



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

ORDER PO-2848

Appeal PA09-16

Ministry of the Attorney General



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

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

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

NATURE OF THE APPEAL:

In late 2007, the Ministry of the Attorney General (the Ministry) received two requests from a husband and wife under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

Several weeks later, the requesters wrote to the Ministry and requested additional documents relating to members of their extended family, including their daughter.

The Ministry wrote to the husband, the wife and their daughter and advised that three separate file numbers had been assigned to the husband's, wife's and daughter's request for information. As a result, the daughter was identified as one of the requesters.

The Ministry issued an interim access decision and fee estimate in the amount of \$600.00 representing photocopying costs, and requested a deposit of \$300.00 to begin processing the requests. The Ministry's interim access decision and fee estimate responded to the three requests.

The Requesters Fee Waiver Application

Upon receipt of the Ministry's interim access decision and fee estimate, the requesters requested that the Ministry waive its fee, totalling \$600.00 pursuant to section 57(4)(b) of the *Act* (financial hardship). One of the parents signed the fee waiver request on the daughter's behalf.

In support of their application, the requesters provided a two-page narrative of the financial difficulties the family has experienced as a result of the loss of their family home due to a fire and the father's ongoing legal issues. The requesters attached two bank account summary slips to their application.

The Ministry's Fee Waiver Decision

After considering the information provided by the requesters, the Ministry denied the request for a fee waiver. The Ministry's letter stated "...after taking your submission into consideration, it has been decided to deny your request."

It appears that the requesters followed up with the Ministry to obtain an explanation. Following several months exchange of correspondence and telephone conversations, the Ministry subsequently wrote to the requesters, stating:

Please be assured that the Head considered all relevant factors in making the decision.

Fair and Equitable. The request has not been narrowed or clarified and a large number of records is at issue.

Actual costs. The fee estimate represents copying charges only.

Financial Hardship. The material produced in support of a fee waiver request is not sufficient to support a claim that the fee cannot be paid. The [Information and Privacy Commissioner/Ontario] Orders state that the requester bears the onus of establishing financial hardship. These Orders state that details regarding the requester's financial situation must be provided, including comprehensive information about income, expenses, assets and liabilities. This could include summaries of tax returns and/or detailed financial statements setting out monthly income and expenses.

If you wish to submit further information regarding your financial situation then we would be pleased to consider it.

It appears that after their receipt of the Ministry's letter, the requesters had further telephone conversations with the Ministry which resulted in the husband providing a letter to the Ministry confirming that his wife was removing her name as one of the requesters. The wife subsequently provided the Ministry with a written consent form authorizing her husband to access her personal information contained in any records responsive to the three requests.

The husband subsequently provided the Ministry with the following additional information relating to his financial status:

- Sworn affidavit, dated November 4, 2008
- Printouts from Canada Revenue Agency dated December 15, 2008 for the appellant's income tax returns for taxation years 2006 and 2007

The Ministry considered the additional documentation provided by the husband but again denied his request for a fee waiver. The Ministry's second fee denial letter stated:

The Ministry has now reviewed the additional documentation provided and considered all the relevant factors. After careful consideration, it is the Ministry's position that the additional documentation provided is not sufficient to warrant a waiver of the fee under the [Act]. It is the position of the Ministry that, in order for documentation to be considered sufficient, it must describe your income, expenses, assets and liabilities.

The letter was addressed to the husband alone and states that the photocopying fee at \$.20 per page "is largely for records that [the husband] generated and sent to the Ministry and the relevant Ministry responses to that correspondence".

Appeal to this Office

The husband (now the appellant) subsequently appealed the Ministry's fee estimate decision to this office. The appellant filed the appeal on his and his daughter's behalf.

Mediation and Adjudication

At the end of mediation, the appellant confirmed that he was not appealing the reasonableness of the Ministry's fee. The parties were unable to settle the fee waiver issue and this issue was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. I decided to commence my inquiry by sending a Notice of Inquiry to the Ministry seeking its representations, initially.

The Ministry's representations were provided to the appellant along with a Notice of Inquiry. In its representations, the Ministry submits that "the appellant must demonstrate that his wife would face financial hardship and otherwise meet the requirements of a fee waiver."

The appellant made representations in reply but asked that his representations to be withheld due to confidentiality concerns. I sent a letter to the Ministry summarizing the appellant's position and provided the Ministry with an opportunity to provide reply representations. My letter to the Ministry stated:

... you are asked to respond to the appellant's representations that he has provided sufficient documentation regarding his financial situation. In this regard, the appellant submits that he has already provided you with financial documentation about his income, assets and expenses. The appellant also submits that his wife's financial circumstance is not a relevant consideration in this appeal as she is not one of the requesters. Finally, the appellant submits that it is "fair and equitable" to waive the fees in the circumstances of this appeal having regard to the spirit and purposes of the *Act*.

The Ministry provided reply representations in response.

This order is being issued concurrently with Order PO-2847, which addresses issues arising from the appellant's fee waiver request to the Ministry of Community Safety and Correctional Services.

DISCUSSION:

PRELIMINARY ISSUE

Who is the requester?

The appellant submits that he is the sole adult requester and thus the Ministry should only consider his financial circumstances to determine whether he qualifies for a fee waiver.

The Ministry states:

.. the appellant has expanded the scope of his request to include all records which contain information about his wife. While this request was originally made by the

appellant's wife, she has subsequently removed her name from the request, the appellant has put his name on the request, and the appellant has provided the Ministry with his wife's consent to release information regarding her.

In this context, the Ministry submits that the appellant must demonstrate that his wife would face financial hardship and otherwise meet the requirements of a fee waiver set out in s.57(4) of the *Act*. Any other outcome would allow a person of sufficient means to avoid the user pay system intended by the Legislature by making a request through a party who is of limited means.

The appellant argues that his fee waiver request should be based solely on his financial circumstances as his wife is no longer a requester.

The Ministry's reply representations did not address this issue.

Decision and Analysis

Section 57(1) of the *Act* indicates that institutions "shall require the person who makes the request for access to a record to pay fees in the amounts prescribed by the regulations..."

I have carefully reviewed the representations of the parties, and it appears that the parties are not in dispute that the appellant's wife removed her name from the request. In fact, after the Ministry received the wife's authorization, it stopped addressing its correspondence concerning the appeals to the wife. Instead, it addressed its correspondence to the appellant.

In my view, there is nothing in the *Act* which prevents the wife from abandoning the access requests she previously filed with her husband. Similarly, there is nothing in the *Act* preventing the appellant from pursuing access to the same information he and his wife previous sought about themselves and their daughter.

As the wife is no longer seeking access to the records, she can not be described as an individual who is making the request and thus is not responsible for the payment of any fees calculated to respond to the request. Accordingly, I find that her financial circumstances are not relevant in the circumstances of this appeal.

In making my decision, I also considered the Ministry's submission that not considering the wife's financial circumstances leads to a result in which a person of sufficient means can avoid the user pay principles contemplated under the *Act*. I disagree. The user-pay principles contemplates that the individual who makes the request is the individual responsible for fees prescribed under the *Act* to process that request. If the request is modified, clarified or expanded after the institution's initial receipt, the *Act* allows institutions to revise its original fee and access decisions. The Ministry takes the position that the appellant expanded the scope of his request by including all records relating to his wife and other family members and that "a number of responsive records no longer fell under the exemption for producing records containing personal information". Presumably, the Ministry's position is that it is entitled to charge the appellant a fee to manually search for general records that relate solely to the appellant's wife. The *Act*

allows institutions to charge requesters for manually searching for records that do not contain the requester's personal information. However, the Ministry inexplicably did not issue a revised fee estimate to reflect the additional fees it could have sought under the *Act*.

Having regard to the above, I find that the appellant is the sole remaining adult requester seeking access to the information set out in the three requests. As a result, I will only consider his financial information in determining whether or not he qualifies for a fee waiver.

FEE WAIVER

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellant claims that payment of the \$600.00 estimated fee will cause him a financial hardship. Section 57(4)(b) 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 whether the payment will cause a financial hardship for the person requesting the record;

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 requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees [Order PO-2726].

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

Section 57(4)(b): financial hardship

The fact that the fee is large does not necessarily mean that payment of the fee will cause financial hardship [Order P-1402].

For section 57(4)(b) to apply, the requester must provide some evidence 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 and P-1393].

Representations of the parties

As noted above, the Ministry's total estimated fee is \$600.00, representing its photocopying charges for approximately 3000 pages.

As noted above, the appellant provided the Ministry with the following additional documentation after his wife's name was removed from the request:

- Affidavit sworn by the appellant on November 4, 2008 to the Ministry of the Attorney General
- Printouts from Canada Revenue Agency dated December 15, 2008 for the appellant's income tax returns for taxation years 2006 and 2007

In his affidavit, the appellant advises that he has suffered financial difficulties since June 2000 as a result of the loss of his family's home and his ongoing legal issues. The Canada Revenue Agency printouts show that the appellant's income in 2006 and 2007 was nil.

Throughout the mediation and adjudication stages of the appeals, the appellant provided this office with extensive documentation. Most of the documentation consists of the appellant's narrative of his lifestyle before and after the house fire. The only asset identified by the appellant is "a high mileage 8 year old 2001 Oldsmobile".

As noted above, the Ministry takes the position that the financial circumstances of the appellant's wife should be taken into consideration in determining whether the appellant qualifies for a fee waiver. However, I found that the appellant is the only individual responsible for the payment of the Ministry's fees pursuant to section 57(1).

In the alternative, the Ministry argues that the appellant has failed to provide sufficient evidence demonstrating financial hardship. In this regard, the Ministry states:

It has been held that self-serving statements of financial hardship and evidence of income alone are not sufficient. The appellant must demonstrate that financial hardship will occur, and to do so must show proof of income, expenses, assets and liabilities so that a real picture of their financial situation is possible [Orders P-1349, MO-1718 and PO-2139]

...

It is clear, in this case, that there is insufficient information upon which to ground a finding of financial hardship. Of the four financial markers that are required to ascertain a real picture of the appellant's financial situation (income, expenses, assets and liabilities), the Requester has only provided limited information in respect of his yearly income for 2006 and 2007. Despite repeated requests by the Ministry, the appellant has consistently failed to provide any evidence of his yearly expenses, his assets, or his liabilities. Without this evidence, it is

impossible for the Ministry to conclude that the fee would cause the appellant financial hardship.

Would payment of the fee cause the appellant financial hardship?

For section 57(4)(b) to apply, the requester must provide some evidence 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 and P-1393].

The Ministry's position is that for section 57(4)(b) to apply in the circumstances of this appeal, the appellant must provide evidence of the "four financial markers" – income, expenses, assets and liabilities. In support of its position, the Ministry refers to Orders P-1349, MO-1718 and PO-2139.

In P-1349, Inquiry Officer Mumtaz Jiwan found that the appellant provided the institution with evidence of her annual income, but failed to provide "any evidence with respect to her expenses when she requested the fee waiver". However, Inquiry Officer Mumtaz did not make a finding based on the adequacy of the financial information the appellant provided. Instead, she found that it was not fair and equitable to waive the fee in the circumstances.

In Order MO-1718, Adjudicator Bernard Morrow took into account information the appellant in that appeal provided about his income, expenses, assets and liabilities and found that the appellant provided sufficiently detailed financial information. In that appeal, Adjudicator Morrow found that appellant "receives a relatively substantial income, which exceeds his expenses to a reasonable degree".

In Order PO-2139, as in Orders M-914, P-700, P-1142, P-1365 and P-1393 this office found that the appellants failed to tender sufficient evidence regarding their financial situation since *no information* regarding their financial situations was provided to the institutions or this office.

I carefully reviewed the evidence of the parties and am satisfied that the appellant has provided myself and the Ministry sufficient evidence to make a finding as to whether payment of the fee would result in financial hardship. In particular, I am satisfied that the appellant has provided sufficiently detailed information about his assets and income. The appellant's evidence is that the only asset he owns is "a high mileage 8 year old 2001 Oldsmobile" and there is no evidence before me which suggests that the appellant has other assets. With respect to his income, I am satisfied that the Canada Revenue Agency printouts for 2006-2007 demonstrate that at the time the appellant applied for a fee waiver, he had not declared income for the previous two tax years. Having regard to the asset and income information provided by the appellant, I am satisfied that payment of the \$600.00 fee would cause him financial hardship.

In making my decision, I took into account that the above-referenced Orders do not specify that in order for section 57(4)(b) to apply, the requester must provide comprehensive evidence of all four financial markers – income, expenses, assets and liabilities. Instead, Orders M-914, P-591, P-700, P-1142, P-1365 and P-1393 and the orders the Ministry rely upon state that section 57(4)(b) requires that requesters provide *some* evidence regarding their financial situation.

Though I agree with the Ministry that the evidence the appellant has provided is somewhat limited, I am satisfied that the appellant provided sufficient evidence for the purposes of section 57(4)(b), given that there is no evidence that he is employed or receives a monthly income.

I will now go on to consider whether it is “fair and equitable” in the circumstances of this appeal to grant the fee waiver.

Is it “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 and PO-1953-F]

The Ministry submits that “it is not fair and equitable in the circumstances that the fee be waived, regardless of the financial circumstances of the appellant”. In support of its position, the Ministry made the following arguments:

- The initial fee estimate provided to the appellant was substantially less than the actual cost incurred by the Ministry; the \$600.00 fee was only representative of the photocopying cost and did not incorporate the cost of searching and accessing the records, nor did it incorporate the time spent by staff to do these tasks.
- The Ministry has attempted to narrow the scope of the appellant’s request, but has been “repeatedly rebuffed”. The Ministry’s position is that the appellant has refused to advance any compromise solution, and has refused to work constructively to narrow the scope of the request.
- The request has “ballooned in size and now involves a large number of records”. The initial request, for which a \$600.00 fee estimate was provided, was for records involving the appellant. The request is now for all records involving the appellant, his wife, his child, and several members of his extended family. The

Ministry states that “[n]o fee estimate has yet been provided for the full cost of this request, but it will certainly be substantially higher than \$600.00.

- Waiving the fee would shift an unreasonable burden of cost from the appellant to the Ministry as the vast majority of the records are copies of correspondence that the appellant sent to the Ministry, the originals of which have been lost in a fire. The Ministry states “[t]he purpose of the *Act* is not provide a safe repository for correspondence with the Ministry, rather to make information available to the public. In the context of this request, the appellant bears a heightened responsibility to pay the cost of his request”.

In addition, the appellant has filed a malicious prosecution claim against the Province and has stated that it is for this purpose that he requested the records. The Ministry states that the appellant should not be permitted to avoid the cost of obtaining documents he could, in the alternative, seek through the court process.

The appellant submits that the Ministry has “acted in extreme bad faith and in a manner that is anything but fair, reasonable and equitable”. In support of his position, the appellant advises that throughout the request and mediation stage of this appeal, he responded to the Ministry’s request for additional documentation, and that the Ministry in turn, continued to deny his fee waiver application. The appellant indicates that this occurred on many occasions.

The appellant also submits that he worked constructively with the Ministry to “seek fewer copies of information but it was not really feasible to do so”. In this regard, the appellant explains he requested that the Ministry provide him with a List of Documents or Index of Records, identifying the date, author and individuals who received and sent each record. The appellant argues that the Ministry did not provide the requested Index of Records and as a result he was not able to narrow the scope of the requests. The appellant also points out that none of the requested records were provided to him free of charge.

Finally, the appellant argues that it is “fair and equitable” to waive the fees in the circumstances of this appeal given that he can not afford to pay the \$600.00 fee.

I have carefully reviewed the factors the parties claim weigh in favour and against a fee waiver and conclude that it is fair and equitable in the circumstances of this appeal to grant the fee waiver.

The parties claim that they each worked constructively with one another to narrow the scope of the requests. I note that in Order MO-2234, Adjudicator Colin Bhattacharjee found that the fact that an institution created an Index of Records which assisted the requester in that appeal to reduce the scope of the requests was a factor which weighed against granting a fee waiver. In this appeal, it appears that the Ministry did not provided the appellant with an Index of Records or a general description of the records after the appellant requester further information about them. I also note that the Ministry did not provide me with specific evidence in support of its claim that the appellant “repeatedly rebuffed” its efforts to narrow the scope of the requests. In addition, the Ministry’s representations did not identify the specific options it identified to the

appellant in an effort to narrow the scope of the requests. Having regard to the Ministry's evidence, I find that there is insufficient evidence before me to support a finding that the Ministry worked constructively with the appellant to narrow the scope of the requests. In my view, had the Ministry created an Index of Records or identified the specific records it located, the appellant may have been placed in a position to narrow the scope of the requests. Instead, it appears that the appellant advanced a compromise solution which the Ministry declined without an explanation. Accordingly, I find that the compromise solution identified by the appellant amounts to a factor which demonstrates his efforts to narrow the scope of the request. This consideration weighs in favour of granting a fee waiver.

I also considered whether granting the fee waiver would shift an unreasonable burden of the costs from the appellant to the Ministry. In particular, I considered the Ministry's evidence that the requests were for a large number of records, along with its statement that it did not incorporate into the fee its actual search costs to locate the records. I also took into account that it appears that none of the 3,000 records located were provided to the appellant free of charge. Having regard to these factors and the amount of the fee, I am satisfied that waiving the Ministry's \$600.00 fee in the circumstances of this appeal would not shift an unreasonable burden of cost from the appellant to the Ministry. In considering this factor, a key consideration was the amount of the fee. Had the fee been for a larger amount, I may have been inclined to find that requiring the Ministry to absorb the costs associated with provided the appellant with photocopies of records, which mostly consist of correspondence from or sent to him, would shift an unreasonable burden of cost from the appellant to the Ministry.

In my view, the fact that most of the records consist of records the appellant exchanged with the Ministry weighs heavily against a fee waiver. However, given that the fee is \$600.00 and taking into account all of the particular circumstances of this appeal, I find that granting the fee waiver would not shift an unreasonable burden of the cost from the appellant to the Ministry.

In making my decision, I considered the appellant's ability to pay, along with the Ministry's concerns about the expanding scope of the requests which resulted in its fee not being reflective of its actual costs to process the request. I accept the Ministry's evidence that its \$600.00 fee is only representative of its photocopying costs and did not incorporate the costs of searching or accessing the responsive records. However, based on my review of the Ministry evidence, it is not clear to me whether the Ministry conducted additional searches following its receipt of the appellant's alleged expanded requests. In addition, though the Ministry argues that the appellant expanded the scope of his requests, it did not provide evidence quantifying the number, if any, of additional records that were located as a result of the expanded requests. The Ministry also did not provide evidence as to the specific additional fees it was entitled to charge the appellant as a result of the expansion of the scope of the requests.

Further, the Ministry does not explain why it did not avail itself of the remedies under the *Act* to address its concerns relating to the expanding scope of the requests or the nature of the information sought by the appellant. For example, the Ministry could have issued a revised fee estimate or claim that the request was frivolous or vexatious. Instead, it appears that the Ministry sought to rely on the fee waiver provisions in the *Act* to address its concerns.

It appears that the Ministry main concern is that from the time the requests were originally filed, the nature of the requests had transformed into entirely different requests. In my view, the fee waiver provisions of the *Act* should not be used by institutions to address concerns about revised and/or expanded requests.

Finally, I find that evidence that the appellant could potentially obtain the records through the court system is not relevant to a determination as to whether it is fair and equitable to waive the fee in the circumstances of this appeal. While the *Act* contemplates a user-pay principle, it does not impose any limitation on government-held information that is subject to the *Act*, but may also be otherwise available. As a result, requesters are free to choose whether they wish to pursue access to government-held information through the *Act* or some other access regime. Similarly, a requester's decision to pursue access under the *Act* should not be used to limit his or her ability to request a fee waiver under the *Act*.

In summary, I find that the Ministry's evidence that it worked constructively with the appellant to narrow the scope of requests was insufficient and found that the compromise solution the appellant advanced weighs in favour of granting a fee waiver. Similarly, I found that the fact that the Ministry did not make available any of the records free of charge amounted to a less significant factor weighing in favour of a fee waiver. I also found that the Ministry's evidence that its fee only represents its photocopy costs weighs against a fee waiver and that the fact that most of the records consist of records the appellant exchanged with the Ministry weighs heavily against granting a fee waiver. However, having regard to the circumstances of the appeal, including the manner the Ministry responded to the request and amount of the fee, I attributed greater weight to my conclusion that granting a fee waiver would not result in a shift of an unreasonable burden of the costs from the appellant to the institution.

Having regard to the above, I find that it is fair and equitable in the circumstances to grant a fee waiver.

ORDER:

1. I order the Ministry to grant a fee waiver in the amount of \$600.00 to the appellant.
2. In order to verify compliance with this Order, I reserve the right to require the Ministry to provide me with a copy of its cover letter to the appellant enclosing the records.

Original signed by: _____
Jennifer James
Adjudicator

November 24, 2009