be waived, which was denied by the Ministry.

The appellant appealed the Ministry's denial of a fee waiver to this office. During the mediation process, the mediator confirmed that the appellant is only appealing the fee waiver and is not disputing the fee itself. Mediation was not successful, and as a result, the appeal was transferred to the adjudication stage of the process.

Initially, I sought representations from the Ministry. I received those representations and then shared those representations in their entirety with the appellant. I invited the appellant to submit representations. She declined to do so stating that she had already submitted any relevant information by way of her request to the Ministry for a fee waiver.

DISCUSSION:

FEE WAIVER

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

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].

Whether dissemination will benefit public health or safety

In her letter to the Ministry requesting a fee waiver, the appellant provides no information to support a claim for waiver under sections 57(4)(a)(b) or (d). Based on her request, it is apparent that the appellant is relying on section 57(4)(c) (benefit to public health or safety) as the basis for her claim, and I will therefore only consider this section.

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

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

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

This office has found that dissemination of records will benefit public health or safety under section 57(4)(c) where they relate to the quality of care and service at group homes [Order PO-1962], and the quality of care and service at long-term care facilities (nursing homes) [Order PO-2278 and PO-2333].

Representations

As noted, the appellant did not submit representations to this office during the Inquiry process. However, in her letter to the Ministry dated March 24, 2006, the appellant requested that the fee be waived and set out the basis for such a waiver:

I am requesting to have the fees waived, as it is in the public interest to see what kinds of out-of-country cancer treatments have been paid for by the Ministry of Health and to determine if the Ministry is paying for treatments that are still not covered or under review here in Ontario. Allegations have been made publicly that there are examples/cases where OHIP has covered out-of-country cancer treatments for intravenous-based drugs that are currently under review (and therefore unavailable) to the majority of patients needing these in Ontario. The release of what OHIP has paid in this regard already would either confirm or refute these allegations. Moreover, as an MPP and a resident of Ontario, I strongly believe that the expenditure of tax dollars outside of the Province for

health care services that are required to be available in Ontario should be publicly available.

In its representations, the Ministry does not dispute that the subject matter of the records is a matter of public interest or that the requester may disseminate the content of the records. However, the Ministry submits that the subject matter of the records does not relate directly to a public health or safety issue:

The Ministry submits that, while the requester has identified a public interest that would be served by the dissemination of the records, this interest cannot be characterized as relating to an issue of “public health or safety”. Strictly speaking, “public health” issues relate to health matters governed by the *Health Protection and Promotion Act*, whose stated purpose is “to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario.”

The requester is being provided with access to records that relate to medical treatments for ailments suffered by individuals. The Ministry submits that “public health” issues are issues relating to populational health, such as the prevention of chronic diseases, the promotion of healthy living and the prevention of the spread of infection...

The Ministry submits that treating the records at issue in this appeal as relating to a “public health” issue would result in fee waivers for all general Ministry records that relate to health issues and that such an approach would undermine the “user pay” principle established by the *Act*.

Finally, the Ministry acknowledges that this office found in Order PO-2333 that records relating to the quality of care provided in long-term facilities to be related to a public health concern. However, it notes:

...in PO-2433, the IPC held that there was a “significant distinction” between records that describe the *care requirements* of facility residents and records that provide details on the *quality of care* that residents receive. The IPC also stated in PO-2458 that it was “not persuaded that dissemination of [records that only describe care requirements] would benefit public health or safety”. The Ministry respectfully submits that the reasoning in PO-2458 is applicable in this appeal, where the records being provided to the requester only describe the nature and cost of medical treatments that were funded for certain individuals, and do not discuss quality of care issues.

Findings

I have carefully considered the representations of the Ministry and the position taken by the appellant. I find the Ministry's position that the subject matter of the records does not relate directly to a health or safety issue to be unpersuasive. Rather, I am satisfied that the records relate to a matter of significant public interest concerning public health, and that their dissemination would benefit public health and safety.

The appellant has pointed out, and the Ministry acknowledged, that the issue of out-of-province payment for health services, including cancer care, is a matter of public interest in Ontario. Further, the payment for out-of-province treatments that are not covered in Ontario is a matter that impacts on the provision of health care in the province. In a publicly funded health care system, the manner in which health care dollars are spent has a direct relationship to the quality of health care provided. Similarly, the question of whether the province is paying for the out-of-province provision of treatments that are not covered in Ontario is of great relevance to the provision of health services and the quality of those services.

This view is supported by the finding of Adjudicator Frank DeVries in Order PO-2333, who found that records which address delivery of health care are matters of public interest. He 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.

Similarly, in Order PO-2278, Adjudicator Sherry Liang found that the dissemination of records relating to specific health care and service funding by the Government of Ontario would benefit public health or safety. 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.

I am satisfied that the records at issue in the current appeal, which relate to the provision of out-of-province cancer treatment, relate directly to the quality of health care being provided by the province, perhaps even more so than records relating to the quality of care being provided by individual institutions.

The Ministry has taken the position that public health issues are those that relate to health matters governed by the *Health Protection and Promotion Act*. That statute assigns duties to health units

and boards of health. Other provisions address “community health protection” and communicable diseases. In my view, this is an overly narrow definition of “public health”. In the context of the *Act*, the Legislature has chosen to include a mandatory provision to require fees to be waived where “dissemination of the record will benefit public health or safety”, and this is clearly intended to further the public interest in relation to this important objective. There is no evidence that a narrow interpretation was intended. As Adjudicator Sherry Liang stated in Order PO-2278 (which the Ministry cites with approval on another issue):

I find no reason to link the scope of “public health” issues to those addressed in the *Health Protection and Promotion Act*. Such a view of section 57(4)(c) is not found in the discussions of the purpose and genesis of this section by the Williams Commission, by former Commissioner Sidney B. Linden in Order 2, and by other adjudicators...

I also find it unpersuasive to state, as the Ministry does, that these records “do not discuss quality of care issues.” Although the records themselves may not contain such a dialogue, they relate directly to quality of care issues. Whether services that are funded on an out-of-province basis are available in Ontario is a question that is directly related to the quality of the province’s health care system. Further, as stated previously, in a publicly funded health care system, records that relate to decisions regarding which services to fund, and when treatment will be funded on an out-of-province basis, relate to an important public health concern and will contribute to the understanding of this issue.

The Ministry references Order PO-2278 in support of the proposition that records that are “not extraordinary” but rather are “routine” will not support a request for fee waiver. With respect, I also disagree with this position. While the records at issue might be described as “routine”, the issue of out-of-province funding is not. Records shedding light on treatments for which out-of-province funding is provided relate, in my view, squarely to important public health issues. As a result, the dissemination of such records will benefit public health and safety.

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

Whether it would be fair and equitable to waive the fee

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

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

- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

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

Representations

Although not directly addressing the issue of whether a fee waiver would be fair and equitable, the appellant took the position, in its correspondence with the Ministry, that:

...as an MPP and resident of Ontario, I strongly believe that the expenditure of tax dollars outside of the province for health care services that are required to be available in Ontario should be publicly available.

The Ministry submits that it would not be fair and equitable to grant the fee waiver requested. The Ministry points out that an extensive search was conducted and that the appellant has not disputed the Ministry's fee calculation.

The Ministry also takes the position that the appellant's status as an MPP does not support the shifting of the burden of the cost of access from the requester to the Ministry:

In PO-608, the IPC noted that the Legislature had granted MPPs special status under section 42(j) of the *Act* in order to allow MPPs to forward the interests of their constituents. The IPC went on to state that "[t]his special status was not extended, however, to include the right to access information without the requirement that fees be paid. In my view, if the Legislature had intended to grant such a right to its Members in the Act, it would have expressly done so, as it did in section 42(j)." The IPC went on to find that, since the requester's status in PO-608 as an MPP was not a relevant factor in determining whether a fee waiver should be granted, it would not be fair and equitable to grant a fee waiver in that appeal. The Ministry respectfully submits that the same reasoning is applicable in the present appeal, and that it would not be fair and equitable to shift the cost of access to the records from the requester to the Ministry.

Analysis

In the circumstances of this appeal, I find that a number of factors support the Ministry's position and do not favour a fee waiver. There is no evidence to suggest that the search costs are not the actual cost of producing the records. The appellant is also being given access to the entire records. The appellant has not offered any suggestion that the payment will cause a financial hardship.

However, I am satisfied that the factors in favour of a fee waiver should be given greater significance. I find that the requester worked constructively with the institution to narrow the scope of her request, as outlined above, which resulted in reducing the number of responsive records. The narrowing of the request was a result of the appellant's initiative. Further, there was no reduction in the fee by the Ministry as a result of mediation or the narrowing of the request.

I acknowledge that the appellant has not challenged the search time claimed by the Ministry. The Ministry cites this as a factor in favour of not granting the fee waiver. I do note that the Ministry has claimed 25 hours of search time to identify responsive records. While this may be the actual time spent by Ministry staff, one would expect that for an important issue such as the payment of out-of-town medical treatment, records would be much more readily available. I am of the view that it would be neither fair nor equitable for the appellant to bear the financial brunt of the Ministry's less than adequate records management system.

The Ministry submits that the waiver of the fee would shift an unreasonable burden of cost to the Ministry from the appellant and would affect future fee waiver appeals involving this office. Reference is made to Order PO-2333, where Adjudicator Frank DeVries made a distinction between a request for ordinary Ministry records and extraordinary requests. He referred to Order PO-2278 where Adjudicator Sherry Liang decided not to order a fee waiver for what she considered "records kept by the Ministry in the ordinary course of its monitoring responsibilities" and the circumstances of his appeal, which he determined to be extraordinary. In my view, this distinction does not support the position put forward by the Ministry. As I noted above, although the Ministry might categorize these records as "routine", the issues to which they relate are not. There is a significant public interest in the issue of out-of-province funding for medical services. This public interest will be served by the dissemination of these records.

Finally, while the appellant's status as an MPP may not be determinative of the issue of whether a fee waiver is fair and equitable, in my view, it is a factor to be considered. The appellant is an elected official with an interest in and responsibility for public policy. Significantly, I note that the appellant is an Opposition Critic of the Ministry of Health and Long-Term Care. Her interest in the issue of out-of-province payments by the Ministry is therefore more than a personal curiosity. The records in this appeal are relevant to a significant public health issue and are therefore directly related to her legislative responsibilities. It can be expected that these records will assist in furthering the public debate on this issue through her legislative role. In my view, shifting the cost of producing these records would not place an unreasonable burden on the Ministry. Whether this is the case in future requests by MPPs is a matter to be determined on the particular facts of those cases.

While it is clear that the *Act* is based on a user-pay principle, exceptions to that principle do present themselves from time to time. I believe this is one of those circumstances.

I am satisfied that it would be fair and equitable in the circumstances of this appeal to waive all fees. I therefore find that the requirements for a fee waiver in section 57(4) of the *Act* have been established for all fees in this appeal.

ORDER:

I order the Ministry to waive the fee.

Original Signed By: _____

Brian Beamish

Assistant Commissioner

April 23, 2007