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

ORDER PO-2726

Appeal PA07-255

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) is responsible for the supervision of adult offenders, who are convicted by the courts and sentenced to custodial prison terms of up to two years less one day. The Ministry received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> I seek access to a one-time data snapshot that shows the length of sentence for individual inmates, as well as the corresponding last known postal code for each inmate. In the event postal code information is grossly incomplete or unreliable, I would also seek home street name and city/town data. I request that the date that the data snapshot is taken be shared with me, and that the date be as close as possible to the data release date…
>
> I do not seek personal information and it is not my intention to identify individuals. I am a member of the media and it is my position that this information is of public interest, given the cost of incarceration and the struggles many communities and neighbourhoods face.

The Ministry issued a fee estimate in the amount of $1320, requesting a deposit of $660. When the requester paid the deposit amount, he requested a waiver of the fee and also concurrently filed an appeal of the amount of the fee with this office.

This office opened an appeal regarding the fee issue, and appointed a mediator to try to resolve the issues between the parties. During mediation, the appellant indicated that he was willing to revise his request in order to satisfy the Ministry's concern about the potential for the data to identify specific individuals, with a resulting invasion of their personal privacy. The appellant offered the following suggestions:

- [R]ather than releasing raw postal code and sentence data, [the Ministry could] produce a report that sets out a one-time snapshot of the number of offenders by postal code, and total or average sentence information for that postal code;
- It is also not necessary for me to know the date the snapshot is taken, just the year.

On receipt of the deposit, the Ministry issued a final decision respecting fee and access. The decision letter confirmed a final, total fee of $661.59, and also advised the appellant that the balance of $1.59 was being waived pursuant to section 57(4)(d) of the *Act*. However, the Ministry denied the appellant's request for a waiver of the entire fee. The appellant decided to add the denial of fee waiver as an issue in this appeal.

Regarding access to the information, the Ministry took the appellant's suggestion as to the polling of the data and advised the appellant that it was granting:

> … partial access to the requested information. Attached please find a CD containing the available first three digits of the requested postal codes, known as the Forward Sortation Area (FSA) and the associated aggregate sentence length (in days). The data was extracted from OTIS [Offender Tracking Information

> System] in 2007. The last three digits of the requested postal code has been severed in accordance with the personal privacy exemption from disclosure contained in section 21(1) of the *Act*. The Ministry is of the view that release of this information would constitute an unjustified invasion of the personal privacy of individuals.

The appellant appealed the Ministry's decision to withhold information pursuant to section 21(1). The appellant also raised the issue of the possible application of section 23 of the *Act* (a compelling public interest in the disclosure of the record).

No further mediation was possible and this appeal was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry to the Ministry initially, outlining the facts and the issues, in order to seek representations, which I received. Next, I sent a modified Notice of Inquiry to the appellant, inviting him to respond to the Ministry's representations. The appellant provided submissions for my consideration.

RECORDS:

The information remaining at issue consists of the last three digits of the postal code available for 2228 (out of 3843) provincial offenders identified by the Ministry in its one-day 2007 OTIS data snapshot.

DISCUSSION:

INTRODUCTION

In my view, the appellant's description of his intention in pursuing access to the information at issue in this appeal provides a helpful context for discussion of the issues to follow.

> [It] is my intent to use the postal code and sentence length data to examine geographic and socio-economic factors behind crimes committed by people that demand incarceration. Using estimates of the cost of incarcerating an inmate in Ontario, one would be able to also look at the impact of crime at an economic level, and also explore the reasons why certain areas are filling our jails at a higher rate than other areas. It is my intention to examine hotspots, at a neighbourhood level. This would allow one to link the corrections data with census tract data that defines the neighbourhood.

It should also be mentioned that between the appellant's appeal of the Ministry's decision to this office and the issuing of this order, the appellant wrote a series of articles in the *Toronto Star* newspaper relying, in part, on the FSA data previously provided to him by the Ministry. The appellant continues to appeal the decision to withhold the final three digits of the postal codes because:

> If the full postal code is not released, the matching process would be less robust. One would have trouble drilling down to census tract levels, and thus have difficulty knowing what factors may be behind the higher incarceration rates.

PERSONAL INFORMATION

For the purpose of deciding if disclosure of the postal code data at issue would constitute an unjustified invasion of personal privacy under section 21(1), I must first determine if the information qualifies as "personal information." Only "personal information" can be exempt under the personal privacy exemption in section 21(1) of the *Act*.

The definition of personal information is found in section 2(1) of the *Act* and reads, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Background and Representations

The following explanation of the constituent elements of a Canadian postal code appears in the background section of the Ministry's representations:

> … the first three characters only of the requested available postal codes … [are] known as the Forward Sortation Area (FSA). FSAs are associated with the location of the postal facility from which mail delivery originates. Canada Post publishes detailed maps that list the FSAs for municipalities [citation omitted]. These maps include the geographical boundaries associated with individual FSAs. The number of FSAs varies from municipality to municipality. For example, the City of Ottawa has 40, the City of Hamilton has 20, and the Town of Dryden has 1.

Referring to the definition of "personal information" in section 2(1) of the *Act*, the Ministry takes the position that the information at issue is "recorded information about an identifiable individual" as contemplated by paragraphs (b) (criminal history) and (d) (address) of the definition. The Ministry submits that the available requested postal code data should be considered to constitute "personal information about potentially identifiable offenders" because:

> … the postal code is a part of offender address information contained in OTIS. The Ministry submits that the postal code of an offender is a personal identifier in the context of the appellant's request. This information could allow a person to pinpoint the location of [an] offender to his or her actual address in some circumstances. In this regard, it is the Ministry's understanding that in some large urban locations a designated postal code may be assigned to a single apartment building or part of a townhouse complex.

The Ministry submits that the data at issue cannot be viewed in isolation since the information disclosed to the appellant includes:

- the postal code in an address associated [with] the adult offender in the OTIS database;
- a revelation that the adult offender has been convicted of an offence punishable by a term of imprisonment;
- a revelation that the adult offender was serving a custodial sentence in one of Ontario's 31 correctional facilities at some point in 2007; and
- the adult offender's total aggregate sentence length.

The Ministry also suggests that other conceptual grounds exist for finding that the undisclosed information is not "non-identifiable," but is, rather, personal information. Referring to the concept of "identity knowledge," developed by a sociologist from M.I.T., the Ministry argues that the requested postal code data about sentenced offenders falls within two categories known as "locatability [sic] of the individual and social categorization relating to the individual." The Ministry continues by noting that disclosure of the requested data may, in conjunction with other publicly available information, lead to the identification of offenders. The Ministry also points out that even though the appellant maintains that he would not use the postal code data to identify individuals, others might.

The Ministry describes two previous orders of this office where the information at issue also consisted solely of postal code data. The Ministry notes that in Order PO-2131, Adjudicator Rosemary Muzzi found that because there was no other information from which individuals could be identified, the postal codes did not qualify as personal information. However, the Ministry submits that the circumstances of this appeal more closely mirror those in Order PO-2518 in which Senior Adjudicator John Higgins considered the disclosure by the Ministry of records related to the Ontario Sex Offender Registry. In that order, the Senior Adjudicator found that the complete postal code from the address of sex offenders listed with the registry qualified as personal information. In that appeal, the Senior Adjudicator ordered that the postal code of the

individuals listed on the registry be withheld on the basis of the weight of two relevant factors in section 14(2) of the *Act*. The Ministry provided the appellant with a copy of Order PO-2518 during the mediation stage of this appeal.

The Ministry also referred to a privacy investigation report issued by former British Columbia Information and Privacy Commissioner, David Flaherty [P97-009]. In that report, former BC Commissioner David Flaherty recommended to the Insurance Corporation of British Columbia [ICBC] that only the first three characters of the postal codes of insurance claimants be disclosed to a company contracted to conduct survey research based on his view that release of the full postal code "may reveal the address of claimants who live in small towns."

In an email sent to the Ministry during mediation, the appellant sought to distinguish the circumstances of the current appeal from those before Senior Adjudicator Higgins in Order PO-2518:

> My request is much broader in terms of the number of inmates involved, and does not seek information about the crimes involved. It is my position that it would not be reasonable to expect that individuals can be identified using postal code and length of sentence information alone. …
>
> Of prime and quite right concern in PO-2518 was the very real possibility that releasing the postal code data of sex offenders would result in vigilantism. In this request, because it seeks no information about the nature of the offences, it is my position that this should not be a concern.

The appellant maintains that a complete postal code is not personal information, and relies on the following features of this appeal in support of this position:

> The Ministry released a *one-time snapshot* of data that *aggregates* sentence lengths by postal code. Without dates, it is impossible to know when the sentence started being served. By aggregating sentences, one cannot calculate exact sentences of individuals in postal codes where more than one inmate is serving time at the time of the snapshot.
>
> The only means a member of the public would have in matching a sentence length and postal code with an individual is by doing a search of exact sentence length and city or town in newspaper clippings, news databases and other forms of media reportage. This is very unlikely or impossible for a number of reasons: it is costly to search; time-consuming; and, many crimes involving sentences of less than two years go unreported [in the media].
>
> Postal code and length of sentence information – absent of nature of crime, sentence date, name, gender, or age – is not enough for any court in Ontario to do a search of public records and identify the individual involved.

Analysis and Findings

In the present appeal, the record created by the Ministry contains only a list of postal codes and aggregate sentence lengths for each of those postal codes, all taken from the Ministry's OTIS database on one unidentified day in 2007. The record does not list the names of any individuals and so the issue to be decided is whether the record contains information that is "about identifiable individuals." Having carefully considered the evidence, and for the following reasons, I find that this information does not qualify as "personal information."

Previous orders of this office have established that information is identifiable if there is a *reasonable expectation* that an individual may be identified by the disclosure of the information [see *Pascoe,* cited above, and Order P-230]. However, as the Ministry has pointed out, information without personal identifiers attached – as in the present appeal - may not be truly "non-identifiable" if it can be combined with information from other sources to render it identifiable [Order MO-2199].

In support of its position in this appeal, the Ministry relied on Order PO-2518, where, as noted above, Senior Adjudicator John Higgins found that the postal codes of individuals listed on the Ontario Sex Offender Registry qualified as the personal information of those individuals. In my view, however, the reasons written by the Senior Adjudicator in Order PO-2518 provide the basis for distinguishing the circumstances of that appeal from the present one.

In Order PO-2518, the Senior Adjudicator reviewed this office's approach to "personal information." In discussing *Pascoe* (cited above), the Senior Adjudicator stated:

> As noted, Adjudicator Pascoe's decision was upheld on judicial review by the Court of Appeal … It had previously been upheld by the Divisional Court (reported at [2001] O.J. No. 4987). The Divisional Court stated that in order to establish that information is identifiable, **an institution must provide submissions establishing a nexus connecting the record, or any other information, with an individual**. In the Court's view, **any connection between a record and an individual, in the absence of evidence, is "merely speculative"** [emphasis added].
>
> The Divisional Court elaborated:
>
> > The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the records [see Order P-316; and Order P-651].

In my view, the reasons of Senior Adjudicator Higgins in Order PO-2518 and of the Divisional Court in *Pascoe* outline a clear requirement that the evidence in each appeal must demonstrate a nexus between the information and an identifiable individual.

The Ministry has referred me to paragraphs (b) and (d) of the definition of "personal information" in section 2(1) of the *Act*. These paragraphs contemplate that information relating to criminal history and an address can be "personal information." Indeed, a number of orders have found that the *complete* municipal address of a property is the personal information of an identifiable individual [see Orders PO-2322, PO-2265 and MO-2019]. These orders have typically found that there is a reasonable expectation that disclosure of a complete address will result in the identification of individuals because of the availability of reverse directories and other search tools which can facilitate the connection between the information and identifiable individuals.

In Order PO-2347, former Assistant Commissioner Tom Mitchinson considered whether a smaller segment of an address - the unit number for apartments in a large building complex - qualified as the "personal information" of the individual residents.

> It is well established that an individual's address qualifies as "personal information" under paragraph (d) of the definition of "personal information", as long as the individual residing at the address is identifiable. However, if an address is not referable to an identifiable individual it does not constitute personal information for the purposes of the *Act*.
>
> Order PO-2265 also addressed the proper treatment of unit numbers. In that order I found that if the full address of units subject to [Ontario Rental Housing Tribunal] applications, including the specific unit number were disclosed, it was reasonable to expect that the individual tenant residing in the unit could be identified. I concluded that the full address of units consisted of the "personal information" of the tenants residing in them. However, I went on to find that if unit numbers are removed, the remaining components of the address - the building number, street, city, and postal code - do not provide sufficient information to reasonably identify a specific resident of a unit within a residential rental accommodation. I stated:
>
> > The vast majority of rental units in the province are contained in multi-unit buildings and, **in the absence of any other associated field of information that would itself constitute a tenant's "personal information", disclosing address-related information with the unit number removed would render identifiable information non-identifiable, thereby removing it from the scope of the definition of "personal information".** Accordingly, the address-related information, with unit numbers severed, should be provided to the appellant [emphasis added].

As noted previously, the Ministry also drew my attention to Order PO-2131 in which former Adjudicator Rosemary Muzzi found that postal codes did not qualify as "personal information," and to a privacy investigation report in which the former BC Commissioner made recommendations to ICBC presumptively based on an understanding that postal codes constituted personal information. In my view, Adjudicator Muzzi's comments in Order PO-2131 about the former BC Commissioner's report are relevant to my findings here:

> First, it is important to note that [the former BC Commissioner] found, as fact, that providing the postal code in the particular circumstances could identify persons living in smaller communities. Presumably, there was some evidence before the [the former BC Commissioner] upon which it could base this conclusion. The evidence advanced in the appeal before me does not provide a sufficient basis for me to reach the same conclusion. The OLGC has not supported its assertion with reliable or cogent evidence. The appellant, on the other hand, has provided information indicating that it is unlikely that any one postal code in Ontario would attach to fewer than five points of call.
>
> Second, in the surveys in question, the insurance company provided certain and substantial information about its customers, in addition to postal codes, to the consultants hired to conduct the surveys and compile the results thereof including: driver's name; resident phone number of driver; age of driver; sex of driver; claim number and type; office location; date of loss; and plate/policy number. It is not unreasonable to suggest that the [the former BC Commissioner] concluded as it did, that provision of the postal code could allow for identification of specific individuals in smaller communities, **because that information was supplied in conjunction with much other personal information about individuals**.
>
> By contrast, the only information at issue is postal codes, in the absence of other information from which individuals may be identified.
>
> Since it is not reasonable to expect that specific individuals can be identified from the information sought by the appellant, the information does not qualify as personal information. Consequently, the section 21 exemption does not apply.

In my view, the circumstances of this appeal closely resemble those before former Assistant Commissioner Mitchinson in Orders PO-2265 and PO-2347 and before Adjudicator Muzzi in Order PO-2131 in that the "field of information" associated with the postal codes - the aggregate sentence lengths - does not, itself, constitute "personal information."

Moreover, it is well established that each appeal must be decided on its facts, and within the context of the available evidence. While the Ministry suggests that "in some large urban locations a designated postal code may be assigned to a single apartment building or part of a townhouse complex," it has not provided any explanation or evidence other than this statement for how "[t]his information could allow a person to pinpoint the location of [an] offender to his

or her actual address in some circumstances." The Ministry has not, for example, directed my attention to a publicly available source of information that might provide the means to connect any given complete postal code from the list with a specific individual offender. Moreover, on this point, I agree with the appellant that the possibility of linking up a postal code with an identifiable individual through, for example, a laborious search of newspaper articles suggests a scenario too remote to satisfy the burden of proof.

As to the reliance on Order PO-2518 to support withholding the three final digits of the postal codes in this appeal, it is worth emphasizing, in my view, that Senior Adjudicator Higgins was satisfied by the evidence before him that the postal codes at issue could reasonably be expected to identify individuals listed on the Ontario Sex Offender Registry. In that appeal, the Senior Adjudicator expressed concern about those situations where a postal code may be limited to five or six residence locations, a so-called "small cell count," due to the particularly sensitive context of an individual being listed on this particular registry.

In my view, the meaning given to the term "personal information" by Senior Adjudicator Higgins in Order PO-2518 reflects a careful and purposive interpretation of the *Act*. It is well established that the act of statutory interpretation requires consideration of legislative purpose and that a purposive interpretation of the *Act* necessitates the balancing of privacy protection principles with those related to access to government-held information [see, for example, Order PO-2693]. In this regard, then, any interpretation of the definition of "personal information" must be informed by the context in which it arises. Indeed, in past orders of this office where the notion of "small cell counts" has been relevant, findings have varied, and have been based on a contextual examination of the relationship between privacy and identifiability.

In the circumstances of this appeal, moreover, there are several distinguishing features of the postal code data that work against identifiability. To begin with, the number of individuals to which each entry in the aggregate sentence length column refers is unknown; and there could be one or more individuals' sentences associated with each postal code. It is also significant, in my view, that there is no specific date in 2007 attached to the Ministry's data snapshot, and that there are so few information fields overall.

In such a context, I am not satisfied that the postal code information at issue is about "identifiable" individuals or that disclosure of the complete postal code and aggregate sentence length of these provincially sentenced offenders could *reasonably* be expected to identify individuals. For all these reasons, I find that the postal code information at issue does not qualify as "personal information" under the *Act* and that it cannot be exempted under section 21. Accordingly, I will order the Ministry to disclose it to the appellant.

In view of my finding, it is unnecessary to review the appellant's claim that the public interest override in section 23 of the *Act* applies to the information withheld by the Ministry. I will now review the issues related to the fee charged by the Ministry for access to the information.

FEE

General principles

This office has the power to review an institution's fee to determine whether it complies with the fee provisions in the *Act* and Regulation 460. In conducting this review, I may uphold the fee estimate or vary it.

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.

More specific provisions regarding fees are found in section 6 of Regulation 460 under the *Act*. This section states:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:
>
> 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 a 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.

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

Representations

Referring to the "user-pay principle" on which the *Act* is premised, the Ministry points out that section 57(1) outlines specific fees institutions are required to charge in relation to requests for access to general records. The Ministry's final fee statement regarding the processing of this request sets out the fee as follows:

> Computer Programming Time (time spent by a person to develop a computer program or other method of producing requested information from a machine readable record)
>
> | | |
> |---|---|
> | 10.8 hours [@15.00/15 minutes = $60.00/hour] | $648.00 |
> | Data Storage | |
> | 1 CD [$10.00 per CD] | $10.00 |
> | Shipping | |
> | Total cost of shipping document to applicant | $3.59 |
> | Final Total Fee | $661.59 |
> | Deposit Received | $660.00 |
> | Fee Balance Waived | $1.59 |

The Ministry also described the process by which the initial fee estimate of $1320.00 was prepared. The Ministry states that a Senior Systems Analyst/Programmer from its Justice Technology Services (JTS) division was assigned to review the request. This individual initially estimated that extraction of the available postal codes and aggregate sentence data could be accomplished in approximately 21.75 hours, which represented the computer programming time necessary to complete the data analysis and write the data extract script. The Ministry notes, however, that the final fee statement communicated to the appellant was based on the actual work completed by the JTS Analyst/Programmer in extracting the requested data.

On the issue of the reasonableness of the fee charged by the Ministry, the appellant simply states, "I am in your hands on this issue."

Analysis and Findings

The issue before me is whether the Ministry's $660.00 fee, which does not include the waived $1.59, is reasonable and is calculated in accordance with the *Act*.

Programming Time

In this appeal, the information at issue is stored electronically, and all the requested information is located in one case management database, the Offender Tracking Information System. However, to prepare the record for disclosure, the Ministry had to extract the relevant information from the database, and create a new record with that information. Since the database contains information other than what was requested, the Ministry had to find a way to extract what was relevant, and charged the fee on the basis of it having developed a computer program to extract the information.

Section 6(5) of Regulation 460 under the *Act* contemplates the development of a customized program in order to produce a new record. As has been recognized in previous orders of this office, the development of a computer program is a complicated process utilizing high-level computer language [see Order MO-1456]. In the circumstances of this appeal, I am satisfied that the Ministry's development of a computer program to extract the relevant information properly fits within the parameters of section 6(5) of Regulation 460 under the *Act*. Accordingly, I find that the Ministry can charge at the rate allowed for developing a computer program and that the 10.8 hours the Ministry charged for completion of this task is reasonable.

Data Storage and Shipping

In the circumstances of this appeal, and based on the evidence submitted by the Ministry, I find that the data storage charge of $10 for one CD and its shipping cost of $3.59 are reasonable under section 6(2) of Regulation 460 and section 57(1)(d) of the *Act*, respectively.

In conclusion, I am satisfied that the Ministry's fee was based on appropriate consideration of the steps reasonably necessary to respond to the request, and I find that it is in compliance with the *Act* and regulations. I will now consider whether a fee waiver is warranted in the circumstances of this appeal.

FEE WAIVER

General principles

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

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.

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

> The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.
>
> 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393, PO-1953-F]. The standard of review applicable to an institution's decision under this section is "correctness" [Order P-474].

There are two parts to my review of the Ministry's decision under section 57(4) of the *Act*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived [Order MO-1243].

Previous orders have determined that the person requesting a fee waiver (in this case the appellant) bears the onus of establishing the basis for the fee waiver under section 57(4) and must justify the waiver request by demonstrating that the criteria for a fee waiver are present in the circumstances [Orders M-429, M-598 and M-914].

Part 1: Basis for Fee Waiver

Public health or safety

In past 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
    - 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 the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- expansion of a landfill site [Order PO-2514]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]

Representations

The appellant submits that since public money is used to incarcerate individuals, there is a public interest in the disclosure of the information. The appellant states:

> [T]he data at issue has been released with data that allows one to link it to other socio-economic data. The Ministry is aware of this. It was only after I explained fully what my intentions were that the Ministry agreed to the partial release. Please also note that this requester has also asked for a more complete data set from OTIS, and that the request is being challenged by the Ministry.

> The previous orders set out in the notice, where the IPC has found dissemination will benefit health or safety, are helpful in that they indicate this may be new ground: the requested data, when combined with other data and analysed in a way that perhaps the government has not attempted or considered, may achieve this end. I believe it will, provided one agrees that looking at causes of crime and incarceration policy, from a geographical and economic perspective, benefits public health and safety. It is a common tool used in the United States, where tough-on-crime political campaigns have led to a crisis in communities, neighbourhoods, and city blocks, across that country. Please see The Sentencing Project [web address omitted] and the U.S. Justice Mapping Center [web address omitted] for examples of how this data has been explored south of the border. Quoting from the latter's web site:
>
> > *We specialize in using computer mapping – otherwise known as Geographic Information Systems or GIS – to help our partners better understand, evaluate and communicate criminal justice and other social policy information. Our mapping studies are used by legislators, government agencies, research institutes, technical assistance providers and the media* [italics in original].

The Ministry maintains that the disclosure of the data at issue – postal codes of sentenced provincial offenders (where available) and aggregate sentence length – will not benefit public health or safety. The Ministry explained its rationale for concluding that a fee waiver was not warranted on the grounds of benefit to public health or safety in the following manner:

> The requested data concerns individuals sentenced to a period of incarceration at a provincial correctional facility. The requested total aggregate sentence data is available for all 3,843 individuals serving a provincial sentence of incarceration at the time of the data capture. The data reflects a small subset of individuals under supervision to the Ministry. On any given day, the Ministry is responsible for the supervision of approximately 65,000 individuals. …

The Ministry notes that postal code data was available for only 58% of incarcerated provincial offenders and provided a number of reasons why this data may not be accurate or otherwise reliable. As I understand it, the Ministry is arguing that the incompleteness of the data, and the potential for the existing data to be inaccurate, militate against a finding that its disclosure is in the public interest or could benefit public health or safety.

The Ministry also submits that the requested data is not a matter of public interest or "public health or safety" for the following reasons:

> In the absence of other case-specific information, the Ministry does not believe that the public has a need to know that specific offenders, who may have resided (current or past) in a particular building, neighbourhood or community, as

> evidenced by their full postal code reflected in OTIS, are serving a sentence in a provincial correctional facility.
>
> The Ministry does not believe that the requested data relates directly to a public health or safety issue. The Ministry is responsible for a wide-range of public safety programs such as policing, correctional services and emergency response. An overly broad interpretation of the term "public safety" could lead to a "health and safety" rationale being invoked routinely as the basis for a fee waiver with respect to all requests for access to information relating to programs of the Ministry.
>
> …
>
> The Ministry agrees with the appellant that it is important for the public to have an understanding as to why crimes in our society are committed. However, the Ministry does not believe that there is a relationship between the specific data requested and the appellant's objective of "helping the public understand why crimes are committed". The Ministry submits that the requested data does not reflect information that will advance a greater public understanding as to why crimes are committed.

The Ministry takes the position that the information would not contribute meaningfully to the development of an understanding as to why crimes are committed because "[t]he requested data does not reveal any information about the crime that resulted in the incarceration sentence imposed on the individual." Finally, the Ministry submits that disclosure of the requested data will not reveal information about the provision, or quality of, correctional services in Ontario.

Analysis and Findings

I have considered the representations of the Ministry and the appellant, as well as other relevant factors related to the issue of fee waiver under section 57(4)(c) of the *Act*. In the circumstances, I am not persuaded by the appellant's evidence that dissemination of the information relating to provincial offender incarceration by neighbourhood would benefit public health or safety for the purposes of section 57(4)(c). For the following reasons, I find that this basis for fee waiver has not been established.

As I understand it, the appellant's position is that investigation into the "causes of crime and incarceration policy, from a geographical and economic perspective" is in the public interest, and that there is a nexus between the public interest and dissemination of the information for the purposes of section 57(4)(c) of the *Act*. The appellant appears to be arguing that there is room for expansion of the existing categories of information qualifying as "public health and safety" matters under this section to include socio-economic analysis of crime.

Upon consideration, I accept that investigating (and reporting on) the socio-economic basis for crime may contribute to the understanding of crime and, by extension, to a more contextualized understanding of the expenditure of tax dollars to incarcerate provincial offenders. Moreover, I accept that the appellant is likely to disseminate the information received as a consequence of the provision of this order. I note, in fact, that the appellant has already published a series of articles on the subject, using the more limited data available to him at that time. However, while I agree that the subject matter, generally, is one of public interest, I am not persuaded that the existence of a public interest by itself fits within the "public health or safety" section of the fee waiver provisions in section 57(4).

In considering the relationship between "public health or safety" in section 57(4)(c) of the *Act* and the notion of public interest as that concept is understood elsewhere in the *Act* and in other contexts, I have been assisted by my review of previous orders of this office. In Order PO-2592, Adjudicator Laurel Cropley considered the issue of fee waiver with respect to requests to the Ontario Secretariat for Aboriginal Affairs for records related to the native standoff in Caledonia.

> In Order MO-1336, I addressed arguments that a fee waiver should be granted in circumstances that did not meet the criteria set out in section 45(4) (the municipal *Act* equivalent to section 57(4)) as follows:
>
> > The appellant submits that he is entitled to a fee waiver on the basis of financial hardship and "public interest". He also states a number of other reasons why the fee should be waived in the circumstances of this appeal. In this regard, he refers to other Board expenditures and states "[i]t is clear that the [Board] is not concerned about the amount of money involved in the search for the material I am seeking". He also notes that the Board has always made exceptions or modifications concerning fees that families might be asked to pay out of area students wishing to attend schools within the Board's jurisdiction. Further, he appears to suggest that because the Board has not been inundated with access requests and that his is the first request for a fee waiver, this case should be treated as an exception to the general rule that fees should be charged.
> >
> > Section 45(1) of the Act is very clear and straightforward, stating "[a] head **shall require** the person who makes a request for access to a record to pay fees in the amounts prescribed". The circumstances under which a head shall waive payment of the fee in section 45(4) are specific and limited to those matters cited above. On this basis, I find that the activities of the Board with respect to other financial matters within its jurisdiction and authority have no relation to its obligation to charge a fee for responding to an access request or to consider waiver of the fee.

> Nor does the fact that the Board may not deal with a high volume of access requests.
>
> …
>
> The focus of section 45(4)(c) is "public health or safety". It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know". There must be some connection between the public interest and a public health and safety issue.

This interpretation of the breadth of the fee waiver provisions is consistent with other orders of this office (see: Order MO-2071, for example). **Although "public interest" may be considered under other legislation, or in a different context under the *Act*, the appellant has not persuaded me that a fee waiver should be considered in circumstances other than prescribed in section 57(4), which does not consider "public interest" in isolation to constitute a basis for granting a fee waiver** [emphasis added].

I agree with Adjudicator Cropley's analysis in Orders PO-2592 and MO-1336, and will apply it in this appeal.

As I have previously suggested above, there is insufficient evidence of a nexus between dissemination of this particular information and a specific issue, *directly* linked to health and safety, of importance to the public. Having concluded that the appellant has not established that the information in the records relates *directly* to a matter of public health or safety as contemplated under section 57(4)(c), I find that a fee waiver is not justified in the circumstances of this appeal.

In addition, I am not persuaded that any of the other considerations set out in section 57(4) of the *Act* or section 8 of Regulation 460 are applicable in the circumstances of this appeal. The appellant has not suggested that paying the fee would cause, or has caused, him or the newspaper for which he works, financial hardship. In addition, I note that the Ministry has charged the appellant a fee in keeping with what it may charge under the Regulation for the cost of processing, collecting and copying the responsive record under section 57(1).

I note that the appellant is being given access to the information that is at issue in this appeal and, in my view, he is simply being asked to pay in accordance with the *Act* for the processing of his request. The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.

In conclusion, based on all the circumstances surrounding the appellant's request for a fee waiver, coupled with the user-pay principle inherent in the fee provisions, I find that the Ministry has been fair and equitable in declining to waive the fee in this appeal.

ORDER:

1. I order the Ministry to disclose the postal code data in its entirety to the appellant by sending him an unsevered copy of the record **November 13, 2008**.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the appellant pursuant to Provision 1, upon request.

3. I uphold the fee of $660.00 charged by the Ministry to respond to the appellant's request.

4. I uphold the Ministry's decision not to grant a fee waiver.

Original Signed By: October 22, 2008

Daphne Loukidelis
Adjudicator